Queensland
Workplace Rights Ombudsman
Queensland Government

12 January 2009

Mr John Carter
Committee Secretary
Senate Education, Employment and Workplace Relations Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

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

Re: Inquiry into the *Fair Work Bill 2008* (Cth)

Dear Mr Carter

As the Queensland Workplace Rights Ombudsman ("**the Ombudsman**") I am pleased to have the opportunity to make the attached submission to this inquiry concerning the *Fair Work Bill 2008* (Cth) ("**the Bill**"). This submission is made pursuant to my functions under section 339D(f) of the *Industrial Relations Act 1999* (Qld).

I regard this Senate inquiry as a opportunity to put forward submissions for consideration which, if accepted, will result in greater clarity and fairness.

There are a number of areas covered in the attached submission including:-

- The development of a system whereby employers are assisted to make provision for future redundancies, thus lessening the burden on the public purse (GEERS) in the event of insolvency and lessening the economic impact on solvent employers at the time of downturn leading to redundancy.
- Proposals for the improvement of the enforcement regime as it relates to occupational superannuation; and
- Rules relating to the treatment of small businesses and their employees.
- Submissions related to compliance and fairness generally.

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In the compilation of this submission I have drawn on the experiences and information available to me through the Queensland Workplace Rights Office ("**the QWRO**") and my personal knowledge and experience gained from 32 years full time involvement in industrial relations, the last 9 ½ as a member of both the Queensland Industrial Relations Commission and the Australian Industrial Relations Commission, and simultaneously for the last 18 months as the Ombudsman.

Where no comment is made with respect to any Chapter, Part, Division, or section of the Bill, it is not intended to mean that I agree or disagree with the relevant provision.

The Ombudsman is the holder of an independent statutory office and as such this submission is drawn directly from the Ombudsman's experience and does not purport to be the views of the Queensland Government.

I thank the Senate Committee for giving due consideration to this submission.

Yours sincerely

COMMISSIONER DON BROWN
Queensland Workplace Rights Ombudsman

Queensland Workplace Rights Ombudsman

Submission to the

Commonwealth Parliament of Australia
Senate Standing Committee on Education, Employment and Workplace Relations

Inquiry into the *Fair Work Bill 2008* (Cth)

Fair Work Bill 2008 (Cth)

Submission by the Queensland Workplace Rights Ombudsman

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Fair Work Bill 2008 (Cth)

Submission by the Queensland Workplace Rights Ombudsman

Background of Submitter

Commissioner Don Brown was appointed as the inaugural Queensland Workplace Rights Ombudsman in control of the QWRO which commenced operation from 2 July 2007. The Ombudsman's functions (enclosed at **Appendix 1**) include the provision of information and advice to Queensland workers and employers about their workplace rights and obligations, and to promote fair and equitable practices in Queensland workplaces. The Ombudsman is charged with investigating and publicising unlawful, unfair or inappropriate industrial relations and other work related matters in Queensland.

The Ombudsman also advises the Minister for Transport, Trade, Employment and Industrial Relations, the Hon. John Mickel MP, on the impact of industrial relations laws in Queensland workplaces as well as providing quarterly and annual reports to the Queensland Parliament. (Available at www.workplacerights.qld.gov.au)

In the 18 months since the Ombudsman was appointed and the QWRO established, there have been in excess of 29,000 inquiries and over 900 cases investigated along with three industry-wide investigations. In this time it has been possible to identify emerging trends and pressing problems. Issues addressed in these submissions arise mainly from matters dealt with by the Ombudsman and the QWRO or the experience gained by the Ombudsman in his role as a Queensland Industrial Relations Commission member.

Summary of key points of this Submission

- A proposal to address the disadvantage imposed on small business employers and their employees because of differential treatment under the Bill.

- A proposal that a small business employer can opt to be a "Category A" small business employer thereby waiving the exclusions that would otherwise apply to their employees.

- A proposal to enhance the provisions of the Bill related to compliance and enforcement, including recovery of unpaid superannuation.

