THE UNION FOR QNU NURSES AND MIDWIVES

QUEENSLAND NURSES' UNION

Submission to The House of Representatives Standing Committee on Education and Employment

Inquiry into Inhibitors to Employment for Small Business and Disincentives to Working for Individuals

May, 2015

Introduction

The Queensland Nurses' Union (QNU) thanks the House of Representatives Standing Committee on Education and Employment (the Committee) for the opportunity to submit to the Inquiry into Inhibitors to Employment for Small Business and Disincentives to Working for Individuals (the Inquiry).

Nursing and midwifery is the largest occupational group in Queensland Health (QH) and one of the largest across the Queensland government. The QNU is the principal health union in Queensland covering all categories of workers that make up the nursing workforce including registered nurses (RN), registered midwives, enrolled nurses (EN) and assistants in nursing (AIN) who are employed in the public, private and not-for-profit health sectors including aged care.

Our more than 50,000 members work across a variety of settings from single person operations to large health and non-health institutions, and in a full range of classifications from entry level trainees to senior management. The vast majority of nurses in Queensland are members of the QNU.

Definition of 'small business'

We note that the inquiry does not define 'small business', nor is there any background paper that informs the public of the reasons for this review. Indeed, there are several conflicting definitions of 'small business' where we suggest guidance to the public may have been useful. For example:

- The Australian Bureau of Statistics (2002) defines a small business as one that employs less than 20 people;
- The Australian Taxation Officer considers annual turnover (excluding GST) of less than $2 million that may enable a range of tax concessions whether the small business is operated by a sole trader, partnership, company or trust;
- Section 6D - Small business and small business operators – of the *Privacy Act 1988* defines a small business as a business at a time (the *test time*) in a financial year (the *current year*) if its annual turnover for the previous financial year is $3,000,000 or less;
- For reporting purposes, section 3 of the *Workplace Gender Equality Act 2012* defines a *relevant employer* as

  (a) a registered higher education provider that is an employer; or

  (b) a natural person, or a body or association (whether incorporated or not), being the employer of 100 or more employees in Australia;

  but does not include the Commonwealth, a State, a Territory or an authority;

- Section 23 of the *Fair Work Act 2009* (the Act) defines a small business as one that has less than 15 employees whether full or part time. The Act entitles small business employers to a number of exemptions that reduce their employment obligations such as the requirement to make redundancy payments (s121) and a reduced qualifying period for unfair dismissal claims (s383).

In the absence of any specific definition or any indication that the Committee is looking to determine one, and as this inquiry relates to employment matters, we take our understanding of small business from the Act (Relevant sections of the Act are set out in Attachment A).

We also note here that Workchoices[1] introduced the idea of a threshold number of staff to whom specific unfair dismissal provisions would apply.[2] WorkChoices provided that no claim for unfair dismissal could be made if the employer, at the time of termination, employed 100 employees or less. The figure of 100 included the employee whose employment was terminated, as well as part-time and casual employees who had been engaged on a regular and systematic basis for a period or a sequence of periods of at least 12 months. This represented a significant increase on the Howard Government's earlier unsuccessful attempts to amend the *Workplace Relations Act 1996* to exclude small businesses that employed fewer than 15 or 20 employees.

Many workers and their representatives criticised Workchoices on the basis that low-income earners and small business employees lost conditions of employment, penalty rates and overtime were removed, and too many workers were unfairly dismissed with little remedial action available.

The Abbott government has led us to believe that Workchoices is history, yet here we find the Minister for Employment, Senator the Honorable Eric Abetz, launching an inquiry under the well-worn banner of 'reducing red tape' by again bringing to the forefront the possibility of a lesser set of entitlements for employees working in small business. The move to a higher threshold for small business would remind us of those unfortunate times and pave the way for further 'reform' based on the size of the enterprise.

[1] See the *Workplace Relations Amendment (Workchoices) Act 2005*.

