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9 April 2009

John Carter Committee Secretary
Senate Education, Employment and Workplace Relations Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

By email: eewr.sen@aph.gov.au

Dear Secretary,

Re: Inquiry into the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009

Please find attached the submission of the Qld Council of Unions (QCU). Note that the submission has been provided as a scanned version; with the latter to ensure that the formatting is retained as it appears in the word version.

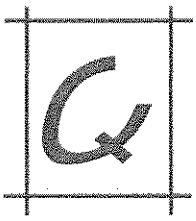
Note that the QCU is available to appear before the Senate Committee if requested. Appearance would be by Deborah Ralston (Advocate) and Ron Monaghan (General Secretary). Note that we would prefer a session time later in the morning, if this is possible.

Any contact in regard to this material should be generated to deborahr@qcu.asn.au.

Many thanks -

Yours faithfully

Deborah Ralston
Industrial Officer



Queensland Council of Unions

Queensland Council of Unions submission to the Standing Committee on Education, Employment and Workplace Relations into the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009

9 April 2009

QUEENSLAND COUNCIL OF UNIONS SUBMISSION TO THE STANDING COMMITTEE ON EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS INTO THE FAIR WORK (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 2009

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GLOSSARY

ACTU: Australian Council of Trade Unions
AEC: Australian Electoral Commission
AIRC: Australian Industrial Relations Commission
EM: Explanatory Memorandum
FRU: Federally Registered Union
FWA: Fair Work Australia
FWAct: Fair Work Act 2008
FWB: Fair Work Bill 2008
FWROA: Fair Work (Registered Organisations) Act 2009
IRA: Industrial Relations Act 1999 (Qld)
NES: National Employment Standards
NTWA: National Training Wage Award
OBO: Apprentices' and Trainees, Wages and Conditions (Excluding Certain Queensland Government Entities)
QCU: Queensland Council of Unions
QIRC: Queensland Industrial Relations Commission
RSRA: Recognised State Registered Association
SRU: State Registered Union
TCB: Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009
TERC: Training and Employment Recognition Council
TRA: Transitionally Registered Association
TWAS: Training Wage Award State
VETE: Vocational Employment, Training and Education Act 2000

INTRODUCTION

1. The Queensland Council of Unions (QCU) is the peak union body in Queensland. The QCU has 35 affiliated unions representing around 350 000 Queensland workers.

2. The QCU is actively involved in state and federal industrial relations policy issues.

3. The QCU presented a substantial submission to the Senate Committee considering the operation and application of the Fair Work Bill 2008 (FWB).

4. We appeared before the Senate Committee in that matter.

5. We again highlight a range of matters that the QCU contends need to be addressed within the content of the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 (TCB).

6. Those matters are as follows:

    a. Take home pay orders
    b. State registered unions
    c. Representation orders

TAKE-HOME PAY ORDERS

Bill provisions

7. Provision in the TCB is made to ensure that the award modernisation process is not designed to result in a reduction in take-home pay. Accommodation is made for Fair Work Australia (FWA) to grant orders addressing reduction in take-home pay where take-home pay for working particular hours or for a particular quantity of work is less than would have been the employee's take-home pay for those hours or that quantity of work immediately before the new modern award came into affect.

8. Take-home pay is defined as pay an employee actually receives including wages and incentive-based payment, allowances and overtime; but does not include losses in leave arrangements or changes to employment conditions that are not remunerated conditions.

9. FWA must be satisfied that an employee or a class of employees to whom the modern award applies has suffered a reduction in take-home pay. The reduction has to be not insignificant (not defined).

10. FWA may make an order on application by an employee; organisation; or agent acting on behalf of a class of employees. However once an application has been made and determined FWA cannot determine any further applications for that work group.

11. Note that these types of applications do not cover new entrants into the modern award - only those subject to the modern award at the time it was made

Commentary

Vocational education and training issues

12. For the purposes of this submission, the QCU wishes to draw the Senate Committee's attention to the matter of training wages and entitlements. Although we principally isolate our comments to this issue, the matters raised within this confined area have equal application to other areas wherein changed employment arrangements create a "disadvantage" attached to the award modernisation exercise but to which the take-home pay orders will do nothing to address.

13. The Senate Committee will recollect that this issue of vocational education and training formed part of the submission the QCU made to you during the course of the Inquiry into the FWB. The QCU drew to your attention the fact that there was a potential for substantial loss in the drafting of the exclusion of vocational education and training issues from state regulation.

14. The Fair Work Act 2008 (FWAct) provides at ss.26 and 27(2)(f) for the exclusion of the Industrial Relations Act 1999 (Qld) (IRA) and any legislative provisions related to training arrangements that are otherwise provided for by the National Employment Standard (NES) and may be included in a modern award. This provision is altered from the text that appeared in WorkChoices.