- A proposal that employers, who may be subject to redundancy payment obligations, pay an amount equal to a small percentage of their relevant employee's wages into a fund administered by General Employee Entitlements and Redundancy Scheme ("**GEERS**") and utilised for the payment of redundancy entitlements to employees of that employer where appropriate.

Submissions Specific to each Chapter

Chapter 1 Introduction

Section 3 Object of this Act:

It is submitted that the Objects clause should be expanded to include reference to job security and acknowledge the positive impact that people in secure jobs have on the economy.

Section 22(7) meaning of *transfer of employment*

Problems surrounding recognition of service will continue in the event that States maintain industrial relations functions for sole traders and partnerships (of unincorporated entities) and some other unincorporated bodies.

For the transfer of employment provisions to apply, such as in the event of a transfer of business, the Bill currently provides that all parties to the contract of employment must be in the national system before and after the transfer.

If a national system employer buys a business of a non-national system employer and re-employs the employees within 3 months, those employees lose their continuity of service by virtue of the regulation of their employment conditions changing jurisdictions. This affects the employee's ability to access rights and entitlements that are contingent on the length of their service.

This problem has already arisen under the WorkChoices legislation and it is not addressed in the Bill in its current form.

It is submitted that appropriate amendments be adopted in order to avoid this problem.

Section 22(8) Meaning of *service* and *continuous service*

Following from s.22(7), it should be clarified whether the transfer of business between associated entities applies when an employer who is not incorporated, incorporates.

It is submitted that employees employed before and after the employer's act of incorporating (i.e. going from a non-national system employer to a national system employer) should not lose their continuity of service.

Section 23 Meaning of *small business employer*

1. Small business differential

It is submitted that the separate category of "small business employer" should be removed as it potentially creates unfair consequences for both employers and employees.

Effect on employers: Small businesses already competes in the marketplace from a position of disadvantage compared to larger businesses. For a host of reasons larger businesses are already more attractive employment options for workers. For example, larger businesses have the benefit of:-

- cost savings through economies of scale;
- greater market presence and power;
- funds to invest in research and development;
- funds to pay higher salaries to quality employees;
- better career path options for employees; and
- greater access to skills development and training for employees, to name a few.

The creation of a statutory category of "small business" that excludes certain workplace rights and entitlements for employees disadvantages the smaller business employer. The actual (or at least perceived) job quality and security advantages which a larger employer can offer potential employees over a small business employer logically would attract quality employees to the larger business. The small business employer's lack of obligation to provide notice of termination of employment during the first 12 months of an employees employment (s.123(3)(a)(ii)), pay redundancy pay (s.121(b)) and exclusion from unfair dismissal remedies in the first year of employment (s.383(b)) may cause quality employees to shun employment with such an employer. This will be a significant inhibitor to small business viability and compound their already difficult task of competing with larger employers for quality employees.

Effect on employees: Employees are disadvantaged because, by virtue of the number of employees employed by their employer at the time of their termination of employment, they may have no entitlement to notice of termination (ie if they have been employed for between 6 and 12 months see s.123(3)(a)), redundancy pay (s.121(b)) or access to unfair dismissal remedies (s.383(b)). It is palpable that an employee in these circumstances has less job security.

Additional Comments: Employees of non-national system employers currently in the State jurisdiction have a right to challenge the fairness of a dismissal regardless of employee numbers (subject to probationary periods). In July 1997, the '15 and under exclusion' was introduced in Queensland. Employees employed prior to that date maintained their right to apply for reinstatement. The change only applied from that date onward and to new employees. The 15 and under exclusion was eliminated by the enactment of

Industrial Relations Act 1999 (Qld). Without a provision in this Bill enabling this right to be maintained, employees of non-national system employers would lose this existing right if State jurisdiction is referred to the Commonwealth. The same is the case with respect to notice period and redundancy payments.

At the very least, it is submitted that the Bill be amended to provide a savings provision so that current State system small business employees are not stripped of their existing entitlements to redundancy pay, notice of termination, and the right to challenge a dismissal in the event of the residual State jurisdiction being referred to the Commonwealth.

