Parliamentary Committees

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

Report No. 45

Legal Affairs and Community Safety Committee

November 2013

Legal Affairs and Community Safety Committee

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Abbreviations

Attorney-General	The Honourable Jarrod Bleijie MP, Attorney-General and Minister for Justice
Bill	Industrial Relations (Fair Work Act Harmonisation No. 2) and Other Legislation Amendment Bill 2013
COA	Commission of Audit
Committee	Legal Affairs and Community Safety Committee
Department	Department of Justice and Attorney-General
Fair Work Act	*Fair Work Act 2009* (Cth)
HHB Act	*Hospital and Health Boards Act 2011*
Industrial Court	Industrial Court of Queensland
IR Act	*Industrial Relations Act 1999*
LGAQ	Local Government Association of Queensland
NES	National Employment Standards
NRA	National Retail Association
QES	Queensland Employment Standards
QIRC	Queensland Industrial Relations Commission
QNU	Queensland Nurses' Union
QPU	Queensland Police Union of Employees
QSuper Board	Board of Trustees of the State Public Sector Superannuation Scheme
QTU	Queensland Teachers' Union
TCR	Termination, Change and Redundancy Clause Statement of Policy
TH Act	*Trading (Allowable Hours) Act 1990*
UFUQ	United Firefighters' Union of Australia, Union of Employees, Queensland

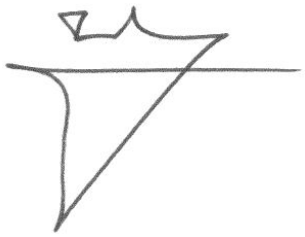
Chair's foreword

This Report presents a summary of the Legal Affairs and Community Safety Committee's (Committee) examination of the Industrial Relations (Fair Work Act Harmonisation No. 2) and Other Legislation Amendment Bill 2013 (Bill).

The Committee's task was to consider the policy outcomes to be achieved by the legislation, as well as the application of fundamental legislative principles – that is, to consider whether the Bill had sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

On behalf of the Committee, I thank those individuals and organisations who lodged written submissions on this Bill. I also thank the Committee's Secretariat, and the Department of Justice and Attorney-General.

I commend this Report to the House.



Ian Berry MP

Chair

Recommendations

The majority of the Committee recommends the Industrial Relations (Fair Work Act Harmonisation No. 2) and Other Legislation Amendment Bill 2013 be passed.

The majority of the Committee recommends proposed section 149(3) in clause 28 of the Bill be amended so that the conciliating member is required to give a copy of the conciliation report to all parties (as well as the vice-president) within 14 days after the conciliation period for the matter ends.

The majority of the Committee recommends that when the Attorney-General and Minister for Justice commences making award modernisation requests to the Queensland Industrial Relations Commission, consideration be given to prioritising matters affected by the transitional provisions in the Bill – such as pre-modernisation interim awards like the *Queensland Fire and Rescue Service Auxiliary Interim Award 2013* and variations to awards such as the *Employees of Queensland Government Departments (Other Than Public Servants) Award.*

1. Introduction

1.1 Role of the Committee

The Legal Affairs and Community Safety Committee (Committee) is a portfolio committee of the Legislative Assembly which commenced on 18 May 2013 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.[1]

The Committee's primary areas of responsibility include:

- Department of Justice and Attorney-General;
- Queensland Police Service; and
- Department of Community Safety.

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.

The Industrial Relations (Fair Work Act Harmonisation No. 2) and Other Legislation Amendment Bill 2013 (Bill) was introduced into the House and referred to the Committee on 17 October 2013. In accordance with the Standing Orders, the Committee of the Legislative Assembly required the Committee to report to the Legislative Assembly by 14 November 2013.

1.2 Inquiry process

On 17 October 2013, the Committee wrote to the Department of Justice and Attorney-General (Department) seeking advice on the Bill, and invited stakeholders and subscribers to lodge written submissions on the Bill.

The Committee received written advice from the Department and received 35 submissions from stakeholders (see **Appendix A**).

The Committee held a public briefing on 30 October 2013, where it took evidence from representatives from the Department, Queensland Health, and the Office of the Public Service Commission on the initiatives being pursued in the Bill. A public hearing was held on Friday, 1 November 2013, where the Committee took evidence from a number of invited stakeholders (see **Appendix B**).

Copies of both transcripts are available on the Committee webpage: http://www.parliament.qld.gov.au/work-of-committees/committees/LACSC.

1.3 Policy objectives of the Industrial Relations (Fair Work Act Harmonisation No. 2) and Other Legislation Amendment Bill 2013

The Bill has a number of policy objectives, however the major objective being pursued is to reform Queensland's industrial relations framework to ensure it continues to meet the needs of both employers and employees operating within the State's industrial relations jurisdiction.

[1] *Parliament of Queensland Act 2001*, section 88 and Standing Order 194.

As stated by The Honourable Jarrod Bleijie MP, Attorney-General and Minister for Justice (Attorney-General) in his introductory speech, the Bill:

> *…responds to the recommendations of the Queensland Commission of Audit and the Blueprint for Better Healthcare in Queensland. In particular, recommendation 130 of the Commission of Audit notes the importance of updating the* Industrial Relations Act 1999 *to ensure that it is modern, flexible and relevant to the public sector environment.*[2]

Other recommendations of the Commission of Audit (COA) that are reflected in the Bill include:

- that awards continue to provide the basis for public sector wages and conditions, however only matters not covered by legislation or Public Service directives should be included; and the number of awards that apply in the public sector should be significantly reduced; and
- that certified agreements only contain wages and conditions for specific groups of employees which are outside award conditions and that these are linked to improvements in productivity and performance.[3]

The Bill therefore sets out a new framework that is modern, flexible and responsive, allowing for the negotiation of employment agreements' terms and conditions.

1.4 Should the Bill be passed?

Standing Order 132(1) requires the Committee to determine whether or not to recommend the Bill should be passed.

The Committee considers the policy objectives being pursued by this Bill are long overdue and will bring positive benefits to all those to whom it will apply.

A modern and effective industrial relations framework, as proposed by the Bill, is essential for Queensland workers. The Committee therefore does not hesitate in recommending that the Bill be passed.

Recommendation 1

The majority of the Committee recommends the Industrial Relations (Fair Work Act Harmonisation No. 2) and Other Legislation Amendment Bill 2013 be passed.

[2] *Record of Proceedings (Hansard)*, 17 October 2013, page 3421.

[3] *Record of Proceedings (Hansard)*, 17 October 2013, page 3422.

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

This section discusses the key issues raised during the Committee's examination of the Bill. In addition to setting out reforms of Queensland's industrial relations framework, the Bill deals with a number of diverse matters, including amendments to the *Industrial Relations Act 1999* (IR Act), the *Hospital and Health Boards Act 2011* (HHB Act), the *Trading (Allowable Hours) Act 1990* (TH Act) and the *Superannuation (State Public Sector) Act 1990*.

The Committee has examined the policy objectives contained in the Bill under the broad headings below, which do not necessarily follow the order in which they appear in the Bill.

2.1 Overview of the proposed Industrial Relations Framework

The framework proposed under the Bill is made up of five elements:

1. legislated minimum employment standards (to be known as the Queensland Employment Standards (QES));
2. an award modernisation process;
3. simplified processes for certified agreements;
4. streamlined bargaining arrangements for agreement making and for taking protected industrial action; and
5. the introduction of individual employment contracts for highly paid senior staff.

To facilitate the above framework, two principal objects of the IR Act are proposed to be removed by the Bill, namely, sections 3(j) and 3(o). These sections relate to promoting and facilitating the regulation of employment by awards and agreements [3(j)]; and promoting collective bargaining and establishing the primacy of collective agreements over individual agreements [3(o)]. Submitters raised concerns generally with these amendments.[4]

The Committee fully accepts there will be opposing views on industrial relations reforms and does not expect Unions would agree to amendments lightly, however the Committee does not accept the proposition that the reforms are an attack on workers' rights.

Moreover, the modernisation process contained in the Bill promotes flexibility, and yet will reduce the number of awards significantly - a process commenced and completed by the Federal Labor Government which reduced the number of awards substantially and in greater numbers than in this modernisation process.

The industrial relations environment changed significantly from 1 October 2010, when the Queensland Labor Government referred industrial powers to the Federal Labor Government.

The Queensland Commission of Audit (Final Report – February 2013 Volume 3) included the following recommendations:

> *128 The Public Service Act 2008 be amended to incorporate the following:*
>
> - *core employment conditions for all persons employed in the Queensland public service;*

[4] See for example: Queensland Teachers' Union, Submission No. 19, page 6; Queensland Nurses' Union, Submission No. 20, page 5; United Firefighters' Union of Australia, Union of Employees, Queensland, Submission No. 30, page 3; United Voice, Submission No. 34, page 1;.

- *streamlining of employment engagements to three categories:*
  - *ongoing employment (full time or part time)*
  - *non-ongoing employment (full time or part time)*
  - *casual employment.*

129 All other employing legislation for specific groups or categories of public service employees be amended to remove core employment conditions which are to be covered in the proposed amendments to the Public Service Act 2008, with only specific qualification and occupation issues to remain.

The Bill's proposed framework has been developed in response to these recommendations and to the Blueprint for better healthcare in Queensland. The Committee is confident the Bill will ensure Queensland's industrial relations framework *is* modern, *is* flexible and *is* relevant to meet the needs of employers and workers in Queensland's industrial relations system.

To that end, it is clearly necessary to amend the principal objects of the IR Act, to ensure the objectives of this Bill are realised.

Each of the five elements of the reformed framework are examined below.

2.2 Legislated minimum employment standards – Queensland Employment Standards

The first element of the framework is the introduction of comprehensive legislated minimum employment standards which are referred to in the Bill as the Queensland Employment Standards (QES).

In his introductory speech, the Attorney–General explained how the QES would fit into the Queensland industrial relations regime:

> *Employment standards are currently provided for under both the state and federal industrial relations legislation. Chapter 2 of the* Industrial Relations Act 1999 *provides for general minimum employment conditions in the Queensland jurisdiction. Federally, the* Fair Work Act 2009 *makes provision for the National Employment Standards, NES. These are non-negotiable minimum employment conditions for employers and employees in the national workplace relations system.*
>
> *The QES, like the National Employment Standards in the Fair Work Act, will provide a safety net of non-negotiable minimum employment conditions for workers and consistency and certainty for employers operating in the Queensland industrial relations jurisdiction. The QES will underpin all employment arrangements including the new modern awards and agreements providing mandatory content for certain standards that cannot be altered in the bargaining process for a certified agreement.*[5]

The QES are based upon the existing state standards set out in Chapter 2 of the IR Act and the National Employment Standards (NES) form the *Fair Work Act 2009* (Cth). While the QES align closely with the NES, there are some key differences i.e. the QES do not contain the following NES standards - maximum weekly hours; requests for flexible working arrangements; and elements of community service leave.[6]

[5] *Record of Proceedings (Hansard)*, 17 October 2013, page 3422.

[6] Letter from the Department of Justice and Attorney-General, 25 October 2013, Attachment, pages 2-3.

The QES do set minimum standards for the following matters:

- **Minimum wage** (Division 2, section 71D) – retains the current drafting of the IR Act;
- **Annual leave** (Division 3, sections 71E – 71EH) – retains the existing level of benefit in Chapter 2 of the IR Act (i.e. 4 weeks; 5 weeks for shift workers). This is consistent with the conditions permitted by the Fair Work Act. The cashing out of annual leave provision (section 71EG) allows an employer and employee to agree in writing to cash out an annual leave balance in excess of the four week annual accrual;
- **Personal Leave** (Division 4, sections 71F – 71FL) – sick leave, carer's leave, bereavement leave and cultural leave are grouped together as Personal leave under this division. 10 days sick leave per annum is adopted from the NES. Provisions for carer's leave bereavement leave and cultural leave continue from the current provisions in the IR Act;
- **Parental Leave** (Division 5, sections 71G - 71) - retains the existing level of benefit in Chapter 2 of the IR Act;
- **Long Service Leave** (Division 6, sections 71H – s71HU) – retains the existing level of benefit in Chapter 2 of the IR Act (i.e. 8.6667 weeks after 10 years; pro rata on termination – subject to criteria for service between 7 and 10 years);
- **Public holidays** (Division 7, sections 71I – 71IB) – adopts the public holiday standard (including payment provisions) from the NES in the Fair Work Act, while retaining the definition of public holiday in the IR Act;
- **Jury service leave** (Division 8, section 71J) – retains the existing level of benefit in section 14A of the IR Act (i.e. leave taken by an employee required to attend jury service: employer to pay employee the difference between the allowance paid and the ordinary rate the employee would have been paid);
- **Notice of termination and redundancy pay** (Division 9, sections 71K – 71KG):
    i) maintains the existing notice of termination benefits and obligations in Chapter 3, part 3 of the IR Act (i.e. between 1 and 5 weeks' notice depending upon length of service and age of employee);
    ii) adopts the redundancy provisions outlined in the Fair Work Act with the level of benefit currently provided in Schedule 3 of the IR Act (up to a maximum of 16 weeks redundancy payment depending upon length of service);
    iii) maintains the exclusions to redundancy pay outlined in sections 16 (for employees with less than one years' service), 17 (for casuals; engaged for specific period or task; termination due to misconduct) and 19 (in cases where there is a transmission of business) of Schedule 1 of the Termination, Change and Redundancy Clause Statement of Policy (TCR) of the Queensland Industrial Relations Commission (QIRC);
    iv) amends the redundancy provisions so they operate consistently with existing section 691D of the IR Act which relates to notification and consultation regarding TCR decisions.

The Department advised 'while there is limited capacity to alter the QES notice of termination standard, an employer's existing capacity to set higher redundancy standards through directives and policy is preserved. For the public sector, these arrangements have traditionally been provided for by a Directive issued by the Minister under the Public Service Act 2008.'[7]

[7] Letter from the Department of Justice and Attorney-General, 25 October 2013, Attachment, page 3.

The QES will apply to all employers and employees within the Queensland industrial relations jurisdiction from 1 December 2013, subject to the transitional provisions contained in clause 75 of the Bill.

Issues raised in submissions

Cashing out of Annual Leave

Numerous submitters commented on the ability to cash out excess leave. New section 71EG provides an employer and employee may agree in writing to cash out leave in excess of an employee's accrued annual entitlement of four weeks.

The Local Government Association of Queensland (LGAQ) supported the flexibility of this arrangement. At the public hearing, Mr Tony Goode of the LGAQ advised the Committee:

> *The ideal situation would be that this particular provision would not have to be availed upon, but the reality is that we have reached a situation within local government that a significant number of councils have accumulated an unreasonable amount of leave liability. Just by way of example, we have one council in the south-east corner that currently has an outstanding leave liability over and above the normal four weeks. Taking for granted that every employee has a four week entitlement already—it is not touching that; over and above that—they have an outstanding leave liability of about 78,000 hours. There are about 630 employees with this outstanding leave liability. That equates to about a $3.5 million—$3.6 million liability on their books at the time. That particular council has a very good track record of promoting within. About 40 per cent of their positions every year are recruited from people from lower levels. That $3.5 million has the potential every couple of years to jump up by about by $500,000 just by the positive practice of promoting people.*
>
> *… So we welcome this particular clause. We see it as an opportunity to try to redress an existing problem that has compounded over recent years. It would be our argument that once that problem has been brought under control then hopefully councils will implement a leave-taking regime which basically says to employees, 'If you don't take your leave within a certain period of time you will be directed to do it', so that it will not happen again. But right now we have a financial liability problem that needs to be addressed and this particular provision will give those councils, subject to the employees agreeing to it—and I want to emphasise that.*[8]

However, in its written submission, the Queensland Police Union of Employees (QPU) raised the cashing out of excess leave as a concern because:

> *… when the provision to allow the cashing out of long service leave was introduced a disproportionally large number of Police Officers made application to the QIRC to cash out their long service leave. Therefore if employees are able to cash out annual leave, there is a high likelihood that a large number of Police Officers will seek to do so. The concern is that these Officers who work in highly stressful positions will not receive sufficient quality time off, which will lead to negative health outcomes.*[9]

[8] *Transcript of Proceedings (Hansard)*, Public Hearing, Legal Affairs and Community Safety Committee, 1 November 2013, pages 5-6.

[9] Queensland Police Union of Employees, Submission No. 24, page 1.

The Committee notes the concerns raised by the QPU in relation to cashing out excess leave however due to the specific requirements contained in the Bill, namely – the cashing out of leave must be by express written agreement of the employer and the employee; and an employee must retain an entitlement to at least four weeks annual leave (after cashing out) – the Committee does not consider the provisions will lead to negative health outcomes.

Rather, the provision will lead to flexible arrangements being entered into by employers and employees to suit the individual needs of employees. The Committee is confident employers will take into account individual officers' circumstances and use existing provisions to direct that leave should be taken, as appropriate.

Long Service Leave and Personal Leave

Issues were raised in submissions with the application of both the long service leave standard and the sick leave standard.[10] The Committee notes however, that apart from the increase of an entitlement of 8 days sick leave to 10 days – the proposed QES standards for both long service leave and sick leave replicate the existing entitlement in Chapter 2 of the IR Act *(existing section 43 - long service leave & section 10 – sick leave)*.

The Queensland Nurses' Union (QNU) observed a perceived issue with the notice requirements to produce a doctor's certificate after an employee's absence from work.[11] The current *award* requirement for nurses and midwives in Queensland Health is to produce a doctor's certificate after an absence of more than three days on sick leave. The proposed *legislative* standard for giving notice in relation to sick leave under the Bill (which replicates the existing minimum requirement) is to produce a medical certificate after an absence of more than two days on sick leave.