[2] Although contraction of broad coverage for unfair dismissal had been present from June 1994 under the Keating government's *Industrial Relations Reform Act 1993,* it was vigorously progressed when the Liberal Coalition government took office federally in 1996 (see Pittard, 1995; Chapman, 2003; Chapman, 2006).

Nursing in Small Enterprises in Queensland

Nurses and midwives provide continuity of care for patients 24 hours a day, seven days a week according to a continuous shift roster. Of all employed clinical nurses and midwives, almost two-thirds (62.6%) work in hospitals (Australian Institute of Health and Welfare, 2013). Nursing is also an ageing workforce. Between 2008 and 2012, the proportion of employed nurses aged 50 years and over increased from 35.1% to 39.1%. In 2012, the average age of nurses was 44.6 years (Australian Institute of Health and Welfare, 2013).

The majority of nurses and midwives in Queensland are employed in the public sector and lie within the Queensland jurisdiction. Nurses who would fall primarily into the 'small business' category work in small private and aged care facilities and general practice. Practice nurses are Registered and Enrolled nurses who are employed by, or whose services are otherwise retained by a general practice. Nationally, there are over 10,500 nurses working within general practice with more than 60 per cent of general practices employing at least one practice nurse (Australian Practice Nurses Association, 2015).

The QNU does not support any measures to introduce a threshold for determining employment rights based on the number of employees beyond the existing definition of small business in the Act. To do so would effectively create a two tiered system of industrial relations where those who work for smaller employers are disadvantaged for no reason other than the size of the workforce. In our view, every worker should have the same general employment rights and access to natural justice. Establishing a higher threshold to qualify as a small business for employment purposes would create a perverse incentive for employers to avoid their obligations and in doing so act as a deterrent to work for them.

Recommendation

The QNU recommends that the committee maintains the current small business employment provisions in the *Fair Work 2009 Act* and makes no recommendations to increase the threshold beyond 15 employees.

Wage Justice in Aged Care

Pay is an important symbolic indicator of the value placed on work by employers and the community. Nowhere is the disparity in wage outcomes in nursing more evident than the difference between the aged and acute care sectors of nursing. Prior to 1996 when there

was centralised wage fixation, there was general parity between nursing wages in the public acute hospital sector and residential care establishments.

Since 1996, the actual wages and conditions of employment for aged care nurses have declined in real terms and progressively fragmented those who were able to secure collective agreements and those who were not. Despite the notional obligation on industrial tribunals to establish and maintain a safety net of fair minimum wages and conditions of employment, for the nurses who continue to rely on awards, their entitlements have been in decline over the past two decades.

The QNU and our federal peak body the Australian Nursing and Midwifery Federation (ANMF) have been campaigning for many years for pay parity for nurses in aged care. Despite our efforts and those of the previous federal government to fund wage adjustments for this purpose, aged care nurses' wages remain well behind their colleagues. Full-time residential aged care nurses now earn on average up to $340 per week less than their colleagues in other sectors resulting in increasing difficulties attracting and retaining adequate numbers of appropriately trained nursing staff (ANMF, 2015).

While the content of federal safety net awards covering nursing staff in both the acute and aged care sectors remains broadly comparable, enterprise bargaining has been unable to deliver similar outcomes across sectors. In aged care, this disparity is attributable to the difficulties of bargaining in a segmented sector with a large number of facilities spread across the nation.

As aged care is also largely dependent on the Commonwealth for funding it has been in the interests of successive governments to restrain wages in this sector, particularly in the context of the ageing demographic. Previous Labor government initiatives such as the aged care supplement made some difference in adjusting wages growth. The aged care wages gap relates not only to the nature of work performed in the sector (caring work where it is difficult to take industrial action to advance claims and therefore there is an inherent bargaining imbalance) but also the funding source.

Given the ageing of the population, wages and conditions in aged care must improve to attract nurses into the sector, particularly smaller facilities.