Industrial law and training arrangements

15. Federal industrial law, since the introduction of WorkChoices, has sought to emphasise the distinction between industrial law and law relating to training arrangements. The problems arising from this approach are best represented by examining the relationship between the contract for employment and the training contract. The case law has established that a contract of training and a contract of employment are two distinct contracts.[1] However the two contracts are intertwined.

16. This was recognised by the Queensland Industrial Court in the decision of *Murrays Australia Ltd V the Training Recognition Council and Ors*[2] when the court stated: *The Training and Employment Act 2000 contemplates that training will be employment based training. The Act is structured on the basis that any training contract will always be underpinned by an employment relationship. I do not seek to suggest that the Training and Employment Act 2000 treats the training contract and the contract of*

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[1] *Siaosi Fainga'a v Tradeflex Services Group Pty Ltd* - PR939186 [2003] AIRC 1265 (10 October 2003); *Brearne Manchee v N Ploumis t/as Envogue Hair Design* - PR952005 [2004] AIRC 933 (20 September 2004)

[2] [2002] QIC 46; 171 QGIG 93 (30 September 2002)

employment as if they are one agreement. The proposition is that there cannot be a training contract in the absence of an employment relationship. The consequence is that restrictions upon the termination of the training contract are also restrictions upon termination of the relationship of employer and employee.

17. This interdependence between the training contract and the employment contract leads to significant issues when the regulation of each contract is in divergent legislation. There is much weight to the argument the apprentices and trainees would be best served by legislation regarding industrial and training arrangements deriving from the same source.
18. Section 139 of the IRA sought to address these problems by stipulating that the employment contract could not be terminated until the training contract had been terminated in accordance with the relevant training legislation. The implementation of WorkChoices and the subsequent introduction of the FWAct have extinguished this provision with respect to employees of constitutional corporations

19. Bearing in mind the issues discussed above, s.16 of WorkChoices excluded the IRA and any laws that related to employment generally within the *Vocational Education, Training and Employment Act 2000* (VETE Act). This impacted both on provisions of the VETE Act and delegations of the Training and Recognition Employment Council (TERC). Further, s.17 of WorkChoices provided that terms in an award or workplace agreement dealing with training arrangements would be subject to the relevant state training legislation, except where the Regulations prescribed the award or workplace agreement could override that state law. The prescription was found in Regulation 1.5 of Chapter 2 of the *Workplace Relations Regulations 2000.*

20. The FWAct at ss.26 and 27(2)(f) excludes the IRA and any legislative provisions related to training arrangements that are otherwise provided for by the National Employment Standard (NES) and may be included in a modern award. This reference to modern awards has the potential to exclude the VETE Act further than WorkChoices.

21. On the surface it appears that the slight amendment made to the application section of the FWB may extend the parameter of the FWB into areas previously accommodated within specialist VETE legislation.

22. The QCU highlights again that a clear and distinctive line needs to exist in relation to vocational education and training issues and their legislative regulation. This is not evident in the FWAct and is compounded when we consider the application of take-home pay orders.

Training wages

23. Note should also be made of the material the QCU represented to the Australian Industrial Relations Commission (AIRC) in relation to the adoption of a new training wage schedule for inclusion in modern awards. Refer to the submissions of the QCU to the AIRC dated 13 February 2009.

24. Increasing participation in vocational training has been a majority priority of the Queensland Government particularly since the introduction of *The Queensland Skills Plan* in 2006. The comparative success of this strategy is evident in the number of school-based apprentices and trainees.

25. Queensland is a leader in this area with 41.7% of national school-based apprenticeships and traineeships.[3] There are currently approximately 45 000 trainees in Queensland.[4]

26. Award modernisation should not lead to a diminution of the entitlements of these Queensland trainees and school-based apprentices and trainees. Accordingly the QCU is seeking, in relation to wage-related matters, the recognition of the widespread adoption of competency-based progression in Queensland with respect to apprentices and trainees, as being an accessible outcome from take-home pay orders.

The OBO

27. A unique and affective arrangement exists in regard to the industrial scheme for Queensland trainees. This is evident in two key respects.

28. Firstly wages and conditions of employment are predominately provided by an Order colloquially known as the OBO - Apprentices' and Trainees, Wages and Conditions (Excluding Certain Queensland Government Entities) - of the Queensland Industrial Relations Commission (QIRC); and not in awards.

29. In Queensland, trainees were initially employed in the 1980s under a state award or specific agreement of the QIRC. Queensland subsequently followed the national lead and adopted the *Training Wage Award – State* (TWAS) to mirror the *National Training Wage Award* (NTWA).

30. In the 1990s a competency-based approach to wage progression was introduced in Queensland. This was a significant change from the age-based progression provided in the TWAS and NTWA.

31. As a result, there was a shift away from use of these awards. In its place the QIRC exercised its powers under s.137 of the IRA to make orders setting minimum wages and conditions for apprentices and trainees. The

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[3] NCVER, Apprentice and Trainee commencements 12 months to 31 December 2007
[4] DETA , Trainees in Training as at 30 September 2008

subsequent proliferations of orders were addressed through the consolidation of all orders to form the OBO.[5]

32. The objectives of the OBO included the consolidation and replacement over time of a range of existing Orders previously approved by the Commission.[6] The OBO became effective on 1 January 2000.