As an example of how the new flexible arrangements will work, the relevant section in the QES will not apply if a modern industrial instrument provides otherwise, and it is no less favourable to the employee. The current provisions of the award may therefore apply if they are contained in the relevant modern industrial instrument.

Public Holidays

A number of submitters raised issues with the provisions relating to public holidays.[12] The most serious concern related to professions such as nurses, police officers and teachers in special education being subject to the new industrial relations regime after commencement (1 December 2013) and not being able to receive penalty rates for working on public holidays during the 2013 Christmas period.

As described by the QNU:

> *Should the Bill pass into law in its current form, it is apparent that the Award Modernisation provisions would not be implemented prior to Christmas 2013. The consequence of s 71IA, therefore, would be that nurses and midwives required to work in our public hospitals on Christmas Day would be paid at their base rate of pay and not at the current award penalty rate of pay.*[13]

It appears to the Committee, these concerns are unfounded.

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10 See for example: Queensland Law Society, Submission No. 26; Queensland Teachers' Union, Submission No. 19.

11 Queensland Nurses' Union, Submission No. 20, page 11.

12 See for example: Queensland Council of Unions, Submission 23, page 5; Queensland Nurses' Union, Submission No. 20, page 10, Queensland Police Union of Employees, Submission No. 24, page 2; Queensland Teachers' Union, Submission No. 19, pages 8-10.

13 Queensland Nurses' Union, Submission No. 20, page 11.

With respect to penalty rates over the 2013 Christmas period, as advised by the Department, section 8AA of the Bill provides simply that existing Chapter 2 applies to pre-modernisation industrial instruments (and not the new Chapter 2A QES).

Employees currently on pre-modernisation awards or instruments will continue to be subject to them until such time that a modern industrial instrument comes into force. This will not occur before the Christmas 2013 period.

While penalty rates themselves are not contained in the QES (as minimum standards), under new section 71N(e), penalty rates are permitted to be included in a modern industrial instrument. Once new section 71IB(4) comes into operation (for those on modern instruments), penalty rates will be permitted.

The Committee understands the only category of employees who would fall under section 71IB(4)(b) over the Christmas period and beyond (and would not be eligible for payment other than at their base rate) are employees who are currently not subject to any award. These employees will move automatically to the QES on commencement. They will experience no change as they are currently not entitled to penalty rates as they are not subject to an award.

Notice of termination and redundancy

Several issues were raised in submissions[14] with respect to the termination and redundancy provisions in the QES. The QLS stated:

> *Section 71KE restricts redundancy pay to those subject to a modern industrial instrument. It is not payable as a minimum standard to all employees. That position is inconsistent with the* Fair Work Act 2009 *and is inconsistent with what is suggested to be the publicly held common understanding of redundancy pay entitlements. In the Society's view, redundancy pay should be part of the minimum standards for all employees and not subject to industrial instrument coverage. A transitional arrangement, where severance pay is to be calculated only by reference to an employee's service on and after the legislation's commencement date, might alleviate any concerns as to retrospectivity. A similar approach was taken by the Australian legislature in relation to the National Employment Standards.*[15]

Submitters also generally commented on what was considered to be a limitation or cap on redundancy payments in the QES. As observed by the QTU:

> *The maximum payment prescribed is 16 weeks. These amounts are less than those currently contained in Directive 11/12, which has a maximum payment of 52 weeks. In order to re-assure public servants, the government should clarify that the more favourable Directive provisions will continue to prevail as the Act provides a minimum safety net and that it does not intend to amend the current Directive 11/12.*[16]

[14] See for example: Queensland Teachers' Union, Submission No. 19, page 10; Queensland Nurses' Union, Submission No. 20; Queensland Council of Unions, Submission 23, page 6; Queensland Police Union of Employees, Submission No. 24; AMA Queensland, Submission No. 25; Queensland Law Society, Submission No. 26, pages 2-3; Queensland Council for Civil Liberties, Submission No. 35.

[15] Queensland Law Society, Submission No. 26, pages 2-3.

[16] Queensland Teachers' Union, Submission No. 19, page 10.

This issue was directly addressed by the Acting Deputy Director-General, Dr Simon Blackwood at the public briefing. In his opening remarks, Dr Blackwood informed the Committee:

> *Concerns about redundancy entitlements were commonly received in the submissions and obviously they will be raised in further hearings. What we wanted to emphasise is that the Queensland Employment Standards, which are provided for in the bill in relation to notice of termination and redundancy pay, are as were previously in the Industrial Relations Act.*
>
> *The three points to note are that it maintains the existing notice of termination benefits and obligations under chapter 3, part 3 of the Industrial Relations Act, which is notice of termination of between one and five weeks depending on length of service and age of employee. So that is exactly replicated in the new bill. The second point is that it adopts the redundancy provisions in the Fair Work Act with the level of benefit currently provided for in schedule 3 of the Industrial Relations Act, and that is up to a maximum of 16 weeks redundancy payment depending on length of service. However, I emphasise to the committee that these are the minimum standards that have been provided for around the country over the last 10 to 20 years in all jurisdictions. It maintains the exclusions to redundancy pay outlined in section 16 for employees with less than one year's service, section 17 for casuals engaged for a specific period or task and termination due to misconduct, and section 19 in cases where there is a transmission of business.*
>
> *The other issue that has been raised in relation to the 16 weeks is that these amounts are less than those currently contained in directive 11/12 of the public sector which has a maximum payment of 52 weeks. First, we would say that that issue has been raised by a number of parties and they are correct in their observation that the redundancy pay is prescribed as 16 weeks, but under the Public Service Award and schedule 3 of the IR Act we clarify that more favourable directive provisions continue to prevail. That is a reference to section 71CB. So there is no intention to change the situation where the minimum standards provided for are 16 weeks redundancy, but then there are directives—and local government will also have their own arrangements—which will provide for redundancy payments which are in excess of the minimum of 16 weeks. So that has been a situation that has prevailed for the last 20 years or so and there is no intention to change it. As I say, if you look at section 71CB of this bill, it provides for directives that are more favourable than what is in the Queensland Employment Standards.*[17]

In its submission, the Rail Tram and Bus Union raised concerns with section 71KG (variation of redundancy pay by commission):

> *The ability for an employer to apply for a reduction in redundancy pay to zero is appalling. There are no guidelines as to what an employer may be required to show as evidence of their inability to pay.*[18]

Dr Blackwood similarly addressed this issue in his opening remarks at the public briefing:

> *The other only issue that has been raised in relation to the redundancy payments is that of the Queensland Industrial Relations Commission—and this is at page 6 of our explanatory notes, and we have highlighted that again at the bottom of that page—and*

[17] *Transcript of Proceedings (Hansard)*, Public Briefing, Legal Affairs and Community Safety Committee, 31 October 2013, pages 1-2.

[18] Rail Tram and Bus Union, Submission No. 31, page 3.

> *an order reducing the amount of redundancy payment. The bill provides that an employer may apply to the Queensland Industrial Relations Commission for an order reducing the amount of redundancy payment the employer would otherwise be required to pay according to the statutory formula for redundancy payment calculation. Again, that was at 85C of the existing Industrial Relations Act. The same provision has continued in the new bill, and that provision was originally in the termination and change statement made by the Queensland Industrial Relations Commission. So, again, that has been a principle within the legislation before this bill. So we just wanted to clarify that because there had been a lot of comment in submissions about how the system works.*[19]

The Committee considers the Government's position was clearly set out at the public briefing. The QES in the Bill largely replicate the existing provisions in the IR Act and an employer has the capacity to set higher redundancy standards through directives (for example, Directive 11/12). As such, the Committee is satisfied the provisions are appropriate.

2.3 Modern industrial instruments – award modernisation and certified agreements

Hand in hand with the introduction of the QES, the Bill also contains a process to modernise existing industrial instruments. The process is intended to make awards that provide a fair, minimum safety net of enforceable terms and conditions for the employment relationship between employers and employees.[20]

The award modernisation process emanated out of recommendation 131 of the COA. This recommendation states awards should continue as the basis for public sector wages and conditions - but that only matters which are not covered by legislation or public service directives should be included in an award.

Importantly, the COA recommended that the number of awards that apply in the Queensland public sector should be significantly reduced. As set out in the Department's initial briefing letter to the Committee:

> *There are currently 83 state and local government awards operating in the Queensland industrial relations system. The awards have, over many years, been amended to contain extensive and complex provisions relating to a broad range of employment conditions. A further 246 awards which were applicable to the private sector have been declared obsolete.*[21]

Together with the QES, the modern awards created under the Bill will constitute the safety net of minimum terms and conditions of employment for award-covered employees.

Content of modern instruments and awards

As contained in the Bill, Part 3 of the new Chapter 2A (sections 71L – 71OL) sets out the content to be included in modern industrial instruments. The Bill clarifies what provisions *must* be contained in instruments, awards and certified agreements by setting out 'required content' provisions for each of all modern industrial instruments (sections 71M – 71MB); modern awards (sections 71MC); and certified agreements (sections 71MD – 71ME).

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19 *Transcript of Proceedings (Hansard)*, Public Briefing, Legal Affairs and Community Safety Committee, 31 October 2013, page 2.

20 *Explanatory Notes*, Industrial Relations (Fair Work Act Harmonisation No. 2) and Other Legislation Amendment Bill 2013, page 1.

21 Letter from the Department of Justice and Attorney-General, 25 October 2013, Attachment, page 4.

In addition to required content, the Bill also sets out the matters which are 'permitted content' for all industrial instruments (section 71N – 71NC); modern awards (section 71ND); and certified agreements (section 71NE).

Finally, the Bill contains provisions that deal with 'non-allowable content' for each of all industrial instruments (sections 71O – OJ); modern awards (section 71OK); and certified agreements (section 71OL).

This approach differs to the current provisions in the IR Act which do not specify employment matters that must or may be included in awards. Current provisions merely provide general guidance. The modern award process contained in the Bill is similar to the process included in the Fair Work Act which specifies employment matters that must and may be included in awards, and places restrictions on matters that must not be included in awards.

As explained by the Department:

> *Some matters that may be contained in the Queensland award content are the same as those allowed under the FW Act, for example, allowances, penalty rates and superannuation. Non-allowable matters for Queensland modern awards include such things as restrictions on the number or proportion of employees that may be employed; maximum or minimum hours of work for regular part time employees; restrictions on training arrangements and on engagement of independent contractors or labour hire; and workforce planning are not permitted in Queensland modern awards. It is noted that some provisions i.e. contracting in and out of services; employment security; policy incorporation; and encouragement provisions have already been rendered of no effect in the awards and agreements applying to government entities as a consequence of previous amendments to the IR Act.*[22]

Required content

The following matters are required content for all modern industrial instruments:

- Consultation (section 71M) – all modern awards and certified agreements must include a consultation provision to be prescribed in regulations which require an employer to consult with employees about the implementation of major organisational changes that are likely to have a significant effect on the employees;

The Department advised this provision will be based on the Fair Work Act model clause, amended to operate consistently with existing section 691D of the IR Act.[23]

- Dispute resolution (section 71MA) – all modern awards and certified agreements must include a dispute resolution provision to be prescribed in regulations for preventing and settling disputes about matters arising under the instrument or the QES;

The Department similarly advised this provision will be based on the Fair Work Act model clause.[24]

- Individual Flexibility arrangements (section 71MB) - all modern awards and certified agreements must include a provision to be prescribed in regulations which will enable an employee and employer to agree to a flexibility arrangement to meet the genuine needs of both parties.

Again, the Department advised this provision will be based on the Fair Work Act model clause.[25]

[22] Letter from the Department of Justice and Attorney-General, 25 October 2013, Attachment, page 4.
[23] Letter from the Department of Justice and Attorney-General, 25 October 2013, Attachment, page 5.
[24] Letter from the Department of Justice and Attorney-General, 25 October 2013, Attachment, page 5.
[25] Letter from the Department of Justice and Attorney-General, 25 October 2013, Attachment, page 5.

The Bill identifies coverage provisions as the required content for modern awards – i.e. the modern award must specify to whom it applies.[26] In relation to certified agreements – required content is set out to include expiry provisions, coverage provisions and other matters prescribed by regulations.[27]

Permitted content

Proposed section 71N lists the following permitted content for all modern industrial instruments:

- types of engagement;
- allowances – including expenses, skills based allowances and disability allowances;
- annualised salary arrangements;
- overtime rates;
- penalty rates;
- arrangements for when work is performed – i.e. Hours of work, rostering etc;
- superannuation; and
- anti-discrimination and equal opportunity.

As referred to earlier in discussion on the QES, permitted provisions also include provisions that relate to, or supplement, the QES - provided they are no less favourable to the QES and are not related to the QES redundancy provisions.[28] As expected, other incidental and or machinery provisions are also permitted.

In relation to modern awards – permitted content is limited to minimum wage provisions, and provisions on skill-based classifications and career structures.[29]

Permitted content for certified agreements is set out in proposed section 71NE. The non-exhaustive list in that section includes the following:

- arrangements for the taking of leave;
- bonuses or incentive-based payments;
- continuous improvement initiatives;
- productivity improvement initiatives;
- salary sacrifice arrangements;
- uniforms, including personal protective equipment; and
- wages.

Non-allowable content

Consistent with the COA recommendations, the Bill sets out 'non-allowable content' for all modern industrial instruments, modern awards and certified agreements. The Bill clarifies that certified agreements should only contain wages and matters for specific groups of employees which are linked

[26] Proposed section 71MC.
[27] Proposed sections 71MD & 71ME.
[28] Proposed section 71NA in Clause 7 of the Bill.
[29] Proposed section 71ND in Clause 7 of the Bill.

directly to their employment relationship and further, to improvements in productivity and performance which are not otherwise contained in the modern award.[30]

As stated above, currently the IR Act does not specifically limit those conditions that may be the subject of bargaining. As a consequence, provisions contained in agreements can and do impact on managerial prerogative. In June 2013, the IR Act (section 691C) was amended to void certain provisions associated with union encouragement and impede managerial prerogative in agreements applying to government entities.

Under the Bill, the following provisions must not be included in industrial instruments:

- contracting provisions - requiring, restricting or prohibiting the contracting out, or in, of services (section 71O);
- employment security provisions - relating to job security or maximising permanent employment (section 71OA);
- encouragement provisions - relating to membership of industrial associations (section 71OB);
- organisational Change provisions - requiring an employer to notify, consult or involve an entity in decision-making about organisational change (section 71OC);
- policy Incorporation provisions - ensuring no other policy documents can be incorporated into the modern instruments (section 71OD);
- private practice provisions - relating to medical practitioners (section 71OE);
- resource allocation provisions - relating to allocation of funding to a program or a scheme not directly related to entitlements of, or benefits for, employees (section 71OF);
- right of entry provisions (section 71OG);
- discriminatory provisions (section 71OH);
- provisions displacing the Queensland employment standards (section 71OI); and
- general matters (section 71OJ).

The Bill provides examples of provisions in current certified agreements which will no longer be permitted.

Under proposed section 71OK, a modern award must not contain provisions about training arrangements, workload management, delivery of services or workforce planning.

Proposed section 71OL states that certified agreements must not contain provisions inconsistent with the provisions for industrial action in chapter 6, divisions 6 to 8 (of the IR Act) or other provisions that:

- provide for types of engagements or classifications that are inconsistent with the relevant award;
- require or permit a contravention of the provisions in chapter 4 (of the IR Act);
- require an employer to manage workloads in a particular way;
- restrict access to training arrangements; or
- restrict the efficient delivery of services.

Additionally, a certified agreement must not contain a provision about unfair dismissal or a remedy arising from termination of employment, other than as provided for in the provisions in the IR Act relating to notice and redundancy pay.

[30] Letter from the Department of Justice and Attorney-General, 25 October 2013, Attachment, page 6.

The process for modernisation

The award modernisation process is set out in clause 16 of the Bill. This clause inserts a new Chapter 5 Part 8 - Modernisation of Awards (sections 140B – 140CE) into the IR Act. The Department advised the Committee the process set out in the Bill is similar to the process undertaken federally, as set out in Part XA of the repealed *Workplace Relations Act 1996* (Cth).[31]

The modernisation process will commence after 1 December 2013 (the commencement date of the Bill) and will rely on an award modernisation request being made under proposed section 140C to the QIRC by the Attorney-General or his or her delegate, setting out the process to be carried out and the timeframes in which the request must be completed.

The Government intends for there to be fewer awards in use following the completion of the award modernisation process, with only 20 to 40 awards remaining in place.[32] Modern awards will not be separate, detailed awards. Whilst providing a true safety net, they will apply to a greater number of employees and contain less content than is currently the case. The Department advises the scope to bargain for additional entitlements will be provided through the certified agreement making process.[33]

Clause 17 of the Bill inserts new Chapter 5A into the IR Act which deals with modern awards. These provisions deal with the coverage and operation of awards (Part 2) and the making, varying and revoking of modern awards (Part 3). Importantly, the provisions require the QIRC to review a modern award every four years.[34]

Issues raised in submissions

Modernisation process

Union submitters generally raised concerns with the modernisation process relying on a request from the Attorney-General.