Employment in Small Enterprises in Queensland

It has been our experience that small business employers create a lot of their own red tape by trying to avoid the very simple obligations they have under the Act and the modern award system. Small businesses may not often be suited to enterprise bargaining so they

should support a firm safety net of minimum standards that are easy to follow and maintain. This works to the benefit of both parties.

The QNU notes that even though s23 of the Act sets out the meaning of small business employer, on numerous occasions we have encountered employers seeking to circumvent this definition in matters such as the 'minimum employment period' for unfair dismissals set out under s383. An employee of a small business employer must serve a 12 month qualifying period to be eligible to make an unfair dismissal application (6 months for other employees).

The *Small Business Fair Dismissal Code* arguably provides for a lesser standard to be met by an employer in terminating an employee's employment. The comparator test for unfair dismissals for employees not employed by small businesses is the 'criteria for considering harshness etc' found at s 387 of the Act.

We encounter employers who appear to have structured their businesses in a way so as to avoid the jurisdiction of the Fair Work Commission (the Commission) for unfair dismissal matters (i.e. setting up associated and non-associated entities and employing the majority of staff as non-regular and systematic casual employees)

Workers mostly trust their employer to provide the correct pay and entitlements, but small businesses often lack a Human Resource function to instigate and monitor proper practices. It is often the case that the QNU becomes involved when the employment relationship has deteriorated or broken down completely and then other matters surface. In our experience, open, consultative workplaces where workers can voice concerns inevitably produce more favourable outcomes.

The following table contains 6 months of recent data from our call centre and indicates the most common types of queries we receive from nurses employed in small business (in particular, doctors' surgeries). This occurs despite the requirement for employers to give employees a copy of the *Fair Work Information Statement* within 12 months of their engagement as set out under ss 124 and 125 of the Act.

Summary data from a total of 132 calls

Employment enquiries

1 – accrual of leave entitlements when on mat leave
4 – annual leave entitlements
2 – applicable award
6 – bullying
1 – attending compulsory employer initiated events in non-paid time
8 – contract of employment
8 – disciplinary matters
1 – discrimination (racial)
1 – dress standards
1 – Enterprise Bargaining negotiation request
4 – long service leave
1 – extension to maternity leave
1 – meal breaks
1 – overtime
1 – pay increase enquiry
15 – pay rate enquiry
1 – pay slip requirements
1 – public holidays
1 – reasonable adjustment
2 – redundancy
1 – roster changes
1 – return to work following maternity leave
2 – secondary employment
2 – sick leave
3 – termination
1 – underpayment

Professional Enquiries

2 – Australian Health Practitioner Regulation Agency matters
2 – professional boundaries
3 – Continuing Professional Development
1 – Medicare local issues
1 – medication administration error
1 – Office of Health Ombudsman
3 – patient complaint
20 – Professional Indemnity Insurance
1 – recognition of interstate training
4 – scope
2 – scope – ear syringing
1 – scope – ENs
4 – scope – immunisation administration
2 – scope – medication administration
2 – scope – nurses employment as "treatment room assistants"
3 – scope – pap smears
5 – scope – professional supervision
1 – scope – prescriptions
1 – statement required
1 – working as an Assistant in Nursing when registered as an Enrolled Nurse

Relevant Cases

In *Scott v Goona Warra Vineyard Pty Ltd,* Gooley DP dismissed an application for unfair dismissal, and in the process determined whether Goona Warra Vineyard complied with the small business fair dismissal code of the Act. We suggest Gooley DP's reasoning in this case provides sound guidance for considering the threshold of employing less than 15 employees.

We cite the following recent case as an example of poor employment practice in a small business (to give some protection to our member we have deidentifed the details here although we recognise the case is now a matter of public record).

In September 2014, our member, an Enrolled Nurse, was informed by her then employer, a doctor's surgery that they had received legal advice that they could no longer employ Enrolled Nurses due to issues with supervision.