33. Since the introduction of the OBO, the TWAS has had little ongoing relevance in Queensland except to provide the actual rates of pay in accordance with the relevant industry schedule of the OBO. The majority of Queensland trainees are covered by the OBO as few state awards include provisions for trainees.[7]

34. Secondly the majority of wage progression for trainees is competency-based. The Queensland Government estimates that approximately 80% of Queensland apprentices and trainees are employed under competency-based wage arrangements.

35. As outlined above, the adoption of competency-based wage progression in place of age-based wage progression drove the creation of the OBO. The objectives of the OBO at clause 1.3.1(d) include the establishment of arrangements where the entitlements of trainees are linked to achievement of competencies, or the demonstration of approved levels of progression towards the achievement of competencies specified in the relevant traineeship.

36. Queensland leads Australia in the introduction of competency-based wage progression arrangements for apprentices and trainees and remains the only state to have effective, competency-based wage arrangements across most industries.

37. The Queensland competency-based wage provisions were adopted by the AIRC in amendments made to the apprentice rates of pay in the federal *Metal Engineering and Associated Industries Award* on 21 February 2006.[8] Competency-based progression has also been the subject of discussion at the Council of Australian Government's (COAG) meeting in recent years.

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[5] *Apprentices' and Trainees, Wages and Conditions (Excluding Certain Queensland Government Entities)* (http://www.wageline.qld.gov.au/aol/wageline/pdfs/obo.pdf) (covers private sector employers) and *Apprentices' and Trainees, Wages and Conditions (Queensland Government Departments and Certain Government Entities)* (http://www.wageline.qld.gov.au/aol/wageline/pdfs/gov_obo.pdf (covers Queensland Government employers including some Queensland Government Owned Corporations)

[6] Clause 1.3.1(c)

[7] Exceptions include: *Children's Services Award - State 2006*; *Hairdressers' Industry Award -State 2003*; *Pharmacy Assistants' Award – State 2003*; *Retail Industry Award - State 2004*; *Rubber and Plastic Industry Award - State 2003*; *Veterinary Practice Employees' Award – State*; and *Whitsunday Charter Boat Industry Award - State 2005*

[8] Competency based progression is included in the proposed *Manufacturing and Associated Industries and Occupations Award 2010*

The OBO wage outcomes

38. Under the OBO wage outcomes are determined on the basis of attainment of competencies and minimum training requirements specific to each identified training package. The OBO contains 23 industry-specific schedules containing the training packages relevant to that industry. This structure is at odds with the age-based progression model under the NTW schedule proposed by the AIRC. This makes it difficult to conduct a direct comparison of wage outcomes between the NTW schedule and OBO regime.

39. Where the OBO relies on the TWAS for wage rates, the comparison is more possible. However even where this occurs, the differing outcomes of the pay reviews by the Australian Fair Pay Commission and state wage cases overseen by the QIRC has seen a different rate emerge between the pay scale derived from the TWAS (NAPSA) and those that apply under the TWAS as it continues to apply for trainees in the state jurisdiction.

40. The potential for disadvantage to Queensland trainees arising due to both the divergence in award pay rates and the different models of pay progression is examined below.

Table 1: Training wage - outcomes - comparing aged-based progression models - Retail - Retail Cert II

	Highest year of schooling completed					
	Year 10		**Year 11**		**Year 12**	
Years out of school	NTW schedule^ *Wage level B* $	OBO# $	NTW schedule ^ *Wage level B* $	OBO# $	NTW schedule ^ *Wage level B* $	OBO# $
School leaver	248	227	270	274	313	317
Plus 1	270	274	313	317	360	365
Plus 2	313	317	360	365	423	429
Plus 3	360	365	423	429	482	490
Plus 4	423	429	482	490		
Plus 5 or more	482	490				

Table 2: **Training wage - outcomes - comparing aged-based progression models - Retail - Retail Certificate III**

	Highest year of schooling completed					
	Year 10		**Year 11**		**Year 12**	
Years out of school	NTW schedule^ *Wage level A* $	OBO# $	NTW schedule ^ *Wage level A* $	OBO # $	NTW schedule ^ *Wage level A* $	OBO # $
School leaver	248	227	270	274	323	323
Plus 1	270	271	323	327	375	375
Plus 2	323	327	375	380	437	437
Plus 3	375	380	437	443	500	500
Plus 4	437	443	500	508		
Plus 5 or more	500	508				

^ Rates in exposure draft NTW schedule – Appendix 1 – full time standard traineeship

\# Schedule 23 – Rates in *Retail Industry Award – State 2004* or *Training Wage Award – State* 2003. Rates effective from 7 August 2008 (2008 state wage case, Queensland Industrial Relations Commission)