The QTU submitted:

> *The unilateral determination by the Minister of employment conditions and the ministerial direction over the award review process proposed by the Bill manifests as a conflict of interest. It is important that some separation of powers exists in the legislation, and consequently, the independence of the QIRC should be enhanced not eroded.*[35]

The QNU raised similar concerns:

> *The ability for a Minister to direct the QIRC in such a manner compromises the independence of this tribunal. Section 320(3) of the* Industrial Relations Act 1999 *requires the QIRC to be governed in its decisions by 'equity, good conscience and the substantial merits of the case having regard to the interests of the persons immediately concerned and, the community as a whole'. The QIRC cannot meet this central obligation if it is subject to unlimited direction from the Minister as set out in the proposed section 140(C).*

31 Letter from the Department of Justice and Attorney-General, 25 October 2013, Attachment, page 5.

32 Letter from the Department of Justice and Attorney-General, 25 October 2013, Attachment, page 5.

33 Letter from the Department of Justice and Attorney-General, 25 October 2013, Attachment, page 5.

34 Proposed section 140F.

35 Queensland Teachers' Union, Submission No. 19, page 4.

> *These provisions highlight a fundamental conflict of interest between the government's role as legislator and its responsibility as the public sector employer. Under the doctrine of the separation of powers, the functions of the executive arm of government must be (and should be seen to be) separate from the judiciary including independent tribunals such as the QIRC. In the case of the government's role of employer, this separation is more necessary than in any other employer/employee relationship because it must preserve the integrity and independence of the parliament.*[36]

The Department did not share these concerns, stating:

> *...the award modernisation process is a one off process, mirroring the approach adopted federally in the* Workplace Relations Amendment (Transition Forward with Fairness) Act 2008*. The Minister's request (also taken from FW Act) is necessary to provide direction and guidance about the required timeframes for the completion of the award modernisation process. The scope of the request is limited by the permitted matters and non-allowable matters as contained in the legislation. Further, the request is required to be published providing transparency in the process and allowing for accountability (clause 16, section 140CB(2)).*[37]

The Committee is of the opinion that the concerns raised by the Unions are unfounded. The process is simply one which the Minister must commence and, after it has started, will be governed by the provisions in the Bill. The Committee does not consider this is a matter which infringes the separation of powers.

Content of awards/agreements

In relation to the content of modern awards, submitters generally argued that the Bill's non-allowable provisions were largely unfair to employees.[38] As stated by the AWU in its submission: '*In effect, it is 'stacking the deck' against workers. Workers can no longer pursue matters which relate to the employment relationship unless they fit into the narrow list allowed by the Government (who also happens to be the employer).'*[39]

At the public hearing, Mr Ian Leavers, General President of the QPU, explained to the Committee how he saw the provisions affecting the Queensland Police Officers:

> *It is our view that the proposed legislation, particularly where it provides for award modernisation, the imposition of rigid and allowable and non-allowable matters, and the removal or reduction of collective bargaining rights, will interfere with the established working relationship with the Queensland Police Service. By its very nature policing requires the parties to be able to negotiate and implement flexible working arrangements at short notice based on the operational requirements of the Queensland Police Service. The imposition of a one-size-fits-all award modernisation process will undermine the party's capacity to work efficiently.*[40]

A number of other Unions also submitted the non-allowable content for industrial instruments provisions would significantly reduce the scope of matters that can be negotiated, and would limit freedom of contract for employers and employees.

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36 Queensland Nurses' Union, Submission No. 20, page 5.

37 Letter from the Department of Justice and Attorney-General, 11 November 2013, Attachment, page 9.

38 See for example: Queensland Teachers' Union, Submission No. 19; Rail Tram Bus Union, Submission No. 31.

39 Australian Workers' Union, Submission No. 28, page 1.

40 *Transcript of Proceedings (Hansard)*, Public Hearing, Legal Affairs and Community Safety Committee, 1 November 2013, page 9.

It was considered limiting provisions on matters such as organisational change, workload management and workforce planning, would lead to poorer outcomes for employees as well as poorer service outcomes.[41]

Not only does the Committee not accept these Union assertions, but states that the very modernisation process introduces to Queensland the flexibility, transparency and accountability which has been missing from the industrial relations process.

The Committee unreservedly states the Bill is implementing sound policy realising the recommendations of the independent COA - namely, that awards should continue to provide the basis for wages and conditions of employment, but should be simpler. The process of modernisation, coupled with the framework for modern awards, will set up the Queensland Industrial Relations regime for success into the future.

2.4 Streamlined arrangements for bargaining and taking protected industrial action

The Bill also streamlines bargaining arrangements for agreement making and for taking protected industrial action. As stated by the Attorney-General in his introductory speech:

> *The bill introduces measures designed to reduce protracted disputation and disruption to service delivery, including the introduction of specified time frames in which assisted conciliation and arbitration is to occur. The QIRC may end the bargaining period and commence assisted conciliation if it is considered further negotiation is unlikely to result in an agreement or if the industrial action has been protracted.*[42]

The Attorney-General explained the amendments were designed to assist both parties reach an outcome when it was evident that a negotiated agreement was highly unlikely.[43]

To achieve this, the Bill substantially amends the IR Act in relation to making agreements. In particular, proposed sections 148, 148A, 149 and 149A set out new processes on conciliation and arbitration and implement strict timeframes to streamline the agreement making process.

The new timeframes allow 14 days for conciliation (proposed section 148) and if unsuccessful a further 90 days for arbitration (proposed section 149A). The current bargaining framework, including good faith bargaining (section 146) and peace obligation period (section 147), remains unchanged.

As explained by the Department:

> *… in circumstances where there is, or is potential for, any disruption to public services, the process provides for a capacity to terminate protected industrial action and for the QIRC to assist the parties through conciliation (section 148).*
>
> *Protected industrial action is not available where an agreement has not reached its nominal expiry date, during assisted conciliation and during arbitration (section 150A). In addition, industrial action will not be protected where an employee organisation or its members pursue a non-allowable claim in the negotiations.*
>
> *The Act will be amended to provide for a process to bring a final determination to a bargaining dispute within 118 days from the commencement of assisted conciliation.*[44]

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41 See for example: Queensland Teachers' Union, Submission No. 19; Queensland Council of Unions, Submission No. 23; Queensland Police Union of Employees, Submission No. 24; Australian Workers' Union, Submission No. 28; United Voice, Submission No. 34; Queensland Council for Civil Liberties, Submission No. 35.

42 *Record of Proceedings (Hansard)*, 17 October 2013, page 3423.

43 *Record of Proceedings (Hansard)*, 17 October 2013, page 3423.

44 Letter from the Department of Justice and Attorney-General, 25 October 2013, Attachment, page 7.

In relation to the timeframes developed for assisted conciliation and arbitration, the Department advised they were not modelled on existing processes, but were developed after consideration of a report of the review of the Fair Work Act released in 2012. The report recommended greater access to a limited form of arbitration (at the Fair Work Commission's own motion or at the request of one of the parties) in order to resolve impasses in bargaining for Greenfield agreements.[45]

The Bill also amends section 143 of the IR Act to require a written 'notice of intention' to be issued when a party proposes to begin negotiations on a new certified agreement. New subclause 3A ensures a party giving a notice of intention to make a new certified agreement, must only do so within 60 days before the nominal expiry date of the existing agreement.

Issues raised in submissions

Timeframes

The LGAQ submitted on behalf of councils, that the move to streamline bargaining processes was welcomed, stating:

> *LGAQ is very much aware of the strong claims of "EB fatigue" which has been emanating from Councils over recent years.*
>
> *… The prescribed timelines for achieving an agreement are welcomed also at this time to assist in heralding in the new system of bargaining. There is no doubt that protracted and drawn-out bargaining applies stressors on the relationship between Council and its employees and has been used at various times by unions and councils alike to achieve a preferred outcome. However, given the earlier reference to EB fatigue as well as the current financial stressors on Councils and employees, it is considered that the advantages of earlier resolution of certified agreements at this time outweigh the benefits of the current Laissez-faire regime of bargaining.*[46]

In contrast, Union representatives did not agree. At the public hearing, Mr Anthony Cooke, Industrial Officer of the UFUQ informed the Committee:

> *The proposed bill suggests 14 days for conciliation and 90 days for arbitration. I would put to the committee, take it from someone who is in the trenches, that 14 days and 90 days is not, in the firefighters opinion, going to work. We would suggest that parliament take on board the experience of the firefighters when considering whether 14 days and 90 days is appropriate for the arbitration of a certified agreement.*[47]

The QTU also submitted:

> *By limiting the timeframe of conciliation to 14 days, the government is demonstrating little understanding of the processes of conciliation. It is the QTU's experience that in negotiations before the QIRC, proposals need to be taken away and considered by the Union's Executive and departmental senior officers. Access to these decision makers can, at times, be limited. If the government is genuine in allowing the QIRC to act independently and autonomously, it would not put time restrictions in place, but would rather provide an opportunity for the relevant commissioner to take stock of negotiations and attempt to achieve a resolution within a time determined by them.*[48]

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45 Letter from the Department of Justice and Attorney-General, 25 October 2013, Attachment, page 7.

46 Local Government Association of Queensland, Submission No. 32, page 5.

47 *Transcript of Proceedings (Hansard)*, Public Hearing, Legal Affairs and Community Safety Committee, 1 November 2013, page 9.

48 Queensland Teachers' Union, Submission No. 19, pages 14-15.

Similarly, in relation to the arbitration provisions, the QTU submitted:

> *The Union's experience in arbitrations over the past 16 years informs our assertion that a time period of 90 days in which to prepare, present and determine matters is unrealistic. The introduction of such stringent time frames suggests that the government is likely to be disingenuous when entering EB negotiations. If it is not the intention of the government for matters to be arbitrated but instead to promote negotiated outcomes, the government would not limit the duration of negotiations, conciliation or the period in which arbitration is to be commenced and completed.*[49]

The Committee considers the new timeframes will increase the onus on parties to reach agreements in good faith and does not accept assertions by Unions that the Government is likely to be disingenuous in making agreements. Sufficient time is provided to conduct conciliation and, if necessary, arbitration. The Committee notes the Vice-President may extend that period for arbitration if he or she considers that the arbitration cannot 'reasonably be determined' within 90 days.[50]

The Committee also notes the Bill provides a new period of 14 days following the conciliation, where matters to be arbitrated are able to be identified by the QIRC member prior to arbitration commencing.[51] This process will assist the parties in identifying the matters in dispute and will ensure that proceedings are focussed in arriving at a result.

Interim wage orders and retrospective wage increases

Another aspect of the Bill which received criticism in submissions relates to the QIRC's inability to make an interim wage increase order[52] and limits on backdating wage increases.[53]

The UFUQ summarised its opposition to these provisions as:

> *These changes would remove the long-standing ability by parties to negotiate about or request these wage decision during a matter before the Commission. This proposal is a deliberate removal of a benefit to employees with no justification provided by the Bill or the explanatory notes to the Bill.*
>
> *Many decisions by QIRC have historically provided some relief to employees due to either the time required to have matters heard and/or the time waiting on a decision made about Certified Agreements.*
>
> *In fact, it is likely that this change will encourage employers to hold out on negotiations, knowing that there will be an actual wage cost saving to them, through forcing the matter to drag on for as long as possible.*[54]

The QCU stated these amendments were an attempt to '*win a particular point that has arisen in the negotiation of the Core Public Service Certified Agreement*.'[55]

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49 Queensland Teachers' Union, Submission No. 19, page 16.

50 Proposed section 149A(2).

51 Proposed section 149.

52 See proposed sections 148B and 149C(1)(c).

53 Proposed section 150(2A).

54 United Firefighters' Union of Australia, Union of Employees, Queensland, Submission No. 30, pages 4-5.

55 Queensland Council of Unions, Submission No. 23, page 9.

The Committee understands from advice provided by the Department, there has been some doubt as to whether the QIRC can currently make an order.[56] The amendments to the Bill will put this matter beyond doubt, and ensure all parties are fully aware of when wage rises can take effect. This will lead to clarity and increase certainty for parties during the conduct of making agreements.

The Committee also notes, despite the assertions to the contrary of the QCU, the amendments do not have any impact on the current proceedings associated with the core public service arbitration.

Protected Industrial Action

With respect to the amendments relating to taking protected industrial action, the QCU objected to the amendments stating in its submission:

> *The entire process of collective bargaining relies upon a group of employees being able to exert pressure on their employer to agree to a term. By including in the proposed section s148 (3)(iv) and (v) any action that "affects, or threatens to affect, directly or indirectly, access to, or delivery of, services to the community or part of it" it renders any form of protected industrial action useless. It follows that any industrial action that might have been in any way effective will now be able to be concluded.*
>
> *The question that might be asked, given the language used in the proposed section 148 (3) (iv) and (v) is what protected action would remain? The existing legislation has a very low threshold for matters to be referred to arbitration by comparison to its federal counterpart the FWA (or for that matter the FWA's predecessor the* Workplace Relations Act 1996*. Matters that are protracted or difficult are now easily referred to arbitration and there is no justification for taking any further rights away from employees.*[57]

Similarly, the QTU submitted:

> *Additionally, the introduction of further restrictions for protected industrial action shows the conflict of interest of the government as the regulator and an employer. This section determines that any industrial action is not protected if it is organised or engaged in on behalf of a negotiating party once the conciliation and arbitration periods commence. With the replacement of s148, the Commission is now compelled to step into negotiations if invited to do so by just one party and if there is a prospect of "relevant industrial action", which is defined as protracted action which could threaten the economy or part of it, the local community or a single enterprise or service delivery.*
>
> *By requiring the QIRC to intervene, this section removes the discretion currently afforded to the QIRC. The QTU acknowledges that while the right to strike remains on paper, the additions of s148 (3) (iv) and (v) is likely to introduce increasing pressure and compulsion on the Commission to issue stop-strike orders.*[58]

The Committee is satisfied the new arrangements adequately allow for protected action to be undertaken. As pointed out by the Department, the conciliation process may commence when there is specific industrial action on foot.[59] It is only industrial action that 'affects, or threatens to affect, directly or indirectly, access to, or delivery of, services to the community or a part of it' that will trigger conciliation and end the industrial action.

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56 Letter from the Department of Justice and Attorney-General, 11 November 2013, Attachment, page 12.

57 Queensland Council of Unions, Submission No. 23, page 9.

58 Queensland Teachers' Union, Submission No. 19, page 15.

59 Letter from the Department of Justice and Attorney-General, 11 November 2013, Attachment, page 14.

The Committee has no hesitation in supporting the intent of the provision which is plainly to ensure that the delivery of services to the Queensland public is not disrupted due to industrial action.

Conciliation report

In its written submission to the Committee, the Queensland Teachers' Union (QTU) criticised another aspect of the Bill:

> *Additional to the insertion of the provision to limit the powers of the QIRC to award interim increases and retrospective wage increases through arbitration, a number of other key issues arise with the amendments to S149 and the insertion of S149A.*
>
> *…In particular, the absence of the requirement for the conciliating member to provide a copy of the conciliation report to the parties will impact on the capacity for parties to commence preparations for arbitration of an agreement within a timely manner.*[60]

The amended section 149 of the IR Act applies if the QIRC has helped negotiating parties to try to negotiate a certified agreement, but unresolved matters exist when the conciliation period ends. The conciliating member, that is, the commissioner, is required to prepare a conciliation report identifying the aspects of the matter on which the negotiating parties agree; the aspects that remain at issue; and any issue the conciliating member considers relates, or may relate, to non-allowable content under specific provisions.[61]

The Bill requires the conciliating member to give the conciliation report to the vice-president on the day that is 14 days after the conciliation period for the matter ends.[62] Under the new section 149A, the arbitration period commences the day after the vice-president receives the conciliation report. The Bill does not require the conciliating member to provide the conciliation report to the negotiating parties.

The Committee advocates the inclusion of legislative provisions which support conciliation and arbitration processes. In this light, the Committee supports the QTU's suggestion that the negotiating parties would be aided in arbitration preparations by receiving the conciliation report.

Recommendation 2

The majority of the Committee recommends proposed section 149(3) in clause 28 of the Bill be amended so that the conciliating member is required to give a copy of the conciliation report to all parties (as well as the vice-president) within 14 days after the conciliation period for the matter ends.

2.5 Individual employment contracts for senior employees

In his introductory speech, the Attorney-General identified individual employment contracts for highly paid senior staff as the fifth element of the industrial relations reform framework:

> *The bill introduces a facility for an employer and an employee to enter into an individual employment contract. Such contracts will only be available to highly paid senior staff. A highly paid senior staff member is someone whose remuneration is above $129,300.*

[60] Queensland Teachers' Union, Submission 19, page 16.

[61] See proposed amendment of section 149 of the *Industrial Relations Act 1999* (clause 28 of the Bill).

[62] See proposed amendment of section 149 of the *Industrial Relations Act 1999* (clause 28 of the Bill).