Our member asked if she was being sacked; the employer stated that she was not. We initially pursued this matter as a case of unpaid entitlements, as she did not receive

redundancy payment, appropriate notice, long service leave, annual leave and associated loading upon the cessation of her employment.

The employer's legal representative, (a local law firm) responded on their behalf asserting that the member had actually been terminated for serious misconduct, specifically "failing to have in place a written supervision agreement with a Registered Nurse" which they asserted was a legal requirement.

Upon being informed she had now apparently been terminated for "serious misconduct", the QNU lodged an out-of-time unfair dismissal application with the Commission on her behalf. The employer (now respondent) exercised their right to oppose the application for an extension of time (noting here that unfair dismissal applications must be filed with the Commission not later than 21 days after the dismissal takes place). The extension of time application therefore proceeded to a formal hearing.

An extension of time will only be granted where "exceptional circumstances" exist as per a recent decision of the Full Bench of the Commission, '*the test for granting an extension of time involves both a broad discretion and a high hurdle of 'exceptional circumstances'.*

In this judgement the Commissioner stated:

In my assessment, there can be no doubt that the merits of the applicant's case are strong, if not overwhelming. The uncontested evidence was that:
a) the applicant was given two diametrically opposed and inconsistent reasons for the termination of her employment;
b) the applicant was given no warning of her dismissal;
c) the applicant had an unblemished record of employment, as the respondent's reference for her makes abundantly clear;
d) as the applicant was accused of serious misconduct, she was given no opportunity to defend herself or respond to the allegations;
e) given that the applicant was accused of serious misconduct, the conduct alleged does not go any way close to a deliberate and wilful act of the applicant, such as to constitute misconduct, let alone serious misconduct; See: r 1.07 of the Act's Regulations;
f) whilst there must be some doubt that the respondent was a small business, as defined, assuming it was, it would appear an inescapable conclusion that it had not complied with the Small Business Fair Dismissal Code (the 'Code').

Further, the Commissioner stated:

> In all my years, I have not come across a similar set of circumstances in which an employer expressly claims to have not dismissed an employee, provides the employee a glowing reference and then claims the employee was dismissed for serious misconduct based on the same grounds it was said she had not been dismissed. As I said earlier, is it little wonder the applicant (and her Union) were confused.
>
> In this extraordinary case, I am not satisfied that the respondent's reason for terminating the applicant's employment was a valid reason.
>
> I propose to exercise my discretion to extend the time for filing of the application to 7 November 2014. The substantive application will be remitted to the Unfair Dismissal Unit for further processing in accordance with the Commission protocols.
>
> I would add however, my strong recommendation that the respondent should carefully reconsider its position in respect to settlement of this claim, if only to avoid further criticism and embarrassment for its conduct.
>
> FWC [2015] 2594

Conclusion

The QNU is always willing to discuss genuine reform ideas. We are continually involved in negotiations for enterprise agreements and workplace initiatives aimed at improving the efficiency, productivity and efficacy of the health and aged care systems. However, we will oppose at every opportunity any attempts to create a two-tiered workplace relations system that favours the interests of business at the expense of workers. Redefining the dismissal exemptions for small businesses is just the start.

References

Australian Institute of Health and Welfare (2013) *Nursing and Midwifery Labour Force 2012*.

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Australian Nursing and Midwifery Federation (2015) *Nurses' Paycheck: Public Hospital and Private Age Care Comparative Wage Information.*

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Chapman, A. (2003) 'The Declining Influence of ILO Standards in Shaping Australian Statutory Provisions on Unfair Dismissal', *Monash University Law Review*, 29 (1), pp. 104-136.

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Scott v Goona Warra Vineyard Pty Ltd [2015] FWC 755 (6 February 2015).