Table 3: **Training wage outcomes - comparing aged-based progression and competency-based progression models**
Asset maintenance training package – pest management training package - Asset Maintenance Certificate II and III
Example: Pest Management Certificate III - Completed year 11 - 2 years ago

Level	NTW Schedule Wage level B $	OBO^ $
Commencement	360	464.80
Completion Cert II requirements		464.80
Completed 12 months	423	481

^OBO: Schedule 5 – 2.1.3(b)

Table 4: Training wage outcomes - comparing aged-based progression and competency-based progression models
Meat retailing and meat salesperson/packer training package - Australian Meat Industry Certificate I – III
Example: Pest Management Certificate III - Completed year 10 – school leaver

Level	NTW Schedule Wage level B $	OBO^ $
Commencement	245	258
Completion 6 months or attainment Cert I		355
Attainment Cert II		484
Completed 12 months	270	
Attainment designated competencies		581
Completion 12 months	313	

^OBO: Schedule 8 – 4.1.2

41. It is the QCU's contention that in relation to these areas of wage comparisons between the OBO and the NTWA schedule, it is problematic in that the contrast is between time-based and competency-based outcomes. The QCU contend that applications for take-home pay orders would be available; however the capacity to marry the two as evidenced above has its own difficulties.

42. It is an understatement that this is an area that requires careful analysis and assessment.

The OBO conditions of employment

43. However in a range of areas where conditions of employment have altered, no such compensation would appear possible under the take-home pay orders. And yet the changes proposed between what exists under the Qld OBO to the training wage schedule which is proposed for inclusion in modern awards shows a noticeable diminution in conditions of employment.

Concluding comments

44. Queensland trainees and school-based apprentices represent a significant percentage of the growing number of trainees and apprentices nationwide. In drawing the issue of vocational education and training to the Senate Committee's attention, the QCU is seeking to ensure that award modernisation does not lead to a diminution of any of the entitlements of these Queensland trainees and apprentices. Quite clearly that is not adequately covered in the take-home pay orders provided for in the TCB.

Application for take-home pay orders

45. The QCU notes that the TCB proposes that the applications for orders under this section of the TCB are limited; in that FWA may make an order on application by an employee; organisation; or agent acting on behalf of a class of employees. However once an application has been made and determined FWA cannot determine any further applications for that work group.

46. The potential exists for an application to be made on behalf of one work group which due to the process adopted, the argument promoted, and the workers identified, is unsuccessful. However a different process argument and set of workers around the same issue could potentially result in a successful application. The limitation on further applications could deny those workers. This is inconsistent with the concept of natural justice.

47. This provision needs to be revisited to give an opportunity for applications not to be limited.

Matters to be addressed

48. The Senate Committee needs to provide for the following recommendations:

    a. the removal of the limitation on take-home pay orders applying to wages; and
    b. the removal of the limitation that only one application can be made for the work group.

REPRESENTATION ORDERS

Bill provisions

49. There is a new type of representation order available in addition to the existing s.133 provision. See s.137A-E.

50. The relevant areas of ss.137A and B read as follows:

137A Orders about representation rights of organisations of employees
(1) ... FWA may, on the application of an organisation, an employer or the Minister, make the following orders in relation to a dispute about the entitlement of an organisation of employees to represent, under this Act or the Fair Work Act, the industrial interests of employees:
(a) an order that an organisation of employees is to have the right, to the exclusion of another organisation or other organisations, to represent under this Act or the Fair Work Act the industrial interests of the employees in a particular workplace group who are eligible for membership of the organisation;
(b) an order that an organisation of employees is not to have the right to represent under this Act or the Fair Work Act the industrial interests of the employees in a particular workplace group.

...

(7) FWA must not make an order under subsection (1) or (2) if the order would be inconsistent with an order that is in force under subsection 133 (1).

137B Factors to be taken into account by FWA

(1) In considering whether to make an order under subsection 137A(1) in relation to a particular workplace group, FWA must have regard to:

(a) the history of award coverage and agreement making in relation to the employees in the workplace group; and

(b) the wishes of the members of the workplace group; and

(c) the extent to which particular employee organisations represent the employees in the workplace group, and the nature of that representation; and

(d) any agreement or understanding of which FWA becomes aware that deals with the right of an organisation of employees to represent under this Act or the Fair Work Act the industrial interests of a particular class or group of employees; and

(e) the consequences of not making the order for any employer, employees or organisation concerned; and

(f) any matter prescribed by the regulations.

(2) However, if:

(a) the workplace group relates to a genuine new enterprise (within the meaning of the Fair Work Act) that one or more employers are establishing or propose to establish; and

(b) the employer or employees have not employed any of the persons who will be necessary for the normal conduct of that enterprise;

FWA must, as far as practicable, have regard to the matters set out in subsection (1) as they would apply in relation to the persons who would be the employees in the workplace group.

...