> *This is the same high income threshold used in the Fair Work Act to determine eligibility for individual contracts.*[63]

The Department characterised these new arrangements as '*performance-based individual contracts regulated by the common law*'.[64] At the public briefing, Dr Simon Blackwood, Acting Deputy Director-General, identified the introduction of the threshold of $129,300 as one of the key elements of the Bill, stating it:

> *...will provide, subject to regulation, for groups who earn over $129,300 to be placed on individual contracts—subject to the decision of departments, government and ministers and the Public Service Commission and the health department about the employment arrangements they consider most suitable for people over that wage level of $129,300. As we have pointed out in the bill, that threshold is consistent with the arrangements under the Fair Work Act*.[65]

Under the Bill, the '*high-income threshold*' is $129,300 or a greater amount prescribed by regulation.[66] Workers earning less than the threshold will not be affected by these provisions of the Bill.[67] At the public briefing, Mr Peter McKay, Deputy Commissioner of the Office of the Public Service Commission, confirmed that the intention is for the Bill to provide a cap:

> *Those below the $129,300 annual salary need not have any concern at all. They are not captured in any way. They are not in anyone's focus for an individual contract. That provides that absolute certainty for them.*[68]

However, workers earning remuneration slightly less than the threshold may be treated in such a way as to be captured by the provisions: '*…if there is a benefit that might be considered by government to move that class of employee on to a contract there is the ability to regulate to do that and to make arrangements*'.[69]

Mr McKay identified specific groups who are the focus of change and spoke of the provisions as a mechanism for driving performance:

> *…there are certain groups that we would want to identify as the most senior management—the leadership of an organisation—and whose remuneration should reflect their seniority within the organisation and the particular role they play…*
>
> *What this also does is… allow us to focus on where we want to drive performance out of a particular group of employees. So in that respect it is not necessarily about the executive leadership they provide within an organisation but that we think you can, by individualising the employment arrangements, more effectively drive performance from those high-income earners.*[70]

63 *Record of Proceedings (Hansard)*, 17 October 2013, page 3423.

64 Letter from the Department of Justice and Attorney-General, 25 October 2013, Attachment, page 8.

65 *Transcript of Proceedings (Hansard)*, Public Briefing, Legal Affairs and Community Safety Committee, 30 October 2013, page 3.

66 See proposed insertion of new section 191 of the *Industrial Relations Act 1999* (clause 42 of the Bill).

67 *Record of Proceedings (Hansard)*, 17 October 2013, page 3423.

68 *Transcript of Proceedings (Hansard)*, Public Briefing, Legal Affairs and Community Safety Committee, 30 October 2013, page 8.

69 *Transcript of Proceedings (Hansard)*, Public Briefing, Legal Affairs and Community Safety Committee, 30 October 2013, page 8.

70 *Transcript of Proceedings (Hansard)*, Public Briefing, Legal Affairs and Community Safety Committee, 30 October 2013, page 8.

At the public hearing, Mr McKay confirmed that implementation of the high-income senior employee provisions would not result in an automated process of placing employees who receive remuneration above the threshold on individual contracts: '*There has to be a definite decision taken that that group or class of employee would be one that is offered contracts*'.[71]

Overview of the provisions

The relevant provisions will be contained in a new Chapter 6A of the IR Act. They provide for the engagement of a '*high-income senior employee*', who is defined as a person engaged as an employee in a '*high-income position*'.[72] '*Employee*' is itself widely defined, to capture those who propose to become an employee and whom another person proposes to engage as an employee.[73]

Under the Bill, there are certain ramifications for an employee who is engaged under a '*high-income guarantee contract*' and an employee who holds a high-income position.

A high-income guarantee contract is an employment contract for a high-income position, which takes effect on the '*contract day*', being a day on or after 1 December 2013.[74] The Bill identifies the following '*excluded provisions*' of the IR Act, which do not apply, from the contract day onwards, to employees engaged on a high-income guarantee contract[75]:

- the existing provision providing that unfair dismissal includes dismissal which is harsh, unjust or unreasonable[76];
- the existing awards provisions, new modern awards provisions, existing certified agreements provisions and existing industrial disputes provisions[77]; and
- the existing provisions empowering the QIRC to make certain declarations and to amend and declare void contracts[78].

The Department summarised the effect of these provisions by stating that: '*Such employees will be excluded from award coverage, collective bargaining and recourse to the unfair dismissal provisions of the IR Act (s194)*.'[79] Interestingly, in his introductory speech, the Attorney-General commented that: '*When on a high-income guarantee contract, a highly paid senior staff member will move out of the award coverage and have access to collective bargaining*'.[80] The comments of the Department and the Attorney-General appear to be contradictory with respect to whether employees subject to a high-income guarantee contract will have access to collective bargaining.

Under the Bill, an industrial instrument which applied to an employee, no longer applies from the contract day.[81] The intention of this is to accommodate a seamless transition from industrial

71 *Transcript of Proceedings (Hansard)*, Public Briefing, Legal Affairs and Community Safety Committee, 30 October 2013, page 8.

72 See proposed insertion of new section 189 of the *Industrial Relations Act 1999* (clause 42 of the Bill).

73 See proposed insertion of new section 188 of the *Industrial Relations Act 1999* (clause 42 of the Bill).

74 See proposed insertion of new sections 193 and 194 of the *Industrial Relations Act 1999* (clause 42 of the Bill).

75 See proposed insertion of new section 194 of the *Industrial Relations Act 1999* (clause 42 of the Bill).

76 See proposed insertion of new section 194(2)(a) of the *Industrial Relations Act 1999* (clause 42 of the Bill), which excludes the effect of section 73(1)(a).

77 See proposed insertion of new section 194(2)(b) of the *Industrial Relations Act 1999* (clause 42 of the Bill) which excludes the effect of chapters 5, 5A, 6 and 7.

78 See proposed insertion of new section 194(2)(c) of the *Industrial Relations Act 1999* (clause 42 of the Bill) which excludes the effect of sections 274A and 276.

79 Letter from the Department of Justice and Attorney-General, 25 October 2013, Attachment, page 7.

80 *Record of Proceedings (Hansard)*, 17 October 2013, page 3423.

81 See proposed insertion of new section 194(3) of the *Industrial Relations Act 1999* (clause 42 of the Bill).

instrument to high-income guarantee contract. It ensures there is no period where the employment arrangements lack coverage.

A high-income position is a position (or class of position) in which the '*remuneration*' is greater than the high-income threshold and is:

1. prescribed under regulation as a high-income position; or
2. not covered by an award; or
3. a position (or class of position) in which a '*senior health service employee*' is engaged under the *Hospital and Health Boards Act 2011* (HHB Act).[82]

High-Income Threshold

The Bill's concept of high-income threshold and definition of remuneration has been the subject of considerable focus and explanation. As quoted earlier in this Report, in his introductory speech the Attorney-General stated that the Bill's high-income threshold is the same high-income threshold used in the Commonwealth's Fair Work Act to determine eligibility for individual contracts. In its initial briefing letter to the Committee, the Department made various observations on the federal system:

> *The federal Fair Work system provides that awards do not apply to employees where the employer has guaranteed remuneration above a high income threshold (currently $129,300). The threshold is calculated on the employee's wages, money paid on employee's behalf (e.g. superannuation) and the agreed value of non-monetary benefits (e.g. laptops and mobile phones).*[83]

The Department's initial briefing letter continued, stating that the Bill '*…adopts the 'high income threshold' approach similar to that applied in the Fair Work system as the determining criterion for employees open to individual employment contracts*'.[84]

At the public hearing, Ms Kylie Badke, Senior Industrial Officer of United Voice, spoke of the possibility of many of her organisation's members in the health sector becoming high-income senior employees because of the '*low threshold*' and that '*The threshold does not mirror the Fair Work Act*'.[85] Ms Kate Ruttiman, Deputy General Secretary of the QTU, expressed similar sentiments regarding the Bill's high-income threshold and its comparability with the system set out in the Fair Work Act:

> *The government has introduced a new contract arrangement for high-income employees, stating this is harmonisation with the fair work legislation. This is a misleading statement. The fair work legislation threshold of $129,300 relates to unfair dismissal exemptions; it does not relate to a threshold for an employee to become a non-award employee. Additionally, the $129,300 in the fair work legislation does not include a full remuneration package but refers only to the salary earned—not, for example, their super.*[86]

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82 See proposed insertion of new section 190 of the *Industrial Relations Act 1999* (clause 42 of the Bill).

83 Letter from the Department of Justice and Attorney-General, 25 October 2013, Attachment, page 7.

84 Letter from the Department of Justice and Attorney-General, 25 October 2013, Attachment, page 8.

85 *Transcript of Proceedings (Hansard)*, Public Hearing, Legal Affairs and Community Safety Committee, 1 November 2013, page 32.

86 *Transcript of Proceedings (Hansard)*, Public Hearing, Legal Affairs and Community Safety Committee, 1 November 2013, page 10.

The Bill's definition of remuneration is important, as it dictates what is included and excluded when determining whether an employee's remuneration is more than the high-income threshold. The Bill defines employee's remuneration as annual wages; annual superannuation contributions made by the employer for the employee; and any other amount and the value of any non-cash benefit the employee is entitled to receive from the employer on an annual basis.[87] The Bill lists elements which are excluded from the quantification of an employee's remuneration, including reimbursement for work-related expenses and voluntary superannuation contributions made by the employee.[88]

At the public hearing, Mr John Martin, Research and Policy Officer of Queensland Council of Unions, highlighted anticipated complication, given the Bill's definition of remuneration:

> *Why that is an added complication is that superannuation contributions will vary according to co-contributions. So there could be a complexity that has not been considered. I think that is probably worth you taking into consideration, because if an employee makes a co-contribution, they will get a higher superannuation contribution made by their employer.*[89]

In relation to the threshold amount – the Committee notes the 'remuneration' amount included in the Bill, while the same figure used in the Fair Work Act, is different due to the inclusion of all annual superannuation contributions made by the employer. This is stated clearly in the Bill.

The Committee notes the other issues raised above. However, it observes that not every person whose remuneration exceeds the high-income threshold will be automatically classed as a high-income senior employee (only those in designated positions or classes of positions). In light of this, the Committee considers employers will be able to administer the arrangements effectively, without complication.

Support for high-income guarantee contracts

At the public hearing, Mr Tony Goode of the LGAQ indicated support for the Bill's high-income senior employee provisions relaying councils' agitation for greater exemption from award coverage for higher paid employees, particularly senior managers:

> *We are finding more and more having to turn to contracts for services rather than employment. If you look at the history of local government, we are historically an organisation that values employment of staff rather than contractors. So again with the increased capacity to offer, particular the higher paid professional people, an individual contract with flexibility and with particular conditions that suit them, we believe that will help us more with the retention of our valued professionals at the moment.*[90]

In its written submission to the Committee, the LGAQ identified the following primary motivators for its support for greater exemption from award coverage for higher paid employees:

> *A concern that Councils were relying on managers to represent their interests in enterprise bargaining who were also covered by that Agreement. This lead to a possible real or perceived conflict of interest when these people were directly or indirectly impacted upon the outcome of the bargaining.*

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87 See proposed insertion of new section 192(1) of the *Industrial Relations Act 1999* (clause 42 of the Bill).

88 See proposed insertion of new section 192(2) of the *Industrial Relations Act 1999* (clause 42 of the Bill).

89 *Transcript of Proceedings (Hansard)*, Public Hearing, Legal Affairs and Community Safety Committee, 1 November 2013, page 24.

90 *Transcript of Proceedings (Hansard)*, Public Hearing, Legal Affairs and Community Safety Committee, 1 November 2013, page 4.

> *Certain senior roles rely upon personal effectiveness as much as they do upon job value and the current system does not provide easily for contractual recognition of the individual's value to the organisation.*
>
> *The fluidity of the job market required certain incentives to be able to be added to a particular person during a particular time. The current contractual arrangements were not developed to reflect such arrangements.*[91]

The LGAQ's written submission concluded '*…the option for offering contracts to individuals in such circumstances may be availed upon by some councils in certain situations*'.[92]

Further issues raised in submissions

In contrast, the employee organisations strongly opposed the introduction of high-income contracts. United Voice expressed its support for collective bargaining stating:

> *The high income threshold applies or is likely to extend to employees at the higher levels of classification structures, including Health Practitioners and Ambulance Officers. Individual contracts would remove positions from instrument regulation and remove the rights of an employee to negotiate a fair contract. This will impact upon provisions, including management of fatigue, shift length and hours of work. For example, individual contracts are often used by employers to increase flexibility of hours and increasing the ordinary operating hours of a business, but only paying staff at single ordinary time rates, not overtime rates. This could result in workers being worse-off.*[93]

The Rail Tram and Bus Union were also critical of the Bill's high-income senior employee provisions, claiming that the '*arbitrary removal of high income earners from award and agreement protection is unnecessary*' and stating:

> *It is unclear why workers with skills that warrant higher wages should not also have the benefit of collective bargaining. It does not aid in productivity, in fact it creates the likelihood of inefficiencies given some who could be classed as high income earners work in teamwork environment which function on the basis that each team members [sic] works to the same conditions of employment. This provision is an arbitrary and unhelpful inclusion.*[94]

In its written submission, the QPU claimed that the high-income senior employee provisions will have a negative impact on attracting police officers to remote rural communities and 'hard-to-fill' locations.[95] QPU's concerns are, in part, based on recent enterprise bargaining negotiations with the Queensland Police Service, where:

> *… the QPS claim to remove two weeks annual leave from "non-shift workers" would have meant that Police Officers at all one and two officer stations, small rural stations and most aboriginal communities would have lost two weeks annual leave. Whilst this claim was ultimately dropped by the QPS, there is a view that this claim will be tabled again during future EB negotiations and there is anecdotal evidence that this belief is continuing to have a negative impact on attraction and retention of officers to/in these localities.*[96]

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91 Local Government Association of Queensland, Submission 32, page 5.

92 Local Government Association of Queensland, Submission 32, page 5.

93 United Voice, Submission No. 34, pages 2-3.

94 Rail Tram and Bus Union, Submission No. 31, page 7.

95 Queensland Police Union of Employees, Submission No. 24, page 1.

96 Queensland Police Union of Employees, Submission No. 24, page 1.

The QPU argued that the Bill's high-income senior employee provisions will exacerbate matters, resulting in '*further impact on Police Officers based in the above mentioned one and two officer stations and aboriginal communities as they receive a 35% all-up allowance (shifts, weekend penalties, overtime and leave loading) which may push them into the High-Income Senior Position category*'.[97] The organisation concluded that the Bill's provisions will escalate existing difficulties encountered in attracting police officers to rural communities and '*will also lead to more officers currently stationed in rural localities seeking to transfer back to more "secure" positions in Brisbane or large metropolitan cities*'.[98]

Due to the particular application of high-income guarantee contracts to health professionals, many submissions focussed on that aspect of the industrial relations framework. Maja Peric's written submission to the Committee was one of many that addressed the possible effects of the Bill on the medical profession. The submission expressed concerns that individual contracts and the gradual eradication of permanency would lead to conflict and dissension due to a lack of transparency:

> *Individual negotiated contracts only empower those with the gift of the gab and negotiation skills not the truly skilled worker. Where is the job security in this? More over where is the guarantee of skilled medical professionals and standards? Individually negotiated contracts will only foster suspicion and hostility between fellow employees, "I am more qualified than so and so but I get paid less."*[99]

With respect to the high-income threshold, the QNU conveyed concerns surrounding the Bill's definition of an employee's '*remuneration*' and the significant ramifications the organisation anticipates for nurses and midwives:

> *The definition of 'remuneration' includes the annual superannuation contribution made by the employer, amongst other items. This level of remuneration would exclude all Assistant Directors of Nursing, Nursing Directors, and Directors of Nursing, i.e. Nurse Grade 9 and above, from award and certified agreement coverage. The removal of these senior nurses from industrial instruments would effectively destroy the nursing and midwifery career path.*[100]

The QNU's written submission set out the expected impact of the introduction of individual employment contracts on career progression for employees who held roles that attract remuneration less than the high-income threshold:

> *The career progression for nurses and midwives below these senior levels is from the Nurse Unit Manager/Clinical Nurse Consultant (NUM/CNC) classification of Grade 7. The Nurse Grade 8 classification is the Nurse Practitioner classification which is a specialist clinical role. Most commonly nurses would move from the NUM/CNC position to the more senior ADON/DON positions and would normally 'act up' into these positions from time to time.*
>
> *With the creation of individual contracts for these senior positions it is unclear how nurses and midwives covered by a certified agreement would be able to act in higher positions. This in itself would create an impediment to many NUMs/CNCs progressing to higher levels because of the associated loss of industrial protection and tenure through individual contracts.*[101]

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97 Queensland Police Union of Employees, Submission No. 24, pages 1-2.

98 Queensland Police Union of Employees, Submission No. 24, page 2.

99 Maja Peric, Submission No. 21, page 1.

100 Queensland Nurses' Union, Submission No. 20, page 12.

101 Queensland Nurses' Union, Submission No. 20, page 12.

Together Queensland asserted limiting workers from continuing under award and agreement coverage would result in:

> *…a raft of organisational impediments to this government, possibly including limiting the ability for senior public servants to develop and be exposed to higher level work where such workers drop out of award coverage and into contract coverage as a result of those higher duties. This will act as a disincentive to those workers to develop their skills.*[102]

Together Queensland continued, outlining the anticipated application of the high-income senior employee provisions and the detrimental impacts on employees:

> *Once a position has been declared by a Regulation, or a Directive issued by the Director General of the Department of Health, the Act (If passed) would operate to remove significant protections and entitlements that currently apply to employees in those positions. The Act would operate to remove the rights of an employee to a fair contract by specifically removing the application of the QIRC's jurisdiction to vary a contract considered to be unfair and unreasonable.*
>
> *…The Bill provides for contracts to be offered to high income employees, however this includes provisions which place a significant financial penalty on particular employees who choose not to accept a contract. The Bill provides that medical officers who do not accept a high income contract will lose a number of rights and entitlements including a salary component that comprises up to 50% of their current income through the voiding of provisions in existing contracts, and industrial instruments.*[103]

Together Queensland contended that '*Senior medical officers have been specifically targeted by the legislation and the high-income contract provisions will have particular negative effects for medical officers and the quality of medical care in Queensland*.'[104]

At the public hearing, Mr Andrew Turner, of AMA Queensland, provided guidance on the practical ramifications of the Bill in relation to medical officers when he stated:

> *Three thousand senior medical officers and approximately nine hundred visiting medical officers will be transitioned to individual employment contracts by April of 2014, with an implementation date of 1 July next year.*[105]
>
> *…The arrangements in place at the moment - the medical officers certified agreement - will continue in operation until 30 June 2015. This is for senior medical officers. But a significant proposal of medical officers' income is generated from right of private practice. There will be no right of private practice offered if the medical officer remains on the MOCA, which will continue until 30 June 2015. This is an active disincentive for people not to remain on a MOCA. So while that choice is there, you will find that there will be such pressure applied, either financial or in other ways, that it will result in people either signing on or leaving.*[106]
>
> *…Coupled with the pace with which this is happening, there is so much information. We have 4,000 medical officers across the state. Queensland Health is expecting each individual negotiation to take four hours each. That is a huge amount of time with these*

[102] Together Queensland, Submission No. 18, page 1.