Attachment A

Relevant sections of the *Fair Work Act 2009*

23 Meaning of small business employer

*(1) A national system employer is a **small business employer** at a particular time if the employer employs fewer than 15 employees at that time.*

(2) For the purpose of calculating the number of employees employed by the employer at a particular time:

(a) subject to paragraph (b), all employees employed by the employer at that time are to be counted; and

(b) a casual employee is not to be counted unless, at that time, he or she has been employed by the employer on a regular and systematic basis.

(3) For the purpose of calculating the number of employees employed by the employer at a particular time, associated entities are taken to be one entity.

*(4) To avoid doubt, in determining whether a national system employer is a **small business employer** at a particular time in relation to the dismissal of an employee, or termination of an employee's employment, the employees that are to be counted include (subject to paragraph (2)(b)):*

(a) the employee who is being dismissed or whose employment is being terminated; and

(b) any other employee of the employer who is also being dismissed or whose employment is also being terminated.

121 Exclusions from obligation to pay redundancy pay

(1) Section 119 does not apply to the termination of an employee's employment if, immediately before the time of the termination, or at the time when the person was given notice of the termination as described in subsection 117(1) (whichever happened first):

(a) the employee's period of continuous service with the employer is less than 12 months; or

(b) the employer is a small business employer.

(2) A modern award may include a term specifying other situations in which section 119 does not apply to the termination of an employee's employment.

124 Fair Work Ombudsman to prepare and publish Fair Work Information Statement

*(1) The Fair Work Ombudsman must prepare a **Fair Work Information Statement**. The Fair Work Ombudsman must publish the Statement in the Gazette.*

Note: If the Fair Work Ombudsman changes the Statement, the Fair Work Ombudsman must publish the new version of the Statement in the Gazette.

(2) The Statement must contain information about the following:

(a) the National Employment Standards;

(b) modern awards;

(c) agreement-making under this Act;

(d) the right to freedom of association;

(e) the role of the FWC and the Fair Work Ombudsman;

(f) termination of employment;

(g) individual flexibility arrangements;

(h) right of entry (including the protection of personal information by privacy laws).

(3) The Fair Work Information Statement is not a legislative instrument.

(4) The regulations may prescribe other matters relating to the content or form of the Statement, or the manner in which employers may give the Statement to employees.

125 Giving new employees the Fair Work Information Statement

(1) An employer must give each employee the Fair Work Information Statement before, or as soon as practicable after, the employee starts employment.

(2) Subsection (1) does not require the employer to give the employee the Statement more than once in any 12 months.

Note: This is relevant if the employer employs the employee more than once in the 12 months.

383 Meaning of minimum employment period

*The **minimum employment period** is:*

(a) if the employer is not a small business employer—6 months ending at the earlier of the following times:

(i) the time when the person is given notice of the dismissal;

(ii) immediately before the dismissal; or

(b) if the employer is a small business employer—one year ending at that time.

384 Period of employment

*(1) An employee's **period of employment** with an employer at a particular time is the period of continuous service the employee has completed with the employer at that time as an employee.*

(2) However:

(a) a period of service as a casual employee does not count towards the employee's period of employment unless:

(i) the employment as a casual employee was on a regular and systematic basis; and

(ii) during the period of service as a casual employee, the employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis; and

(b) if:

(i) the employee is a transferring employee in relation to a transfer of business from an old employer to a new employer; and

(ii) the old employer and the new employer are not associated entities when the employee becomes employed by the new employer; and

(iii) the new employer informed the employee in writing before the new employment started that a period of service with the old employer would not be recognised;

the period of service with the old employer does not count towards the employee's period of employment with the new employer.

*(3) If a modern award that is in operation includes such a term (the **award term**), an enterprise agreement may:*

(a) incorporate the award term by reference (and as in force from time to time) into the enterprise agreement; and

(b) provide that the incorporated term covers some or all of the employees who are also covered by the award term.

387 Criteria for considering harshness etc.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and

(b) whether the person was notified of that reason; and

(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and

(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and

(e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and

(f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(h) any other matters that the FWC considers relevant.