These provisions should be contrasted with the existing ss.133 - 135:

Orders about representation rights of organisations of employees

133 (1) ..., on the application of an organisation, an employer or the Minister, make the following orders in relation to a demarcation dispute:

(a) an order that an organisation of employees is to have the right, to the exclusion of another organisation or other organisations, to represent under this Schedule or the Workplace Relations Act the industrial interests of a particular class or group of employees who are eligible for membership of the organisation;

(b) an order that an organisation of employees that does not have the right to represent under this Schedule or the Workplace Relations Act the industrial interests of a particular class or group of employees is to have that right;

(c) an order that an organisation of employees is not to have the right to represent under this Schedule or the Workplace Relations Act the industrial interests of a particular class or group of employees who are eligible for membership of the organisation.

...

Preconditions for making of orders

134 The Commission must not make an order unless the Commission is satisfied that:

(a) the conduct, or threatened conduct, of an organisation to which the order would relate, or of an officer, member or employee of the organisation:

(i) is preventing, obstructing or restricting the performance of work; or

(ii) is harming the business of an employer; or

(b) the consequences referred to in subparagraph (a)(i) or (ii):

(i) have ceased, but are likely to recur; or

(ii) are imminent;

as a result of such conduct or threatened conduct.

Factors to be taken into account by Commission

135 In considering whether to make an order under section 133, the Commission must have regard to the wishes of the employees who are affected by the dispute and, where the Commission considers it appropriate, is also to have regard to:

(a) the effect of any order on the operations (including operating costs, work practices, efficiency and productivity) of an employer who is a party to the dispute or who is a member of an organisation that is a party to the dispute; and

(b) any agreement or understanding of which the Commission becomes aware that deals with the right of an organisation of employees to represent under this Schedule or the Workplace Relations Act the industrial interests of a particular class or group or employees; and

(c) the consequences of not making an order for any employer, employees or organisation involved in the dispute; and

(d) any other order made by the Commission, in relation to another demarcation dispute involving the organisation to which the order under this section would relate, that the Commission considers to be relevant.

51. The two provisions need to be contrasted, as clearly the provision as contained in the TCB is designed as a pre-emptive employer sponsored approach to coverage issues that are largely settled; and a mechanism to secure employer preference in new worksites where greenfield agreements are to apply.

52. In relation to s.137A-E, if there is a dispute about a union's rights to represent employees working for a particular employer or in a particular workplace, a workplace group, a union, an employer or the Minister can apply for an order giving one union the exclusive right to represent those employees, to the exclusion of other unions.

53. FWA will take into account a range of factors, including the views of the workers and the industrial relationship including history of award coverage and agreement making, along with whether the union has represented the employees.

54. The EM suggests this provision can only be used in cases where two or more unions have overlapping coverage, rather than in cases where the employer simply disputes the right of a single union to cover a certain group of workers. *FWA is only able to make an order where there is a disagreement regarding that organisation's entitlement to represent members of a workplace group in circumstances where more than one organisation is entitled to represent members of a workplace group.* (773)

55. On the surface this may appear an innocuous proposition; two unions with overlapping coverage. However in the Queensland context there are examples of overlapping coverage in almost all sectors of the economy.

56. Further the EM states ... *organisations with a longstanding and active history of representing a workplace group should be able to continue to represent those employees. Conversely, organisations that have not been active in representing people within the coverage of their eligibility rules should generally not be able to obtain a representation order that would prevent other unions representing the workplace group.* (774)

57. The making of such an order will, amongst other things, affect a union's capacity as a bargaining agent to organise protected industrial action, to make greenfield agreements, or to exercise right of entry.

58. The EM indicates that the use of these representation orders *are designed to ensure that organisations with a longstanding and active history of representing a workplace group should be able to continue to represent those employees.*

59. Note that the EM also suggests that the orders can be sought pre-emptively: refer to the example of Spokey Dokes. The capacity for pre-emptive orders does not correlate to there being a dispute.

60. Note further that the EM indicates that representation orders can be sought for greenfield areas – a genuine new enterprise that does not yet have any employees. If such an order is sought then FWA is to have regard to the same matters as it would for an established site to the greatest extent possible. (776)

61. The drafting of s.137C suggests that the application can be dealt with on the papers. The provisions indicates as ss.(2):

137C Submissions by peak councils
A peak council is entitled to make a submission for consideration in relation to the proposed making of an order under subsection 137A(1).
Subsection (1) applies whether or not FWA holds a hearing in relation to the matter.

Commentary

62. The FWA contains a range of effective remedies to deal with union activity including good faith bargaining orders (excluding one or more unions from bargaining); representation orders under schedule 1 s.133; and orders in relation to right of entry.

63. The legislative note beneath s.137A suggests that the purpose of the provision is to deal with demarcation disputes between federal unions and SRUs that are recognised in the federal system, without confining the terms of the provision. The QCU notes that the provision allow representation orders to be made between two federal unions, or two recognised SRUs. The federal system already provides mechanisms for dealing with the former type of dispute: refer to s.133. In addition the IRA in Qld provides for the latter situation.