[103] Together Queensland, Submission No. 18, page 2.

[104] Together Queensland, Submission No. 18, page 2.

[105] *Transcript of Proceedings (Hansard)*, Public Hearing, Legal Affairs and Community Safety Committee, 1 November 2013, page 18.

[106] *Transcript of Proceedings (Hansard)*, Public Hearing, Legal Affairs and Community Safety Committee, 1 November 2013, page 19.

> *medical officers. They do not have that time. The administration currently does not have the ability to negotiate that. So it is going to lead to a bottleneck. There are problems that are going to arise because of the vast nature of the negotiation. As I said at the very beginning, there is information that the department of health still does not have about how this is going to work, yet it expects all doctors to be signed up by April.*[107]

The Committee notes the various issues highlighted by the unions, however does not anticipate the introduction of high-income contracts will result with the dire predictions outlined in submissions.

The Committee expects the introduction of high-income contracts will provide the Government with increased capacity to offer flexible individual contacts tailored to the needs of the individual. This approach shows that high-income employees are valued and will have the ability to enter into arrangements with their employer that suits their needs.

2.6 Transitional arrangements for certified agreements/determinations

Division 4 of the Bill contains transitional provisions regarding certified agreements and determinations, '*to manage the processes for those certified agreements that have reached their nominal expiry date but are not in arbitration under section 149 of the Industrial Relations Act 1999, or will reach their nominal expiry date prior to the modernisation of the underpinning awards*'[108].

Overview of the relevant transitional provisions

The Bill contains comprehensive transitional provisions to deal with employees moving from the existing regime into the modern framework. How this will work is set out below;

To ensure there is a clear delineation of when the new regime commences and there is no gaming of processes, the Bill provides in proposed section 821 that any award, or amendment to an award that is made under section 125 of the IR Act on or after the date of introduction but before commencement of the Act has no effect. Similarly, an application made on or after the introduction day for the making or amendment of an award, is taken to have been withdrawn on the commencement date.

Under proposed section 822, a matter relating to the making or amendment of an award or a review of an award that was being heard by the QIRC, immediately before the commencement must cease being dealt with by the QIRC under the former regime and must, on receipt of a modernisation request from the Attorney-General, be dealt with under the new framework.

Proposed section 826 provides that certified agreements and determinations in force before the introduction day will remain in force until their expiry. While under proposed section 827, a certified agreement or a determination which has reached its nominal expiry date before the introduction day, will be known as a 'continuing agreement'.

A certified agreement or determination becomes a continuing agreement on introduction day if:

a) the agreement of determination reaches its nominal expiry date; and

b) the underpinning award(s) have not been modernised (under the award modernisation process set out earlier).

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107 *Transcript of Proceedings (Hansard)*, Public Hearing, Legal Affairs and Community Safety Committee, 1 November 2013, page 21.

108 *Explanatory Notes*, Industrial Relations (Fair Work Act Harmonisation No. 2) and Other Legislation Amendment Bill 2013, page 4.

As explained by the Department, section 827(4) addresses the situation where a number of Local Government certified agreements have already been extended through an administrative process. These agreements, had already reached their nominal expiry date, but the parties had agreed to extend the agreements through an administrative 'rollover' process. The nominal expiry date for these agreements is the expiry day identified through the administrative 'rollover'.[109]

Under proposed section 828, the nominal expiry date for a continuing agreement becomes the day that is 12 months after the introduction day.

Further, under proposed section 829, the Bill provides that the parties to a continuing agreement cannot:

a) apply under section 168 to extend the agreement; or

b) apply under section 169 or 170 to amend the agreement; or

c) terminate the agreement.

Proposed section 830 provides that a regulation may prescribe a wage increase for employees covered by a continuing agreement on a stated day. Any wage increase made under a regulation will continue to apply to employees, notwithstanding the continuing agreement reaching its nominal expiry day;

Proposed sections 831 and 832 apply to existing arbitrations and applications for certification before the commencement day. The Bill provides the QIRC must determine the matter by arbitration under section 149 of the pre-amended Act. Similarly, for an application for certification made before the introduction day, the agreement may be certified under the pre-introduction rules.

Issues raised in submissions

Several groups queried the operation of the transitional arrangements, both at the public hearing and in written submissions. The UFUQ expressed concern with the current status of its Auxiliary Firefighters interim award as follows:

> *The Queensland Fire and Rescue Service auxiliary interim award 2013 is specifically affected by this bill, and I will just explain briefly why. It is caught up by proposed 821(1) and 821(2) and 822(1)(a) and (2)(a) in that it has been 12 months in the drafting, is concluded, has been agreed to by the parties, has been subject to a decision of the commission on 19 September of this year, has been agreed to be backdated to 1 August this year and was ready to go. We were just waiting for the commission to publish this award as being made. We expected that this month—November.*[110]
>
> *The provisions of the bill mean we will have to go back to the starting point for this large group of rural and regional firefighters who do this work as part of their community for the community. They are not permanent firefighters. The interesting thing about these employees is that they currently have no ability to have any say in the terms and conditions of their employment. There is no capacity for them to do it because they are covered by a procedure which is set by the commissioner of the fire service.*
>
> *Therefore, the Firefighters Union submit to the committee today that parliament should take into account this special group of employees and the discrete circumstances of their particular QIRC matter which has just concluded after a year of work. We would hope*

[109] Letter from the Department of Justice and Attorney-General, 11 November 2013, Attachment, page 12.

[110] *Transcript of Proceedings (Hansard)*, Public Hearing, Legal Affairs and Community Safety Committee, 1 November, page 8.

> *that that award can be made and operate as an award until such time as other events, which may or may not arise from the passing of the bill, occur.*[111]

In response to the above, the Department responded:

> *The proposed amendments do not permit the QIRC to make or amend a pre-reform award. This is made clear in the transitional provisions proposed at sections 821 and 822. Under the transitional arrangements, the QIRC must stop dealing with existing matters under Chapter 5 part 2. Section 822 makes it clear that the QIRC may continue its consideration of relevant matters through the award modernisation process when the Bill receives assent. Further, any action taken during this intervening period will be voided upon the assent of the Bill (section 821). As an operative provision, it is necessary that the QIRC does not direct its resources to continuing to amend or make new pre-reform awards (notwithstanding those that have been decided) under a regime that is to be superseded by the award modernisation process.*[112]

Similarly, at the public hearing the QPU indicated that new section 821(2) may have unforeseen consequences for Torres Strait Islander Police Support Officers:

> *The background to this situation is that the Torres Strait Island Regional Council and the Queensland Police Service agreed that the council employees previously referred to as community police would be employed by the Queensland Police Service from 1 October 2013 and redesignated as Torres Strait Island police support officers. There are a lot of very good operational reasons as to why this would occur. Obviously a more integrated and structured policing presence throughout the Torres Strait enables training under the Queensland Police Service and so forth.*
>
> ***…**They were covered under the Community Police (Aboriginal and Islander Communities and Local Governments) Award. Upon being employed by the Queensland Police Service, that award was no longer applicable.*
>
> *… Pursuant to section 147 of the Public Service Act, they were then deemed as general employees and the appropriate award then was the Employees of Queensland Government Departments (Other Than Public Servants) Award. Quite properly, the Queensland Police Service made application pursuant to section 125 of the act to vary this award to, amongst other things, provide appropriate award coverage to these police support officers. The QPUE supported this application and the variation was approved on Friday, 25 October 2013. The effect of the proposed section 821 would be that this variation is no longer applicable and these employees, who have a long history of award coverage, would suddenly become award free.*[113]

No other Union or employee organisation raised particular issues with the operation of the transitional provisions on individual matters.

The QTU did however anticipate general issues may arise with respect to the effect of Division 4 on the negotiation of new certified agreements. Ms Kate Ruttiman of the QTU advised:

> *The other issue is the process of not being able to negotiate a new certified agreement until a modern award is in place and the fact that the legislation itself provides for a period of time of up to two years that an award modernisation process might occur on*

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111 *Transcript of Proceedings (Hansard)*, Public Hearing, Legal Affairs and Community Safety Committee, 1 November 2013, page 9.

112 Letter from the Department of Justice and Attorney-General, 11 November 2013, Attachment, page 9.

113 *Transcript of Proceedings (Hansard)*, Public Hearing, Legal Affairs and Community Safety Committee, 1 November 2013, page 11.

> *the request of the minister, not on the initiation of the commission or the parties. Consequently, if we are going to be genuinely starting to negotiate a new EB then our award modernisation process should have started two months ago. It is obviously a problem with respect to the time frames: the inability to negotiate a new certified agreement if there is no modern award and the content of what is allowed and not allowed in the award.*[114]

The Committee agrees there is a need to ensure the transfer to the new industrial relations framework is seamless and operates as effectively and efficiently as possible. While the QIRC should not ordinarily be directing its resources to continuing to make or amend new pre-reform awards, the Committee has some sympathy for the plight of the Auxiliary Firefighters and Indigenous Police Officers whose matters are caught in the transitional phase.

To ensure the distinct circumstances of these two groups are addressed, the Committee makes the following recommendation.

Recommendation 3

The majority of the Committee recommends that when the Attorney-General and Minister for Justice commences making award modernisation requests to the Queensland Industrial Relations Commission, consideration be given to prioritising matters affected by the transitional provisions in the Bill – such as pre-modernisation interim awards like the *Queensland Fire and Rescue Service Auxiliary Interim Award 2013* and variations to awards such as the *Employees of Queensland Government Departments (Other Than Public Servants) Award.*

2.7 Other objectives of the Bill – changes to the Industrial Court of Queensland

The Industrial Court of Queensland (Industrial Court) is a superior court of record, which hears 'appeals on error of law or lack or excess of jurisdiction against decisions of the Commission, Industrial Registrar or Industrial Magistrates'.[115] The Industrial Court is constituted by the President, the Vice-President or a Deputy President (court) sitting alone.[116]

In its initial briefing, the Department commented on the Industrial Court and the role of its President:

> *Prior to the 1999 appointment of a full-time President to the Court, the role of the President was part-time and held by an existing Supreme Court Judge who would hear appeal matters for approximately six to eight weeks per year.*
>
> *Over the past 10 years there has been a considerable decline in the number of matters being filed in the Court. In 2005/06 100 matters were filed in the Court whereas only 41 matters were filed in 2011-12 and 46 matters were filed during 2012-2013.*
>
> *The current President, President David Hall, resigned on 4 October 2013.*[117]

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114 *Transcript of Proceedings (Hansard)*, Public Hearing, Legal Affairs and Community Safety Committee, 1 November 2013, page 15.

115 http://www.qirc.qld.gov.au/aboutus/aboutus_info/index.htm, accessed 23 October 2013.

116 *Industrial Relations Act 1999*, section 247.

117 Letter from the Department of Justice and Attorney-General, 25 October 2013, Attachment, page 9.

In a return to the Industrial Court's pre-1999 appointment arrangements, it is proposed that the vacant position of President of the court be filled by an existing Supreme Court judge appointed on a part-time basis.[118] In his introductory speech, the Attorney-General identified this appointment as '*…an opportunity to better align the resourcing of the court…*'[119]

The Department advised the Committee a return to such arrangements is considered sufficient to meet the workload requirements of the Industrial Court, and is supported by the Chief Justice of the Supreme Court, the Honourable Paul de Jersey AC.[120]

In June 2013, amendments to the IR Act transferred administrative responsibility for the Industrial Court to the Vice-President. The Explanatory Notes state it is desirable that the administrative arrangements of the Industrial Court be suited to the appointment of a Supreme Court judge on a part time basis.[121] Therefore, contemporaneous with the changes of the President's appointment, the administrative responsibility for the Industrial Court is to be returned to the President.[122]

The Bill also amends the IR Act such that some matters of the original jurisdiction of the Industrial Court will be transferred to the Industrial Magistrates' Court and the QIRC:

> *To further assist the management of workload, the Court's original jurisdiction, with the exception of stays, injunctive orders and referrals of questions of law by the QIRC, will be transferred to the Industrial Magistrate and the QIRC (s245, s248). The Court will maintain its appellant jurisdiction.*[123]

The Vice-President, as a presidential member of the Court, will continue to progress the business of the Court until the replacement appointment is made.

The Committee notes, whilst the role of President of the Industrial Court is changing from a full-time position to a part-time position, the requirements of the role are potentially increasing, with the President acquiring administrative responsibility for the court. It is important for the proper functioning of the court that there exists the appropriate balance between the responsibilities placed on, and expected to be discharged by, the President, and the time available for the incumbent to discharge his or her presidential duties. Given the context of declining court workload (exhibited by decreasing numbers of filed matters and the proposed relinquishment of some of the court's original jurisdiction), the Committee considers the amendments in the Bill strike an appropriate balance.

2.8 Fixed term appointment in the Queensland Industrial Relations Commission

The Bill also contains amendments in relation to the appointment of Commissioners to the Queensland Industrial Relations Commission.

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118 *Explanatory Notes,* Industrial Relations (Fair Work Act Harmonisation No. 2) and Other Legislation Amendment Bill 2013, page 2.

119 *Record of Proceedings (Hansard)*, 17 October 2013, page 3423.

120 Letter from the Department of Justice and Attorney-General, 25 October 2013, Attachment, page 9.

121 *Explanatory Notes,* Industrial Relations (Fair Work Act Harmonisation No. 2) and Other Legislation Amendment Bill 2013, page 2.

122 See proposed amendments to sections 242E-242G and 243 of the *Industrial Relations Act 1999* (clauses 44-47 of the Bill).

123 Letter from the Department of Justice and Attorney-General, 25 October 2013, Attachment, page 9.

Powers and role of the QIRC

Under the IR Act, the QIRC currently possesses power to:

- make, approve, interpret and enforce awards that are non-discriminatory and provide fair wages and employment conditions;
- assist enterprise bargaining and certifying agreements that are reached;
- resolve industrial disputes by conciliation and where necessary by arbitration;
- resolve disputes over union coverage;
- deal with reinstatement applications;
- determine claims for unpaid wages and superannuation contributions where the total claim is $50,000 or less;
- determine applications to amend the name or eligibility rule of an organisation of employers or employees;
- conduct enquiries into a claimed irregularity in an election for office bearers of an industrial organisation; and
- approve amalgamations of industrial organisations.[124]

Amongst other things, the QIRC hears applications for trading hours orders, appeals against Q-Comp review decisions and appeals against certain decisions which affect public service employees.[125]

Currently, members of the Commission are the President (vacant), the Vice-President, three Deputy Presidents and other Industrial Commissioners.[126]

Subject to some exclusions, the Queensland Government referred industrial relations coverage of all employees and employers in the private sector[127], to the Federal industrial relations jurisdiction.[128] These private sector employees and employers were previously covered by the IR Act, and are now covered by the Commonwealth *Fair Work Act 2009*.[129]

As outlined in its advice to the Committee, the Department observed considerable change to, and volatility in, QIRC workload following the movement of private sector industrial relations coverage to the federal workplace relations system:

> *In more recent times, the workload in the QIRC has increased. In 2011, the QIRC was given exclusive jurisdiction to hear and determine appeals against Q-Comp decisions and in July 2012 public sector employment appeals were transferred from the Public Service Commission to the QIRC.*
>
> *The QIRC workload is anticipated to experience an increase as a consequence of award modernisation in 2014 and the introduction of other industrial relations reform measures, notably time constraints within which assisted conciliation and arbitration must be completed.*

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124 http://www.qirc.qld.gov.au/aboutus/aboutus_info/index.htm#functions, accessed 24 October 2013.

125 http://www.qirc.qld.gov.au/aboutus/aboutus_info/index.htm#functions, accessed 24 October 2013.

126 http://www.qirc.qld.gov.au/aboutus/aboutus_info/index.htm#functions, accessed 24 October 2013.

127 The private sector refers to that sector other than: the State public sector; Local Government sector; and some commercial elements of the public sector.

128 http://www.qirc.qld.gov.au/whatsnew/new_jurisdiction.htm, accessed 24 October 2013.

129 http://www.qirc.qld.gov.au/whatsnew/new_jurisdiction.htm, accessed 24 October 2013.