2. "Category A" Small Business Employer Proposal

Alternatively, in the event that the small business category provisions remain unchanged, it is submitted that there be provision enabling small business employers to exercise an option to waive the exclusions that would otherwise attach to their employees.

To this end, it is proposed that the Act provide the opportunity for a small business employer to voluntarily opt to become a "**Category A**" small business employer; that is, one who voluntarily wishes to offer the same benefits and protections to their employees as is required of larger employers.

It is suggested that an employer who exercises the option to be a "Category A" small business employer, be publicly identifiable as having exercised this option. A "Category A" small business employer would be registered on a publicly accessible register, administered by Fair Work Australia ("**FWA**"), and able to advertise and promote that they are a "Category A" small business employer. Potentially therefore, a prospective employee who is choosing between applying for a job with a small business employer or a "Category A" small business employer would opt for the latter. Similarly differential treatment under FWA would cease to be a deterrent to seeking employment with a "Category A" small business employer.

This proposal would in this way enhance the ability of a "Category A" small business employer to compete on a more level playing field with larger business employers with respect to attraction, recruitment and retention of quality employees.

"Category A" status would also send a positive message to larger businesses and government sourcing goods or services from small businesses. In short, "Category A" status would signal that the small business was confident in their ability to provide a fair workplace and intended to continue in business for the long term.

Finally, it is stressed that this proposal is about enabling a small business employer to exercise an entirely non-compulsory option to become and be recognised as a "Category A" small business employer. It may also be logical

to include a provision enabling a "Category A" employer to opt out of the category provided that in doing so all protections and benefits enjoyed by employees employed during the "Category A" status period were maintained and the lesser protections etc applied only to employees engaged subsequent to the opt out date.

3. Additional comments:

Counting employees may be manipulated: An employer which employs slightly more employees than the "fewer than 15" required to be a small business employer might be tempted to stagger employee terminations in a manner that entitles them to the exclusions applicable to a small business employer. For example, the employer might first terminate the employment of employee/s who are not entitled to notice because of their length of service before (leaving some short period of days/weeks in between) terminating the service of an employee that would have been entitled to notice and unfair dismissal protections if the employer had not systematically reduced their number of employees to "fewer than 15" prior to terminating the latter employee's employment.

Encourages negative employing behaviour: An employer who has employee numbers at a level of around "fewer than 15" may choose not to employ more staff when they otherwise would, for the purpose of staying within the small business employer exclusions. Alternatively, an employer may terminate an employee's employment to reduce employee numbers to a level "fewer than 15" so as to come within the small business employer exclusions. Both of these potential flow-on effects are inconsistent with objectives of the legislation, that is, to provide workplace relations laws that are "… flexible for businesses, promote productivity and economic growth …" (s.3(a)).

Additionally, the small business employer distinction may create confusion and uncertainty for borderline employers whose employee numbers fluctuate above and below the statutory level.

Section 27(2) State and Territory laws that are not excluded by section 26

Add laws with respect to:-

- Workers accommodation, for example *Workers Accommodation Act 1952* (Qld).

Chapter 2 Terms and Conditions of Employment

Section 84(a) Return to work guarantee (parental leave)

It is submitted that this provision should be clarified to avoid confusion in the event that the employee's pre-parental leave position was a "safe job" for the purposes of the "risk period". It is submitted that an employee should be entitled to return to their pre-parental leave position or, if that position was a "safe job", they should be entitled to return to the position they held before they commenced in the safe job.

Section 116 Payment for absence on public holiday

It is submitted that an additional provision should be inserted that deals with what the minimum payment should be for an employee who is required to perform work for an employer on a public holiday, be it penalty rates paid and/or time off on full pay in lieu of penalty rates, and/or additional annual leave in lieu of penalty rates.

Section 117 Requirement for notice of termination or payment in lieu

It is submitted that a provision should be added to this section to the effect that notice under this Division is to be exclusive of annual leave and long service leave.