64. The provisions allow orders to be made even in the absence of any harm caused to a party. While FWA under s.133 can only intervene in a dispute between two FRUs where the dispute is actually harming the employer's business, or affecting the work of employees, while under proposed s.137A-E FWA can intervene under these provisions simply on the basis of a paper dispute between unions, or between an employer and one or more unions.

65. This creates ease of access to orders; and in the QCU's assessment will result in parties using the provisions on a pre-emptive basis, rather than seeking them only as a means of resolving real disputes. The QCU assessment is that this will facilitate and exacerbate disputes.

66. The QCU agrees with the ACTU assessment that the provisions will be used by employers to choose a union which it prefers to deal with, and thereby to undermine the interests of employees who are, or would prefer to be, members of another union that is eligible to represent them.

67. This is particularly compounded in Qld where there are unions that have duplicated coverage.

Matters to be addressed

68. The Senate Committee needs to provide for the following recommendations:

    a. the removal of the provision allowing for representation orders associated with a "dispute" and reliance to continue only on the existing provision dealing with representation orders associated with a demarcation dispute.

STATE-REGISTERED UNIONS

Bill provisions

69. The QCU notes that the TCB preserves Schedules 1 and 10 of WorkChoices and converts them into the *Fair Work (Registered Organisations) Act 2009* (FWROA).

70. The QCU is not supportive of locating the rights and responsibilities of registered organisations in a separate Act. This in our view undermines the connectivity between those organisations and workplace law. As such, our strong preference is for Schedules 1 and 10 to be attached to the FWA.

71. The TCB provides for certain state registered unions (SRUs) to be 'recognised' in the federal system as a 'recognised state registered association' (RSRA).

72. Recognition gives a SRU all of the rights of a registered organisation, without creating an additional legal entity, and without subjecting them to the usual democratic and accountability requirements. Note that a union can be de-recognised by FWA if it engages in serious breaches of state industrial laws.

73. Alternatively it can be de-recognised by the Federal Court if it (or a substantial number of its members) breaches court orders made under the FW Act; continually breaches FWA orders; takes unprotected industrial action that interferes with the activities of federal system employers or

federal and state governments; or takes unprotected industrial action that threatens community welfare.

74. The capacity for a SRU to have its recognition cancelled or withdrawn is highlighted. Comment will be made on this issue shortly.

75. Whether a SRU needs to apply for recognition depends on its relationship with its federal counterpart union.

76. A SRU has a federal counterpart if there exists a federal union (including a branch of that union) with substantially the same officers and eligibility rules.

77. If a SRU does not have a federal counterpart, it is entitled to become recognised simply by notifying FWA. The union will become recognised in the federal system to the full extent of its eligibility rules (but confined to the state they are registered in).

78. Alternatively, for these unions there remains the option of seeking full registration in the federal system.

79. SRUs with a federal counterpart cannot apply for full registration in the federal system. However, they can apply for transitional recognition (or if they are already transitionally registered as a transitionally registered association (TRA) they are deemed to be transitionally recognised). The transitional recognition ends on 30 June 2014. After that time they will cease to have rights in the federal system.

80. Note that an organisation will be the federal counterpart of a state union where the state union is identical to a branch or division or constituent part of the organisation, but also where there are differences between the two. See EM point 744. An illustrative example is provided.

81. Federally-registered unions (FRUs) will have the option to extend their eligibility rule to absorb any extra areas of eligibility that the counterpart SRU has in that state (but providing that the SRU was 'actively representing' those workers), without other federal unions being able to bring a 'conveniently belong' objection.

82. The EM provides that the requirement that a SRU be actively representing its members that are covered by the rules relevant to the alteration is intended to prevent organisations expanding their coverage in the federal system where the state counterpart has never used that wider coverage to recruit members, or otherwise actively represent employees in those sectors or occupations. See 752.

83. The Bill anticipates that unions might choose to merge the state branch of the federal union and its counterpart SRU. In such cases, the Bill allows the federal union to alter its rules to provide the (merged) branch with financial autonomy so that it can, for example, operate in the state industrial relations

systems using a separate fund to the one which is used for work in the federal system under such arrangements the branch would be able to hold assets and make its own decisions on operational matters. See ss.154A and 154B.

84. Note that representation orders (earlier dealt with) have equal application to TRAs and RSRAs. See 780.

Commentary

SRUs in the federal jurisdiction

85. As a consequence of the WorkChoices amendments a large proportion of the workforce was covered by the federal jurisdiction to the exclusion of all state industrial relations laws. The effect of this was that not only FRUs but also those unions who have temporary rights under TRA status, can represent those workers.

Structure of unions

86. Trade unions generally fall into two (2) categories: those that are registered in the state industrial jurisdictions (SRUs) and those that are registered in the federal jurisdiction.