> *The Vice-President of the QIRC has recently raised concerns that workload pressures are impacting on the expedient transaction of QIRC matters and are causing increasing delays in dealing with matters, including public sector enterprise bargaining matters.* [130]

Proposed amendments

The Bill amends the IR Act to allow the Governor in Council to appoint a QIRC Deputy President or Industrial Commissioner on a fixed term appointment of not less than one year.[131]

In his introductory speech, the Attorney-General stated that:

> *This amendment will provide greater flexibility for the government to address short- to medium-term pressures within the QIRC. Fixed term appointment arrangements were a feature of the QIRC prior to 1999 and are currently provided for in the New South Wales Industrial Relations Commission and the Fair Work Commission federally.*[132]

Currently, the IR Act provides:

- a President, Vice-President and Deputy President of the Industrial Court holds the equivalent role at the QIRC;[133]
- subject to the appointee fulfilling certain requirements, the governor in council may appoint a Deputy President of the QIRC[134]; and
- subject to the appointee fulfilling certain requirements, the governor in council may appoint an Industrial Commissioner of the QIRC.[135]

Except for a President who is a Supreme Court judge, these QIRC appointments are currently made with tenure to 70 years of age.[136] A Supreme Court judge is appointed as President for a term stated in the relevant gazette notice.[137]

The Bill therefore amends the IR Act to allow for an appointment to the position of Deputy President or Commissioner for a fixed term of not less than one year.[138] This option allows consideration of a fixed term appointments to the QIRC to address current workload pressures without the long term financial commitment of tenured appointments.

Issues raised in submissions

A number of submissions were critical of the amendments enabling fixed term appointments to the QIRC asserting the fixed term appointments undermined the separation of powers. The QCCL stated:

> *Amended sections 259 and 260 will allow fixed-term appointments to the Queensland Industrial Relations Commission. Section 259 envisages appointments as short as 1 year.*
>
> *There are real dangers in having those who rule on disputes and settle them (whether by award or quasi-judicial orders) subject to easy political replacement.*

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130 Letter from the Department of Justice and Attorney-General, 25 October 2013, Attachment, page 10.

131 *Record of Proceedings (Hansard)*, 17 October 2013, page 3423.

132 *Record of Proceedings (Hansard)*, 17 October 2013, page 3423.

133 *Industrial Relations Act 1999*, sections 257(1), 258(1) and 258AA(1).

134 *Industrial Relations Act 1999*, section 258A(1).

135 *Industrial Relations Act 1999*, section 259(1).

136 *Industrial Relations Act 1999*, sections 245(1)(b), 246B(1), 246D(1) and 260(1). These appointments are subject to early cessation in certain circumstances, such as resignation.

137 *Industrial Relations Act 1999*, sections 245(1)(a).

138 See proposed amendments to sections 258A, 259 and 260 of the *Industrial Relations Act 1999* (clauses 53-55 of the Bill).

> *This concern applies doubly where, as will be the case, the government as an employer is a key interested party in much of the Commission's work. At a minimum, a tenure of say five years is required. A one year appointment will leave the perverse potential for a Commissioner hearing a protracted industrial dispute, to which the government or one of its agencies is a party, depending on that party for his/her re-appointment. This will leave the Commission open to accusations of bias perceived or otherwise.*[139]

Similarly, the QLS submitted:

> *It is undesirable that persons holding the position of deputy president and commissioner be able to be appointed on a short term basis as little as 1 year. It is important that Commission members feel able to exercise their duties without fear or favour. Given that Commission members are appointed by the state and that the state will in a large majority of cases be a party to proceedings before the Commission, a perception of influence arises. The fact that such a capacity may have existed before 1999 is not a significant consideration in the Society's respectful submission. That provision was taken out of the legislation after a detailed review. Any issues of resourcing can, in the Society's submission, be met through the ability to make part time appointments.*[140]

In response to these concerns, the Department stated the changes were necessary to provide the flexibility to address short term workload issues in the QIRC. The Department advised fixed term appointment processes in other jurisdictions such as New South Wales and Commonwealth Fair Work Commission operated without incident.[141]

The Committee is not convinced the fixed term appointments will compromise the independence of the QIRC. Fixed term appointments operated in Queensland prior to 1999 and given the current potential for Commission workloads to fluctuate, the Committee is satisfied the proposed arrangements will provide the necessary flexibility within the QIRC to match the workload. The Committee is satisfied with the amendments.

2.9 Deduction of industrial organisation subscription fees from wages

In June 2013, the IR Act was amended to render 'union encouragement provisions' in an industrial instrument applicable to a Government entity to be of no effect from 1 July 2013. An encouragement provision includes a provision that requires an employer to facilitate deductions of industrial association membership subscriptions from an employee's wages.

While the amendment removes the obligation upon the employer to facilitate the payroll deduction, the Act does not prohibit the deduction. This has raised a concern that the State may be at risk of being found in breach of the *Anti-Discrimination Act 1991* (AD Act) or freedom of association provisions of the IR Act as a consequence of a decision to cease to provide a payroll deduction facility for industrial association membership fees.

In his introductory speech, the Attorney-General stated:

> *The Government strongly supports and defends freedom of association. However, an employer should not be forced to implement costly payroll deduction facilities for union fee deductions when these matters can be managed directly between the organisation and its members through direct debit.*[142]

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139 Queensland Council of Civil Liberties, Submission No. 35, page 2.

140 Queensland Law Society, Submission No. 26.

141 Letter from the Department of Justice and Attorney-General, 11 November 2013, Attachment, page 17.

142 *Record of Proceedings (Hansard)*, 17 October 2013, page 3424.

The Bill (section 391A) clarifies that employers are prohibited from facilitating deductions of industrial association membership subscriptions from an employee's wages.

Union submitters unsurprisingly raised issues with the prohibition.[143] Of particular note, the QPU stated:

> *[Section 391A] Makes it an offence for an employer to provide payroll deductions to employees. The Queensland Police Service currently allows sworn officers to pay their Union dues via payroll deductions. When this clause comes into effect on 1 July, 2014 the potential consequence will be that many Police Officers become unfinancial. Given that this is immediately prior to G20 it is our view that this will have a negative impact on the operational capacity of the Queensland Police Service. Firstly, it will be extremely unhelpful to have the QPUE and members distracted by Union dues payment arrangements when there is more important issues to be concentrating on. Secondly there is a long established custom and practice prior to major events (CHOGM, Schoolies, lndy etc.) whereby the QPS and QPUE negotiate a range of operational arrangements (hours of work, shifts, travel arrangements, travel allowances, meals and accommodation) that maximise the efficient policing of the event. The QPS are able to agree on these arrangements with the QPUE, confident in the knowledge that the QPUE represents nearly 100% of all sworn officers. To disturb this efficient relationship immediately prior to G20 is in our view operationally unsound.*[144]

The Department stated 'in cases where an employee chooses to be a member they will make arrangements directly with the association in regard to the payment of their subscription fees.'[145]

The Committee agrees with the Department's assessment and considers there is no real detriment to members of unions, however there will be real savings in not requiring employers to action payroll deductions. The Committee notes the submission from the QPU however does not consider the issues raised by the QPU are as extreme as they appear. The Committee considers there is sufficient lead up time now and there will be sufficient time between commencement of the provision and the start of the G20 meetings, that sufficient arrangements can be put in place by union members to facilitate payment of fees. Accordingly, the Committee supports the amendments.

2.10 Powers of inspectors

In his introductory speech, the Attorney-General noted the Bill 'clarifies the powers of an industrial inspector to request and inspect records in relation to transparency and accountability obligations of industrial organisations under the IR Act'.[146]

The Explanatory Notes state:

> *Following the amendment of the* Industrial Relations Act 1999 *in June 2013 with respect to matters under Chapter 12 (Industrial Organisations) doubt has been raised on the inspector's powers to investigate suspected breaches or to otherwise ensure compliance with the Act. The powers of an inspector under the Act will be clarified to make clear that an inspector can enter premises, interview persons and request and inspect records*

143 See for example: Australian Workers' Union, Submission No. 28; Queensland Police Union, Submission No. 24.

144 Queensland Police Union, Submission No. 24, page 2.

145 Letter from the Department of Justice and Attorney-General, 11 November 2013, Attachment, page 18.

146 *Record of Proceedings (Hansard)*, 17 October 2013, page 3424.

> *in relation to an investigation of suspected breaches of the Act or to otherwise ensure compliance with the Act'.*[147]

The amendments are located in clauses 9-17 of Schedule 1 of the Bill.

In its written submission to the Committee, the Queensland Council for Civil Liberties (QCCL) quoted the following text from the Explanatory Notes pertaining to consistency with fundamental legislative principles:

> *Power to enter premises* – Legislative Standards Act 1992 *s 4(3)(e). The Bill gives inspectors power to enter the registered office of an associated entity without a warrant. Associated entities are only subject to a limited number of provisions under the Act and, for that reason it is unusual for inspectors to be given an entry power.*
>
> *The public interest in the transparency and account ability of industrial organisations is seen to override this concern.*[148]

The QCCL submission questioned the whereabouts of evidence justifying the necessity of a power to enter private premises.[149] The Committee acknowledges the QCCL's view however it considers that the public interest in the transparency and accountability of industrial organisations is seen to override concerns about the extension of this power. The Committee therefore supports the amendments.

2.11 Extinguishing obsolete certified agreements

In accordance with section 164 of the IR Act, a certified agreement commences operation when it is certified and continues to operate until it is replaced by another certified agreement or it is terminated under certain conditions specified in the IR Act. There are over 4,500 certified agreements 'in force', with the majority applying to the private sector and the majority of these being corporations (and therefore subject to the national workplace relations system since 2005).

While it is considered good practice to remove obsolete certified agreements from the Queensland industrial relations system, doing so using the existing facilities of the IR Act is administratively resource-intense.

The Bill therefore amends the IR Act to allow the QIRC to administratively cancel all certified agreements that are now obsolete (Schedule 1 of the Bill, items 1 and 2).

2.12 Provisions governing aspects of the QSuper Board

The Explanatory Notes state the Bill:

- amends the *Superannuation (State Public Sector) Act 1990* (QSuper Act) to relocate the provisions governing the operation, composition, size and tenure of the Board of Trustees of the State Public Sector Superannuation Scheme (QSuper Board) to the Superannuation (State Public Sector) Regulation 2006 (QSuper Regulation); and
- amends the QSuper Regulation to prescribe provisions governing the operation, composition, size and tenure of the QSuper Board.[150]

147 *Explanatory Notes,* Industrial Relations (Fair Work Act Harmonisation No. 2) and Other Legislation Amendment Bill 2013, page 3.

148 *Explanatory Notes,* Industrial Relations (Fair Work Act Harmonisation No. 2) and Other Legislation Amendment Bill 2013, page 7.

149 Queensland Council for Civil Liberties, Submission 35, page 3.

150 *Explanatory Notes,* Industrial Relations (Fair Work Act Harmonisation No. 2) and Other Legislation Amendment Bill 2013, page 5.

The Explanatory Notes set out the reasons for the amendments as follows:

> *Discussions at industry and Commonwealth Government level continue to focus on the optimal structure for boards of superannuation funds. To provide flexibility for any changes that may result accordingly, there is a benefit in having the… QSuper Board… arrangements governed by a regulation instead of primary legislation and bring these arrangements in line with current industry best-practice.*[151]

Additionally, the Department's initial briefing letter to the Committee observes that 'Changes are also being made limiting tenure for trustees and to the member representative provisions'.[152]

At the public hearing, Ms Beth Mohle, State Secretary of the QNU, expressed her organisation's concerns about the transitional arrangements for the reconfiguration of the QSuper Board:

> *We are extremely concerned about reports that only three existing QSuper board members will be continuing on the board after the end of this month. We have expressed our concern about the significant risk that this poses in our letter to the Treasurer accepting my nomination to the board as a representative of the Queensland Nurses Union. In this letter I asked for details of who I should contact to discuss my concerns about how this very significant risk will be mitigated and I am yet to receive a response to my correspondence. This is a critical issue, given that the QSuper board has fiduciary duties to manage over $43 billion of QSuper members' funds.*[153]

The Bill inserts new provisions on membership of the QSuper Board. The QSuper Act is amended to provide that the QSuper Board consists of the number of trustees prescribed under a regulation and that the trustees are to be appointed by the Minister is a way prescribed under a regulation.[154] The QSuper Regulation is amended to provide that the Minster must, under the QSuper Act, appoint:

- 4 trustees as representing employers; and
- 4 member representative trustees, of whom 1 is to be nominated by the Queensland Police Union; and the Queensland Nurses' Union; and the Queensland Teachers' Union; and Together Queensland.[155]

The Bill further amends the QSuper Regulation to provide that, with the QSuper Board's written consent, the Minister may also appoint one other trustee if, when appointed, the person will be an independent director of the QSuper Board.[156]

In its written submission to the Committee, the QNU expressed concerns regarding the Bill's new membership provisions:

> *The transitional arrangements outlined in the Bill means that upon commencement of the legislation the appointment of existing trustee directors ends and all offices declared vacant. We understand from informal discussions over the past week or so that only three or four of the existing QSuper trustee directors are confirmed as continuing on the board after 30 November 2013.*[157]

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151 *Explanatory Notes,* Industrial Relations (Fair Work Act Harmonisation No. 2) and Other Legislation Amendment Bill 2013, page 3.

152 Letter from the Department of Justice and Attorney-General, 25 October 2013, Attachment, page 14.

153 *Transcript of Proceedings (Hansard)*, Public Hearing, Legal Affairs and Community Safety Committee, 1 November 2013, page 17.

154 See proposed new section 5 of the *Superannuation (State Public Sector) Act 1990* (clause 121 of the Bill).

155 See proposed new section 2B of the *Superannuation (State Public Sector) Regulation 2006* (clause 131 of the Bill).

156 See proposed new section 2B of the *Superannuation (State Public Sector) Regulation 2006* (clause 131 of the Bill).

157 Queensland Nurses' Union, Submission No. 20, page 12.

The submission continued, noting the QNU's extreme concern about the loss of expertise from the QSuper Board and reiterating comments made at the public hearing about clarification sought from the Queensland Treasurer about how this will be addressed via transitional arrangements and how the significant risks associated with the loss of expertise mitigated: '*This is of particular interest to the QNU given that the Bill provides for us to nominate a trustee director to the QSuper board*'.[158]

The QNU submission identified 'board stability' as central to the maintenance of best practice governance and appropriate risk management for the QSuper organisation, and commented further on concerns pertaining to membership of the QSuper Board:

> *The planned retirement from the board by two longstanding trustee directors was known for sometime (sic). However the further loss of board expertise resulting from decisions made to not continue the nomination of a number of longstanding employer and employee nominated trustee directors that is occurring in conjunction with this legislative change is of great concern. This in part results from the loss of board nomination rights by the Queensland Council of Unions and Australian Workers Union and the resultant loss of two longstanding trustee directors from the board.*[159]

In its response to submissions received by the Committee, the Department acknowledged concerns raised by the QNU and asserted that the QSuper Board, supported by senior management will have the full range of skills needed for the effective and prudent operation of QSuper.[160] In support of this assertion, the Department stated:

> *Although the appointment of existing trustee directors will end upon the Act's commencement, it is intended that a number of the trustee directors appointed on 1 December 2013 will be existing trustee directors. Additionally, and as required under Commonwealth legislation, the incoming directors will have the skills that allow them to make an effective contribution to Board deliberations and processes.*[161]

The Committee notes the issues raised by QNU and accepts the Departmental response.

Although it identified the Bill's superannuation amendments as affecting governance, rather than entitlement, the QTU recognised the significance of the amendments to matters of substantial importance to its members and to employees in public employment generally.[162]

In its written submission to the Committee, it opposed the transfer of governance arrangements for the QSuper Board to the QSuper Regulation, '*Such a transfer facilitates subsequent amendment without the level of notice or scrutiny associated with an amendment to legislation*'.[163]

The QTU welcomed the retention of its power to nominate a member of the QSuper Board, noting that: '*The Union does not believe that the size of the existing board is so unwieldy as to justify its reduction and the removal of trustees nominated by the Queensland Council of Unions and the AWU covering other areas of public sector employment*'.[164]

158 Queensland Nurses' Union, Submission No. 20, pages 12-13.
159 Queensland Nurses' Union, Submission No. 20, page 13.
160 Letter from the Department of Justice and Attorney-General, 11 November 2013, Attachment, page 19.
161 Letter from the Department of Justice and Attorney-General, 11 November 2013, Attachment, page 19.
162 Queensland Teachers' Union, Submission No. 19, page 24.
163 Queensland Teachers' Union, Submission No. 19, page 24.
164 Queensland Teachers' Union, Submission No. 19, page 24.

The QTU submission expressed concerns pertaining to continuity of membership of the QSuper Board:

> *The Union acknowledges contemporary corporate governance principles promoting limited tenure on boards. The tenure proposed by the amendments is not unreasonable but the wholesale re-constitution of the board and the limited notice of the proposed legislative changes creates a potential future situation where there is significant turnover in the board at the one time. The legislation would better provide for staggered appointments to the board (and staggered retirements) to ensure continuity, and should provide some discretion for marginally extending the limits of tenure for the purposes of continuity.*[165]

The Committee acknowledges the concerns raised by the QTU, however supports the proposed amendments set out in the Bill.