Comments: It is submitted that it would be unfair for an employer to require an employee to utilise their accumulated paid leave during (therefore instead of) the notice period. To allow this would be to deny an employee the ability to use the leave as they choose.

Section 119 Redundancy pay

It is submitted that all employees should be entitled to redundancy pay in the circumstances of redundancy in accordance with accepted standards (s.119(2)), subject to satisfying the minimum period of service. The provision at s.119(1)(a) that there is no entitlement to be paid redundancy pay where the redundancy is due to the "ordinary and customary turnover of labour" should be removed as should the exclusion at s.119(b) (insolvency or bankruptcy of the employer).

The exclusion from the obligation to pay redundancy pay for a small business employer should also be removed as it operates unfairly in terms of the viability and competitiveness in the (workplace) marketplace for small employers, and denies employees of rights that apply to employees of larger businesses. Please refer to the submissions outlined in respect to s.23 and the proposal therein to have an optional "Category A" small business employer and to submission with respect to GEERS under General Submissions at page 25.

It is submitted that the only exclusions to the employer's obligation to pay redundancy should be where the employer secures alternative employment suitable to the employee or where the employer has no capacity to pay.

In these cases the employer should be able to make application to the FWA seeking a determination that the amount of redundancy pay be varied in accordance with the provision at s.120(2) and unless such determination is made in the employer's favour, the employer would not be excluded from its obligation to pay redundancy pay.

Comments concerning the "ordinary and customary turnover of labour" exclusion:

- Where an employee has only been employed a short time, there is no entitlement to redundancy pay regardless of whether the redundancy is in the ordinary and customary turnover of labour. Therefore, it is submitted that this exclusion has no effect where it is "ordinary and customary" for an employer to have a high turnover of labour, such as in service industries, or for example, the usual drop off in staff requirement in the tourism and hospitality industry after the Christmas/New Year period.
- The Bill should contain a specific definition of "ordinary and customary turnover of labour" in order to ensure that where an employee has been employed for a long period of service, their service is recognised for the purposes of redundancy pay if the employer is terminating their service as a consequence of economic belt-tightening. Economic belt-tightening could be "ordinary and customary" for an employer at any time, therefore this exclusion potentially operates broadly enough to entirely avoid operation of these redundancy pay provisions. Case law determining the question of "ordinary and customary" is complex and parties to future arguments on this question would be greatly assisted by such a definition.
- Examples where confusion might arise with this exclusion:
    - Where a major bank is shedding employees because of economic circumstances or because of a merger with another bank, this arguably could be what is "ordinary and customary" for the bank to do in the circumstances especially where the bank has acted similarly in the past. Therefore this exclusion might operate to deny employees redundancy pay despite their length of service.
    - Where it is "ordinary and customary" for a security company to shed employees on the basis of winning or losing a contract, those employees, notwithstanding that they may be long-serving and would otherwise qualify for redundancy pay, would not receive it under this exclusion.

Redundancy Pay Fund Contributions: See the proposal set out under General Submissions (page 25).

Section 121 and Section 123(3)(a) Exclusion from obligation to pay redundancy pay and notice.

The current wording of the Bill provides that an employee's employment is treated as terminated "*at the time when* the person was *given notice* of

termination" (emphasis added). This provides an opportunity for an employer to give notice of termination shortly before the relevant employee reaches 6 or 12 months service thereby preventing the employee from obtaining rights to minimum notice and, dependent also on length of service potentially deprives the employee of redundancy pay and unfair dismissal rights at that point in time. It is difficult to understand how the employment of an employee can be, at law, terminated, while the employee is still at work.

Unfairness would arise where the dismissed employee continued to work for the notice period meaning that the employee actually worked a period of service extending beyond the 6 or 12 month qualifying period but would not have the protections that period of service is intended to afford by virtue of the date their notice of termination was given to them.

Whether or not an employer has obligations to give notice or pay redundancy pay in terms of an employee's period of service should not be determined by when notice of termination was given to the employee, but instead should be determined by when the employee's termination of employment actually takes effect.