87. In many cases there are, for any given industry, occupation or craft (or combination thereof), SRUs and FRUs, with branches in each state. Essentially, a common group of workers' interests will be represented by two vehicles, a SRU and the FRU.

88. Commonly the SRU and their counterpart state branches of the FRU have similar names and substantially similar memberships.

89. It is now settled and well established that SRUs have a separate legal identity and personality to their federally registered counterparts.

90. Whilst the SRU has a separate legal identity to its federal counterpart union, in most occasions the SRU and the state branch of the federal counterpart union share common leadership, staff and premises. This commonality, coupled with the parallel state and federal industrial relations jurisdictions, has ensured that the state and federal unions have appeared to have acted as one body.

91. In addition there are also some SRUs that have no federal counterpart union.

Union eligibility rules

92. There can be a similarity between eligibility/coverage of the SRU and FRU.

93. There can also be differences.

94. The reasons for the variations between state and federal eligibility rules are many and varied. There are situations where a SRU has, for historical reasons or amalgamations which have not occurred at a federal level, had eligibility that their federal counterpart has not. Often, as a result of that state union's coverage other unions, both federal and state, have not sought to enrol those particular workers.

95. The TCB has sought to accommodate for the instances where eligibility between the FRU and SRU are not the same. Such a mechanism should balance interests. The interests of the existing FRUs, with existing and largely settled eligibility, need to be weighed against the interests of the SRU to maintain their existing representation rights. These interests need then to be weighed against the desire to establish a stable jurisdiction.

De-recognition of unions

96. The capacity for a SRU to have its recognition cancelled or withdrawn includes cases where a substantial number of the union's members take unprotected industrial action (whether or not authorised by the union) which hinders the activities of their employer, or another corporation.

97. The TCB allows recognition of state registered unions to be cancelled or withdrawn in a very wide range of circumstances, including cases where a substantial number of the union's members take unprotected industrial action (whether or not authorised by the union) which hinders the activities of their employer, or another corporation.

98. It should be noted that taking unprotected industrial action is generally not unlawful. And further it should be noted that the FWA provides that unions are not held responsible for the acts of members where the union took all reasonable steps to prevent those acts: see s. 363(2).

99. The breadth of this provision is startling and requires amendment.

Accommodating for FRUs and SRUs

100. The benefit of adopting a TRA/RSRA system; along with the capacity to merge SRUs with the branch of the federal counterpart union, should also be underpinned by a complementary laws scheme. This requires activity by both the state and federal jurisdictions.

101. The complementary laws scheme is based heavily on the recommendations made by the Committee of Inquiry on Co-ordinated Industrial Organizations (chaired by J B Sweeney) in 1974 (and referred to the Sweeney Report).

102. Whilst the recommendations made in the Sweeney Report were never fully adopted in state or commonwealth law, there are still some remnants of earlier attempts to do so presently in effect. In this regard Part 7 of Schedule 1 to WorkChoices purportedly provides complementary

registrations schemes and the *Fair Work Act 1999* (South Australia) also makes some provision for a complementary scheme.

103. The issue of preserving the autonomy and independence of the SRU is addressed not by preserving the separate corporate status, but by merging it with the state branch and a legislative requirement that the internal rules of FRU provide for the autonomy of that state branch.

104. Additionally this autonomy is buttressed by a legislative requirement that the rules of the FRU must provide for the funds of that state branch to be kept separate and managed by the state branch.

105. This combination of legislative requirements ensures that the state branch, whilst being part of the FRU, is able to function as its own entity.

106. The complementary laws scheme meets the requirement that a viable SRU be maintained by providing for the state branch of FRU (which had the SRU merge into it) to obtain non-corporate registration in the state jurisdiction.

107. This means that the state branch of the FRU will be able to participate in both the state and federal jurisdictions. Therefore if the unitary or expanded federal jurisdiction is dismantled there will a viable entity that will be able to participate in the state jurisdiction.

108. As indicated above, the requirement for complementary state and federal laws should provide for SRUs to determine that they wish to merge with the state branch of their federal counterpart body. This is accommodated in the TCB.

109. The TCB accommodates for the eligibility of the FRU is to be amended to include the eligibility of the former SRUs. This issue was outlined earlier.

110. Complementary laws should also provide for the state branch of the FRU to be registered in the state jurisdiction. This is a matter pursued at a state level with respective governments. The QCU is pursuing this issue.

111. In the Queensland jurisdiction the IRA allows for Queensland registered unions to seek an exemption from the requirement to hold an election on the basis of the elections conducted in their federal counterpart body.[9] In cases where the exemption is granted, the results of the election of the state branch of the federal counterpart union are transposed to the Qld registered union.

112. Although not within the purview of this Inquiry, or within the control of the TCB, it is proposed that the capacity to obtain such exemptions needs to be provided for in each and every state jurisdiction. For those states where exemptions are presently available, the provisions should be reviewed and regularised to ensure that there are not unnecessary barriers to the granting of those exemptions. This is an application based exemption.