2.13 Applications for trading hours orders to be heard by a single Commissioner

The trading hours of shops in Queensland are regulated by the *Trading (Allowable Hours) Act 1990* (Trading Hours Act), supported by the Trading (Allowable Hours) Regulation 200*4* and various trading hours orders made by the QIRC.[166]

Trading hours orders for non-exempt shops[167] and trading hours orders for exhibitions and special displays[168] are currently determined by a Full Bench of three Commissioners. The requirement for a Full Bench has existed in the Trading Hours Act since 1965.[169] According to the Department, '*This reflects a view that trading hours decisions have wide-reaching effects in the business and wider community and a legislative approach that enshrines actual shop trading hours in the legislation (which are subject to the decision of the QIRC)*'.[170]

The Explanatory Notes reference the proposed amendments to the Trading Hours Act and the reasons for the changes:

> *The amendment to the* Trading (Allowable Hours) Act 1990 *will provide that applications for trading hours orders may be determined by a single member, with the determination of these trading hours orders by a Full Bench of three commissioners occurring only when the vice president considers it appropriate in the circumstances. Allowing trading hours orders to be determined by a single commissioner will enable more minor matters to be convened and heard more quickly, while the vice president would retain the right to decide if determination by a Full Bench of three commissioners is more appropriate, given the relative importance of a particular application.*[171]

165 Queensland Teachers' Union, Submission No. 19, page 24.

166 http://www.qirc.qld.gov.au/agreement_award/orders/index.htm, accessed 4 November 2013.

167 *Trading (Allowable Hours) Act 1990*, section 21.

168 *Trading (Allowable Hours) Act 1990*, section 22.

169 Letter from the Department of Justice and Attorney-General, 25 October 2013, Attachment, page 13.

170 Letter from the Department of Justice and Attorney-General, 25 October 2013, Attachment, page 13.

171 *Explanatory Notes,* Industrial Relations (Fair Work Act Harmonisation No. 2) and Other Legislation Amendment Bill 2013, page 5.

The Department explained the granting of discretionary powers to the Vice-President of the QIRC (who is said to support the new approach) as follows:

> *If the matter is of a relatively minor or less complex nature it could be more conveniently dealt with by a single Commissioner. However, the VPC will have discretion to determine the importance of a particular matter and accordingly if a Full Bench of three Commissioners is considered appropriate.*[172]

In his introductory speech, the Attorney-General identified the following benefits of the amendments:

> *In recent years, stakeholders have raised concerns about delays in the hearing of applications for extended trading hours. Allowing for less complex trading hours matters to be dealt with by a single commissioner will help expedite the determination of trading hours orders, alleviate costs incurred by the parties and provide for a more efficient use of QIRC resources.*[173]

At the public hearing, Mr Trevor Evans, Chief Executive Officer of the National Retail Association (NRA), commented on experiences of increased timeframes for the hearing and deciding of recent applications to the QIRC, '*Over the last few years the time between filing an application and the hearing of a typical matter has blown out from around four to five months to a period more like 12 to 18 months for most of our current caseload*'.[174] In support of its claims of time delays, the NRA's written submission to the Committee sets out recent timeframes for the filing, hearing and deciding of trading hours applications.[175]

At the public hearing, Mr Evans identified various probable causes of delay:

> *I think the backlog of other sorts of cases – whether they are in the industrial relations space; whether its (sic) workers compensation or so on – have certainly played a part. I think there has also been a bit of a role in terms of illnesses and retirement and handover of commissioners that have also impacted on our cases. Certainly, all those factors have hindered the ability of the registry and the commission, I understand, to coordinate the schedules of three commissioners at once in order to quickly hear our matters.*[176]

In the Department's view, 'Delays are exacerbated by the requirement that each application be dealt with by a Full Bench of three Commissioners'.[177]

The NRA's written submission sets out various reasons why it supports the proposed amendments as a 'sensible and workable solution to overcoming many of the causes of delays now being experienced in the hearing of trading hours applications', including:

- avoiding delays associated with coordinating the availability of three members of the QIRC;
- assisting when Commissioners retire or fall ill, hearing schedules change for other reasons, or cases need to be transferred between Commissioners at late notice;
- faster turnaround times in the issuing of decisions following hearings, given that three Commissioners no longer need to coordinate their determinations;

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172 Letter from the Department of Justice and Attorney-General, 25 October 2013, Attachment, page 14.

173 *Record of Proceedings (Hansard)*, 17 October 2013, page 3424.

174 *Transcript of Proceedings (Hansard)*, Public Hearing, Legal Affairs and Community Safety Committee, 1 November 2013, page 1.

175 National Retail Association, Submission No. 33, page 4.

176 *Transcript of Proceedings (Hansard)*, Public Hearing, Legal Affairs and Community Safety Committee, 1 November 2013, pages 3-4.

177 Letter from the Department of Justice and Attorney-General, 25 October 2013, Attachment, page 13.

- consistency with the existing stated aim of the TH Act (see section 24) that the QIRC act as quickly, and with as little formality and technicality, as is consistent with a fair proper hearing of the issues; and
- reducing the impacts of red tape and regulation.[178]

The Committee agrees with the submission from the NRA. The amendments will sensibly reduce the impacts of red tape and regulation. Having trading hours matters being heard by a single Commissioner will reduce delays and assist businesses in opening their doors and getting on with business.

2.14 Amendments to the *Hospital and Health Boards Act 2011*

In his introductory speech, the Attorney-General identified the Hospital and Health Boards Act 2011 (HHB Act) as one of the '…other acts that contain employment standards for those in the Queensland industrial relations jurisdiction…' which require amendment as a consequence of the Bill's reform of the industrial relations framework.[179] The Bill's Explanatory Notes state that the Bill amends the HHB Act to '…complement the changes in the state's industrial relations framework'.[180]

The Department's initial briefing letter to the Committee lists the following changes the Bill will make to the HHB Act:

> *Inclusion of a new type of directive relating to the employment terms of employees of the Department of Health and the various Hospital and Health Services. These directives will be called Health Employment Directives and will be able to be issued by the Chief Executive of the Department of Health. The Chief Executive will not be able to delegate this function. Health Employment Directives will interact with legislation and industrial instruments in the same way as do directives of the Public Service Commission Chief Executive under the* Public Service Act 2008 *(Qld). That is:*
>
> *i. If a health employment directive is inconsistent with an Act or subordinate legislation, the Act or subordinate legislation prevails over the health employment directive;*
>
> *ii. If a health employment directive is inconsistent with an industrial instrument, the health employment directive prevails over the industrial instrument, unless a regulation provides otherwise.*
>
> *iii. In addition, if a health employment directive is inconsistent with a ruling made under the* Public Service Act 1958*, section 53, the health employment directive prevails over the ruling.*
>
> *Creation of a new type of senior employee under the HHB Act called the 'senior health service employee'. These will be classifications of senior employees that can be prescribed by regulation as 'senior health service employees'. The amendments to the HHB Act will clarify the matters that must be included in a senior health service employee's contract of employment.*[181]

178 National Retail Association, Submission No. 33, page 5.

179 *Record of Proceedings (Hansard)*, 17 October 2013, page 3423.

180 *Explanatory Notes,* Industrial Relations (Fair Work Act Harmonisation No. 2) and Other Legislation Amendment Bill 2013, page 5.

181 Letter from the Department of Justice and Attorney-General, 25 October 2013, page 13.

At the public briefing, Mr Mark Brady, Senior Director of Queensland Health, spoke about the Bill's creation of a 'senior health service employee' classification and the introduction of an individual contract for those employees *'…as a way to retain our best and brightest doctors and also attract world-class doctors by having remuneration that is structured to do that'*.[182] Mr Brady commented on the anticipated practical application of the amendments with respect to individual contracts and Health Employment Directives:

> *The way we envisage this working in Queensland Health is that a contract will be a framework document that will be underpinned by the new creation of this act, which is the health employment directive, which is issued by the director-general. The parameters of the contracts will be in that health directive. Then negotiations will happen at the hospital and health service level, under the supervision of the chief executive. Remuneration can then be discussed individually and then that agreement would be reached within the parameters of the framework...*
>
> *The way we envisage it is that base pay would be based within the directive, as would mandatory allowances, such as the current motor vehicle allowance, the current professional development allowance, and then there would be a performance portion of the contract and also, where it is required—say, outside of the metropolitan area where it is more difficult to recruit people—there would be components for attracting people to rural or regional areas.*[183]

At the public hearing, Ms Beth Mohle, State Secretary of the QNU, suggested that the amendments to the HHB Act, which will empower the Director-General to issue a Health Employment Directive, highlight a threat to a current industrial entitlement:

> *While this amendment goes to issues in relation to senior health employees being offered contracts of employment, hidden amongst the amendments is a reference to a health service directive being permitted in relation to professional development training of health service employees, and that is section 51A(2)(e). Professional development leave and a professional development allowance was introduced as an industrial entitlement for nurses and midwives employed by Queensland Health since 2006 as part of an enterprise bargaining outcome known as EB6. This amendment will allow the director-general of health to issue a directive that overrides the current industrial entitlement. Furthermore, as the bill provides that the health employment directive prevails over any industrial instrument, it can therefore reduce the current entitlement of nurses and midwives to professional development.*[184]

The QLS submission to the Committee drew attention to new provisions, to be inserted into the HHB Act, pertaining to the Chief Executive's power to issue Health Employment Directives about the conditions of employment for health service employees.[185] The relevant sections, 51A and 51C, provides for the content and application of Employment Health Directives, and the relationship between the directives and other instruments (as per i-iii above, in the extract from the Department's initial briefing letter to the Committee).

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182 *Transcript of Proceedings (Hansard)*, Public Briefing, Legal Affairs and Community Safety Committee, 30 October 2013, page 9.

183 *Transcript of Proceedings (Hansard)*, Public Briefing, Legal Affairs and Community Safety Committee, 30 October 2013, page 9.

184 *Transcript of Proceedings (Hansard)*, Public Hearing, Legal Affairs and Community Safety Committee, 1 November 2013, page 17.

185 See proposed new division 2A, specifically new sections 51A and 51C, of the *Hospital and Health Boards Act 2011* (clause 88 of the Bill).

The QLS raised concerns over the new provisions:

> *Given the scope of a Health Employment Directive pursuant to s51A, the fact that it will apply over an industrial instrument and contract of employment is concerning. This arrangement erodes the ability the Commission, as an independent "umpire", to make or certify industrial instruments in a transparent manner as such instruments will be able to be overridden by directives made without any proper, transparent public hearing, by a person who is not obliged to act judicially.*[186]

The QNU written submission addresses the Health Employment Directive provisions, with particular focus on matters of significance to nurses and midwives, namely, Professional Development Leave (PDL). The submission states that PDL is an industrial entitlement that nurses and midwives pursued for many decades and finally achieved in enterprise bargaining negotiations in 2006.[187] Under the Bill, the conditions of employment for which the Chief Executive may issue Health Employment Directives, includes '*the professional development and training of health service employees in accordance with the conditions of their employment*'.[188] The QNU asserts that this new provision, when combined with the new section 51C(1):[189]

> *…leave[s] nurses and midwives subject to a unilateral decision in a health employment directive to withdraw or amend professional development leave. This of course flies in the face of the proposed s71CB of the* Industrial Relations Act 1999 *that states:*
>
> > *'For an inconsistency provision, the directive is taken not to be inconsistent with the QES provision to the extent that the effect of the directive is more favourable to an employee than a QES provision.'*

In its response to submissions, the Department acknowledged issues raised by the QLS and QNU and stated:

> *It is noted that Clause 88 (proposed section 51A) of the Bill proposes that the chief executive may issue HEDs about the conditions of employment for health service employees. HEDs can be about issues including the professional development and training of health service employees in accordance with their conditions of employment (proposed section 51A(2)(e)).*
>
> *It is also noted that proposed section 51C provides that if a HED is inconsistent with an industrial instrument, the HED prevails over the industrial instrument, unless a regulation provides otherwise. Similarly, if a directive is inconsistent with a health service employee's contract of employment, the HED prevails over the contract.*[190]

The Committee notes the issues raised in relation to amendments to the HHB Act and the response to submissions provided by the Department. The Committee considers the amendments are required to fully realise the reform of the industrial relations framework as it applies to health professionals. The Committee therefore supports the Bill's amendments to the HBB Act.

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186 Queensland Law Society, Submission 26, page 5.

187 Queensland Nurses' Union, Submission 20, page 8.

188 See proposed new section 51A(2)(e) of the *Hospital and Health Boards Act 2011* (clause 88 of the Bill).

189 Section 51C(1) provides that if a health employment directive is inconsistent with an industrial instrument, the health employment directive prevails over the industrial instrument, unless a regulation provides otherwise.

190 Letter from the Department of Justice and Attorney-General, 11 November 2013, page 19.

3. Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* states 'fundamental legislative principles' are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'.

The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of Parliament.

The Explanatory Notes addresses a number of potential breaches of fundamental legislative principles which were raised by the Office of Queensland Parliamentary Counsel with the Department. The Committee has also examined the application of the fundamental legislative principles to the Bill and in addition to those matters in the Explanatory Notes brings the following matters to the attention of the House.

3.1 Rights and liberties of individuals

Section 4(2)(a) of the *Legislative Standards Act 1992* requires that legislation has sufficient regard to the rights and liberties of individuals.

Reduction of redundancy provisions

Clause 7 of the Bill inserts new section 71KF which provides for certain workers' entitlements to redundancy pay, based on an employee's years of continuous service with an employer. Currently the minimum redundancy pay levels are provided for in section 85B and Schedule 3 of the IRA. Current section 85B provides that if an employee is made redundant, the employee is entitled to a redundancy payment that is at least equal to the employee's week's pay multiplied by the number of weeks for the employee's years of service.

Pursuant to proposed section 71KG, if an employee is entitled to be paid an amount of redundancy pay and the employer obtains other acceptable employment for the employee or cannot pay the amount, on application by the employer, the Industrial Relations Commission (IRC) may make an order reducing the amount of the redundancy pay to a stated amount the commission considers appropriate, ranging down to a level of zero. There does not appear to be any current equivalent provision.

The combined operative effect of proposed new sections 71KF and 71KG is that an employee who might otherwise be eligible for a redundancy payment under section 71KF may have the amount to which they are entitled reduced (even to zero dollars) by the QIRC if the employer is not in a financial position to pay the redundancy. Given many employees would require a redundancy payment to offset their living costs until they find other employment, these provisions will substantially impact on the person's standard of living and would operate as a serious erosion of the right to a redundancy payment that they enjoyed under the current *Industrial Relations Act 1999* (IRA). The safeguard that exists for the operation of these sections is that the decision to reduce the redundancy payment due, and by how much, is made by the QIRC rather than by the employer. Presumably the QIRC would need to be satisfied that an employer was genuinely unable to pay the full amount of the redundancy owing to the employee, before the IRC would order that the amount owing was reduced or negated entirely. The other safeguard is that the employer under this division is the State so it would be unlikely that there would ever be a situation where the employer/State was unable to pay a redundancy.

Right of Private Practice

Clause 42 of the Bill inserts new sections 199(2) and 200(3) into the IR Act. These need to be read with the amendment to section 691C under this Bill contained in clause 74**.** Effectively the result is that when an industrial instrument applying to a medical practitioner includes a private practice provision, the operation of section 691C means that such a private practice provision is of no effect in the industrial instrument.

Sections 199(2)(c) and 200(3)(c) confirm that the operation of section 691C(1)(f) which negates the effect of private practice provisions in industrial instruments, does not entitle the medical practitioner to a payment of money or other compensation (for the lost opportunity to engage in remunerated private practice).

3.2 Administrative Power

Section 4(3)(a) *Legislative Standards Act 1992* requires that rights, obligations and liberties of individuals be made dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

Clause 95 of the Bill amends section 75 of the *Hospital and Health Boards Act 2011* to broaden the definition of an 'excluded matter' by inserting the words 'senior health service employee'.

Under section 75 – an excluded matter, or a matter affecting or relating to an excluded matter, is not an industrial matter for the *Industrial Relations Act 1999* and a decision about an excluded matter cannot be challenged, appealed against, reviewed, quashed, set aside, or called in question in another way, under the *Judicial Review Act 1991*.

The former Scrutiny of Legislation Committee (SLC) took particular care to ensure that there was legislative adherence to the principle that there should be a review or appeal against the exercise administrative power. That SLC was generally opposed to clauses removing the right of review. Whenever ordinary rights of review were removed, thereby preventing individuals from having access to the courts or a comparable tribunal, the SLC took particular care in assessing whether sufficient regard had been had to individual rights, albeit noting that such a removal of rights may be justified by the overriding significance of the objectives of the legislation.

The SLC noted 'the purpose of judicial review is to deal with those actions of public officials who act beyond the powers that are intended for them. It acts to protect the legislative intention approved by Parliament and proposed by the executive. As such, ouster clauses should rarely be contemplated and even more rarely enacted.' [191]

The SLC had, in particular circumstances, found provisions removing review under the *Judicial Review Act 1991* unobjectionable if it considered that an adequate alternative review mechanism was provided.[192]

This matter is brought to the attention of the House.

3.3 Delegation of administrative power

Section 4(3)(c) *Legislative Standards Act 1992* requires that the delegation of administrative power occur only in appropriate cases and to appropriate persons.

Clause 16 of the Bill inserts proposed new section 140C into the IR Act which permits the Minister to give the Queensland Industrial Relations Commission a written notice requesting that an award

[191] *Alert Digest* No. 2 of 1996, page 18.

[192] *Alert Digest* No. 8 of 2004, page 8; *Alert Digest* No. 6 of 2003, page 6.

modernisation process be carried out. The request must state details of the award modernisation process that is to be carried out and the day by which it must be completed (140C(2)) and may state any other matter about the award modernisation process the Minister considers appropriate (140C(4)).

Section 140C(5) states - without limiting subsection (4), the Minister's award modernisation request may direct the QIRC to include in a modern award terms about particular permitted matters, or give other directions about how, or whether, the QIRC must deal with particular permitted matters.

Section 140CC(1) states that the QIRC *must* carry out the award modernisation process in accordance with the award modernisation request. However subsection (2) provides that, subject to subsection (1), the QIRC may decide the procedure for carrying out the award modernisation process and may inform itself in any way it thinks appropriate, including by consulting with any person, body or organisation in the way it considers appropriate.

This matter is also addressed in the Explanatory Notes however the question of whether this level of Ministerial direction of an independent judicial/quasi-judicial Commission is appropriate is raised for the consideration of the House.

3.4 Onus of Proof

Section 4(3)(d) *Legislative Standards Act 1992* requires that legislation does not reverse the onus of proof in criminal proceedings without adequate justification.

Clause 7 of the Bill inserts proposed section 71KA which outlines what an employer must do to dismiss an employee, including giving the prescribed period of notice and paying required compensation. Those general requirements apply unless the employee engages in misconduct of a type that would make it unreasonable to require the employer to continue the employment during the notice period (71KA(1)(b)). However, by virtue of section 71KA(3), subsection 1 (b) will not apply if the employee can show that, in the circumstances, the conduct was not conduct that made it unreasonable to continue the employment during the notice period.

Effectively therefore the burden of proving the existence of extenuating circumstances that preclude the operation of section 71KA(1)(b) falls to the employee. From a practical position it is unclear as to how an employee may satisfy that evidentiary burden. It is also not clear why the burden of proof rests with the employee because presumably the employer has sufficient knowledge of the facts/circumstances of the alleged misconduct that is the reason for the dismissal to be able to know whether or not it would be reasonable to continue the employment during the notice period.

Such a scenario is in contrast to instances where a reversal of onus may be justified on the basis of a defendant's peculiar knowledge of the offending conduct/circumstances.

3.5 Retrospectivity

Section 4(3)(g) *Legislative Standards Act 1992* requires that legislation not adversely affect rights and liberties by imposing obligations retrospectively.

Clause 75 of the Bill inserts proposed new section 821 into the IR Act to provide that new Chapter 5, part 2 (being section 125 – the QIRC's power to repeal awards) is taken to have applied on and from the introduction day for the Bill (rather than the commencement day). This means the operation of (new) section 125 will be retrospective to the Bill's introduction day.

Previously, current section 125 allowed the QIRC to make, amend or repeal awards. The proposed new section 125 deals with repealing awards only. The power to make or amend awards under the new regime is contained in proposed section 140G.

Under the transitional arrangements contained in the Bill, proposed section 821(2) provides the making of an award, or an amendment of an award, made under existing section 125 on or after the introduction day and before the commencement day, is of no effect. This is because of the retrospective application of the new Chapter 5, Part 2 as contained in the Bill. As new section 125 operates retrospectively to the introduction day, there is no 'power/authority' under section 125 for the QIRC to make or amend a (pre-modernisation) award after the introduction day, even though the Bill is (at that time) not yet law.

Similarly, under section 821(3), an application made on or after the introduction day under section 125(2) for the making or amendment of an award, is, on the commencement day, taken to have been withdrawn, as there is no power under section 125 to make or amend an award from the introduction day forth.

In the situation where an award has been in the negotiation stages for months, the retrospective removal of the QIRC's power to make or amend an award under section 125 means that any award or amendment purported to have been made after the introduction day for the Bill is, by virtue of the retrospective operation of section 821, made without power/is *ultra vires*, and will be of no effect.

While it is arguable that this may appear unfair to the parties of the negotiation, the Committee notes the parties may reapply to the QIRC under new section 140G seeking a modern award be made or varied under the new industrial relations framework.

3.6 Institution of Parliament

Section 4(2)(b) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to the institution of Parliament.

Clause 7 of the Bill inserts proposed new sections 71K- 71KE into the *Industrial Relations Act 1999,* each of which allows matters pertinent to the operation of those sections to be prescribed by regulation.

Section 71K(f)(3) mirrors existing section 72(1)(e)(iii). Sections 71KA and 71KB are mirrored in existing section 83 of the Act. Section 71KC mirrors existing section 84 of the Act. Section 71KD mirrors existing section 85.

Section 71KE does not appear to have a mirror provision in the existing Act. Section 71KE(3) outlines the types of employees to whom the redundancy pay provisions in Chapter 2A, division 9, subdivision 2 will apply. Section 71KE(3) states that subdivision 2 does not apply to casual employees; employees with less than 1 year's continuous service; employees employed for a fixed period, fixed task or for the duration of particular season; apprentices and trainees; employees participating in a labour market program; and *another employee prescribed under a regulation or a modern industrial instrument as an employee to whom this division [9] does not apply.*

Section 71KE(3)(f) will therefore allow the list of employee types to whom redundancy pay entitlement provisions will not apply, to be subject to expansion by regulation. Whilst any such regulation will be subject to disallowance by the House, regulations take effect from the date they are notified in the government gazette and there can be a significant period of some months in which they are operative before the opportunity for them to be disallowed arises.

This issue of whether it is appropriate for a matter such as the eligibility of certain employee groups for redundancy payments to be prescribed by regulation, rather than prescribed by the Act is raised for the attention of the House.

Amendment of an Act only by another Act – Section 4(4)(c) *Legislative Standards Act 1992*

Does the Bill allow or authorise the amendment of an Act only by another Act?

A Henry VIII clause is a clause in an Act of Parliament which enables an Act to be expressly or impliedly amended by subordinate legislation or executive action. The former Scrutiny of Legislation Committee (SLC) considered clauses to be Henry VIII clauses when they effectively provided that the operation of a provision of an Act could be modified by the making of a regulation. Henry VIII clauses are considered to offend against the institution of Parliament by offending against the principle that amendment of an Act of Parliament should be by Parliament itself, by way of amendment of the Act, and not via executive action.

The former SLC's approach was that if an Act was purported to be amended by a statutory instrument (other than an Act) in circumstances that were not justified, the Committee would request Parliament disallow the part of the instrument that breached the fundamental legislative principle requiring legislation to have sufficient regard for the institution of Parliament.

A couple of clauses in this Bill will arguably operate as Henry VIII clauses by making the situation prescribed by the Act in certain provisions subject to a contrary intention in a regulation.

Clause 88 inserts proposed section 51C into the IR Act. Proposed sections 51C(2) and (3) provide legislative certainty by prescribing that in the event of a health employment directive being inconsistent with either a ruling under section 53 of the *Public Service Act 1958*[193] or a health service employee's contract of employment[194], the health employment directive will prevail.

Generally speaking a health employment directive will also prevail over an inconsistent industrial instrument[195] however section 51C(1) introduces an element of uncertainty by providing that the general rule of a health employment directive's supremacy over an inconsistent industrial instrument will not apply where a regulation provides otherwise. This arguably has the effect of permitting the general policy of section 51C of the Act as approved by Parliament to be overridden by a contrary intention in an executive-generated regulation (at least in the case of there being an inconsistent industrial instrument).

Similarly, clause 42 inserts new section 195 into the IR Act to similarly provide that certain instruments will prevail over others, unless a regulation provides otherwise. For example, a directive of the Chief Executive of the Public Service Commission made under the *Public Service Act 2008* prevails over an industrial instrument (section 195(7)). So too will a health employment directive made under the *Hospital and Heath Boards Act 2011, unless a regulation provides otherwise* (section 195(9)). Thus section 195 will permit the legislatively recognised supremacy of PSC directives and health employment directives to become subordinate to a contradictory regulation.

Clause 75 inserts proposed section 828(1) into the IR Act which provides that the nominal expiry date of a continuing agreement mentioned in section 827(1) becomes the day one year after the introduction day, or *if an earlier day is prescribed for the agreement under a regulation, the prescribed day.* Section 828(2) is the same in respect of certified agreements that become continuing agreements.

[193] Proposed section 51C(2)
[194] Proposed section 51C(3)
[195] Proposed section 51C(1)

Clause 7 inserts proposed section 71KB(4) into the IR Act to provide that a regulation may exclude from the operation of section 71KB, dismissals happening in stated circumstances that relate to the transfer of the employer's business.

These clauses arguably operate as Henry VIII clauses because they allow the generally expressed policy intention provided for in the Act to be overridden by a contrary intention expressed by regulation (i.e. that 'x' document will override an inconsistent 'y' document, or that a date prescribed by regulation prevails over that calculated under the Act).

These matters are generally brought to the attention of the House for consideration.

Transitional regulation making power

Clause 75 **i**nserts proposed new section 835 to confer a transitional regulation-making power. It provides that a transitional regulation may make provision of a saving or transitional nature for which-

d) it is necessary to make provision to allow or facilitate the doing of anything to achieve the transition from the operation of the pre-amended Act to the operation of the amended Act; and

e) this Act does not make provision or sufficient provision.

The former SLC reported that it was an 'inappropriate delegation' to provide that a regulation may be made about any matter of a savings, transitional or validating nature '*for which this part does not make provision or enough provision*' because it anticipates that the Bill may be inadequate and that a matter which otherwise would have been of sufficient importance to be dealt with in the Act will now be dealt with by regulation.[196] The SLC expressed the view that provisions such as those are not an appropriate delegation of legislative power. The SLC consistently maintained that if a matter is of sufficient importance to be included in an Act of Parliament, then that is the only appropriate place for it to be dealt with (and not in subordinate legislation).[197]

The transitional regulation making-power under proposed section 835 is arguably of the broader kind in that it allows a transitional regulation to be made about anything necessary to facilitate transition to the new legislative regime when the Act does not sufficiently provide for that matter. Such a regulation may also have retrospective operation to a day that is not earlier than the commencement date (section 835(3)) and expires two years after commencement (in contrast to a number of other transitional regulations that expire one year after commencement) which is recognised as the outer acceptable limit. The former SLC determined:

> *… the transitional phase for legislation should be limited to a maximum of 2 years and therefore transitional regulation making powers should be subject to a sunset clause; and all regulations made pursuant to transitional regulation making powers should be subject to sunset clauses which bring about their expiry at the same time as the head of power expires.*[198]

Section 835 also operates as a Henry VIII clause. Section 835(2) states that – *Without limiting subsection (1), a transitional regulation may continue the operation of a repealed provision.* This operates as a Henry VIII clause by allowing a transitional regulation made under section 835 to continue the operation of a repealed statutory provision in contradiction of Parliament's previously expressed intention to repeal that provision.

196 *Alert Digest* No. 3 of 1996, page 9.

197 *Alert Digest* No. 3 of 1996, page 9.

198 The Use of 'Henry VIII clauses' in Queensland Legislation, Scrutiny of Legislation Committee, 1997, pages 50-51.

The former SLC considered the possibly justifiable uses of Henry VIII clauses to be limited to circumstances where the clause was necessary to facilitate either – immediate executive action, the effective application of innovative legislation, transitional arrangements, or national scheme legislation. If a Henry VIII clause did not fall within any of the above situations, the SLC classified it as 'generally objectionable'.

3.7 Explanatory Notes

Part 4 of the *Legislative Standards Act 1992* relates to Explanatory Notes. It requires that an explanatory note be circulated when a bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

The Explanatory Notes were fairly detailed and contain the information required by Part 4 and a reasonable level of background information and commentary to facilitate understanding of the Bill's aims and origins.

Appendix A – List of Submissions

Sub #	Submitter
001	Name Suppressed
002	Lynette Uytenbogaardt
003	Helen Gunter
004	Name Suppressed
005	Stephen Roff
006	Judith Holt
007	Keith Newton
008	Izan Gill
009	Anthony Barnes
010	Barbara Coleman
011	Julia Watson
012	Rebecca Griffin
013	Stephen Nicholson
014	Tanja Vanderwalt
015	Estelle Butcher
016	Des Hardman
017	Joanna Chiang
018	Together Queensland
019	Queensland Teachers' Union
020	Queensland Nurses' Union
021	Maja Peric
022	Penelope Bailey
023	Queensland Council of Unions
024	Queensland Police Union of Employees
025	Australian Salaried Medical Officers' Federation Qld and AMA Queensland
026	Queensland Law Society
027	Anne Dinh
028	The Australian Workers' Union
029	Heather Green
030	United Firefighters' Union of Australia, Union of Employees, Queensland
031	Rail Tram Bus Union
032	Local Government Association of Queensland
033	National Retail Association
034	United Voice
035	Queensland Council for Civil Liberties

Appendix B – Schedule of Witnesses at the Public Hearing

National Retail Association Mr Trevor Evans, Chief Executive Officer
Local Government Association of Queensland Mr Tony Goode, Workforce Strategy Executive Mr Shaun Blaney, Senior Advisor, Industrial Relations, Governance/Industrial Advocate
United Firefighters' Union of Australia, Union of Employees, Queensland Mr Mark Dearlove, President Mr Anthony Cooke, Industrial Officer
Queensland Police Union of Employees Mr Ian Leavers, General President and Chief Executive Officer Mr Stephen Mahoney, Senior Industrial Officer
Queensland Teachers' Union Mr Graham Moloney, General Secretary Ms Kate Ruttiman, Deputy General Secretary
Queensland Nurses' Union Ms Beth Mohle, State Secretary Mr Mark Dougherty, Industrial Officer Dr Liz Todhunter, Research and Policy
AMA Queensland Mr Andrew Turner, Manager Workplace Relations
Australian Workers' Union Mr Ben Swan, Secretary
Queensland Council of Unions Mr John Martin, Research and Policy Officer
United Voice Ms Kylie Badke, Senior Industrial Officer Mr Des Hardman, Delegate Ms Barbara Turomsza, Delegate
Together Queensland Mr Alex Scott, Secretary

Dissenting Reports

Bill Byrne MP
Member for Rockhampton

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

The Opposition will strongly oppose this extreme and damaging legislation.

This is nothing but an ideological attack on working Queenslanders and their families.

This will strip the take-home pay of families. It will strip workers of rights and severely limit the power of employees and employers to include many issues and conditions in their enterprise agreements, even if the employees and employers agree.

The Attorney-General is simply kidding himself if he tries to stand in Parliament and say with a straight face that this legislation is 'harmonisation' with the Fair Work Act. The Committee was provided with clarification from the Attorney-General's own Departmental Officers that numerous and significant elements of this bill bear no resemblance to the Fair Work Act at all.

In fact, some significant elements in this Bill bear no resemblance to any other jurisdiction in the country. Even the meagre 'protections' that appeared in WorkChoices are not included in this legislation. I actually feel sorry for the Departmental staff directed to develop and implement this extreme right wing, HR Nichols Society agenda and then asked to portray it as 'harmonisation'.

As was pointed out in the public hearing, this detailed legislation has been pushed through with grossly inadequate time, consideration and consultation. Even with the limited time available to consider this bill, the extreme implications of this legislation and this Government's lack of understanding about how modern industrial relations operates was laid bare in the departmental briefing and public hearing. It is no wonder this government is trying to rush it through without genuine public consultation.

Throughout the Parliamentary debate the Opposition will give attention to the many distortions and damaging elements of this Bill. It will be a test of the Attorney-General's commitment to this legislation whether the Government guillotines debate or actually lets this legislation garner the attention it deserves.

Bill Byrne MP
Member for Rockhampton

Peter Wellington MP
Deputy Chair
Member for Nicklin

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

First and foremost, I must object in the strongest terms to the abuse of process by this Government in pursuing its industrial relations agenda. As set out in the submissions to the Committee from a number of unions, this is the sixth change to the Industrial Relations Act during this Parliament – an incredible average of one amendment every three months.

I accept that there may be some room for reform but if it is to be carried out then the Attorney-General should show some courage and sit down to meet with affected stakeholders and listen to the views of the community.

Once again however he has introduced the Bill after absolutely no public consultation and provided this Committee with less than one month to scrutinise a Bill which makes substantial amendments to Queensland's industrial relations framework.

This is clearly not acceptable and to me a sign of an arrogant Government.

It appears over recent months that there is a trend of this Government to provide its Attorney-General with greater and greater powers, blurring the separation of powers more and more each time a Bill is introduced. Unfortunately this Bill continues the trend.

As set out by the Queensland Teachers' Union the unilateral determination by the Attorney-General of employment conditions and Ministerial direction over the award review process contained in the Bill is simply unnecessary. It erodes the independence of the Queensland Industrial Relations Commission (QIRC) and distorts the balance of power too far towards the Government as the employer of public servants.

The QIRC is well placed to undertake any modernisation process on its own initiative, not at the direction of a Minister who is clearly struggling to understand industrial relations matters. If he had any true understanding of these matters he would never have presented this Bill to Cabinet for approval.

The timeframes provided in this Bill for the conduct of conciliation and arbitration have no bearing on reality. The evidence taken at the public hearing from 'those in the trenches' was indisputably clear – the timeframes are ambitious and will not work. The Committee should have considered this further and recommended the unworkable timeframes be removed from the Bill and that timeframes should be left to the discretion of the QIRC on a case by case basis.

The prescribed matters in the Bill that are non-allowable content are ill-conceived and go too far and do not allow for parties to reach a genuine agreement.

Finally, I have grave concerns for the potential negative effects of this Bill on medical officers and the quality of medical care in Queensland. I truly hope that the impacts on the medical profession outlined in the public hearing by the AMAQ and the Together Union do not eventuate.

On the whole, there has been no evidence provided by the Attorney-General as to why there is a need for this Bill. It is purely ideological and I will be very surprised if one single public servant or local government employee votes for this LNP Government at the next election.

I implore the Members of this House to read this Bill thoroughly for what it is, and do not simply rubber stamp it as has been the case for every other sub-standard Bill put before this House.

On the basis of information presented to the Committee, I simply cannot in good faith support this Bill.

Yours sincerely

Peter Wellington MP
Member for Nicklin