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[9] See Part 13 of Chapter 12 of the IR Act

113. Also not within this Inquiry's control, but a matter that will be discussed at a state level by the QCU is whether the state jurisdictions should be amended so that if the necessary criteria are met, the exemptions are granted on an automatic basis and without the need for application.

114. Such uniform exemption from election laws would ensure, as far as possible, that the leadership of the state registered union and the state branch of the federal counterpart maintained their commonality.

115. This could be extended to areas such as the lodgement of financial returns and other administrative and governance requirements.

116. Although the complementary laws area is one that requires a degree of vigour at a state level, there is one matter outstanding from the TCB that does require addressing.

117. The TCB does not deal with an affective process for the rules of the FRU to provide for the autonomy of the branch.

118. The provision proposed in the TCB reads:

154A Branch autonomy
The rules of an organisation may provide for the autonomy of a branch in matters affecting the members of the branch only and matters concerning the participation of the branch in a state workplace relations system.

119. The QCU proposes that the provision be reworded as follows:

154A Branch autonomy affecting members
The rules of an organisation may provide for the autonomy of a branch in matters affecting members of the branch only.

154AA Branch autonomy concerning participating in state workplace relations systems
The rules of an organisation may provide for the autonomy of a branch in matters concerning the participation of the branch in a state workplace relations system.

120. The existing provision from WorkChoices (which is the provision replicated in the TCB), found at s. 364 of the RAO Schedule,[10] is not sufficient to ensure the genuine autonomy and independence of state branches. In this regard the decision of the Full Court of the Federal Court in *Imlach and anor v Daley* (1985) IR 377 is particularly helpful.

121. In *Imlach v Daley*[11] the Full Court considered, inter alia, whether the decision by the National Council of the Hospital Employees' Federation of Australia (HEFA) to alter the boundaries of the Tasmania branches of the HEFA, and the number of members within those branches, contravened the predecessor to s. 364 of the RAO Schedule, which was in almost identical terms to the current provision.

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[10] Section 364 provides:
"*364 Branch autonomy*
The rules of an organisation must provide for the autonomy of a branch in matters affecting members of the branch only and matters concerning the participation of the branch in a State workplace relations system."
[11] Federal Court of Australia 60 ALR 377

122. The majority of the Court held that the alteration to the boundaries did not contravene this provision. The majority held that the provision for autonomous branches only required that the rules of the HEFA provided for the autonomy of the branches when those branches were participating in the state jurisdiction. The effect of this was the autonomy requirements only related to the branches participation in the state jurisdiction.

123. As the state jurisdiction has the potential to be substantially atrophied, particularly if referrals are pursued at a Qld level; and given that it is likely that the vast majority of unions that will wish to preserve the autonomy and independence of their state entities will be required to participate in the unitary or expanded federal jurisdiction, the limited autonomy that the present provisions provide for, which is limited to the participation in the state jurisdiction, is not sufficient to ensure that the existing structures within some unions are maintained.

124. The committee should note that the QCU proposal is not a mandatory provision, thus ensuring it takes into account the divergent and varied interests of all of our affiliated unions.

125. This must be addressed as part of this Senate Inquiry process.

Five year period

126. The TCB provides that the existence of a TRA or a RSRA expires on 1 July 2014.

127. The capacity for unions to achieve the range of outcomes accommodated within the schedule dealing with SRUs may require an additional period of time to that provided for.

128. The QCU proposes that there be capacity to extend the five year timeframe for an additional five year period.

Intergovernmental arrangements

129. As part of the intergovernmental arrangements, state governments should maintain laws that deal with the registration of trade unions, and the Commonwealth laws should not impinge upon this. This would mean SRUs can continue to have a corporate identity under state laws, participate in state industrial relations, workplace health and safety and vocational education and training systems; along with any administrative arrangements provided for within the state laws.

Matters to be addressed

130. The Senate Committee needs to provide for the following recommendations:

a. modify the provision for dealing with de-recognition.
b. provide for effective branch autonomy for a merged SRU.
c. provide for an extension in relation to the five year transitional status.

131. In addition, the Senate Committee should recommend that the commonwealth and state governments develop legislation whereby compliance with the democracy and accountability provisions in one jurisdiction satisfies the requirements in the other jurisdiction. This might require intergovernmental agreement about the essential democracy and accountability features of laws that regulate industrial organisations.

132. Note that separate to this Inquiry the QCU will be initiating discussions with the Qld State Government in relation to legislation whereby the state branch of a federal union can be recognised in the state system enabling (but not requiring) unions to wind up state registered unions, and still participate fully in the state industrial, VET and OHS systems.

CONCLUDING COMMENTS

133. This bill forms an important component of the overall development of effective and efficient industrial relations laws.

134. The matters canvassed in this submission are matters that require this Seante Committee to recommend a number of changes to the Bill as it is currently drafted.

135. We encourage you to do so in accordance with the proposals identified.

Queensland Council of Unions
9 April 2009