Additionally, it is circular to have an entitlement to a set period of notice dependent on an employees period of service, which is to be determined at the date notice of termination is given.

As a result, it is submitted that the part of s.121 that states "… at the time when the person was given notice of the termination …" should be omitted.

Comments concerning small business employers: In the event that the redundancy pay fund proposal outlined under General Submissions (page 27) is not accepted, rather than exempting a small business employer from obligations to pay redundancy pay (s.121(b)) where there would otherwise be an obligation, it is submitted that the small business employer should have an option to apply to the FWA for an order varying its obligation to pay redundancy under s.120 in the same way a larger employer may.

Section 123(3)(a) Subdivision A [ie Notice of termination or payment in lieu of notice] does not apply.

It is submitted that the provision be amended from

(a) "… 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) (which ever happened first);"

to

(a) "… at the time the termination takes effect."

Section 151 Terms about payments and deductions for benefit of employer

This provision has the support of the Ombudsman as it assists to remedy an emerging trend of employers shifting costs ordinarily met by business on to workers, such as the payment of motor vehicle insurance premiums on the employer's vehicle and education and training required by the employer in order that an employee is able to perform the job.

Section 172(c) Making an enterprise agreement

This provision allows "deductions from wages for any purpose authorised by an employee who will be covered by the agreement". While the thrust of this provision is supported, it is submitted that this provision be amended to be in the same terms as s.151, in that the deductions cannot be about payments that benefit the employer.

Part 2-8 Transfer of business

Please refer to submissions made with respect to s.22(7).

Section 323(b) Method and frequency of payment

It is submitted that word "money" should be omitted and replaced with "Australian currency".

Section 324 Permitted deductions and **section 325** Unreasonable requirement to spend amount and **section 326** Certain terms have no effect

These provisions are supported as they currently are drafted in light of comments made herein concerning s.151 above.

Section 333 High income threshold

The "high income threshold" is to be prescribed by or worked out in the manner prescribed by the regulations. It is understood that the amount of the high income threshold will be expressed as a dollar amount, indexed.

It is submitted that, to provide certainty and consistency with respect to rights and obligations that are triggered or removed by reaching a certain income level, the definition of "base rate of pay" at s.16 of the Bill should be used when determining amounts which are to be taken into account to establish whether or not an employee exceeds the "high income threshold".

In the event that the above submission is not accepted, it is submitted in the alternative that high income threshold should exclude any estimated value of non-monetary benefits provided to an employee by the employer with respect to the employee's employment and also exclude all extraneous amounts such

as bonuses, commissions, reimbursements, overtime etc. Alternatively there should be a definition which clearly and definitively states what non-monetary benefits, if any, are to be included in calculating the value of an employee's income when determining whether an income meets the high income threshold.

It is submitted that the combination of the first two suggestions above is preferred as this would provide an unambiguous dollar value not readily open to dispute.

In the event that the high income threshold will include the value of non-monetary benefits provided directly or indirectly to an employee, it is submitted that the high income threshold include a minimum monetary value to prevent artificial inflation of an employee's income with non-monetary payments to a point where the employee is precluded from protections such as unfair dismissal remedies when they are in fact not earning a high monetary disposable income.

In short, a "high income threshold" definition should clearly state what amounts are included in the calculation of "income" and what amounts are not, thus assisting future litigants to avoid the costly process of having to argue the issue of what does or does not constitute income for the purpose of the high income test.

The Queensland Industrial Relations Commission experience is that such arguments have been numerous, innovative, costly to the parties and a drain on Commission resources.

Also see submissions regarding s.382(b)(iii) concerning agreed value principles.

Chapter 3 Rights and responsibilities of employees, employers, organisations etc

Sections 357 to 359 — Sham arrangements [with respect to independent contracting]

These provisions are consistent with the amendments made under the *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006* (Cth) with the exception that this Bill removes express remedies of injunction and compensation. It is submitted that these provisions are consequently deficient in terms of remedies. Additionally, it is submitted that there needs to be provision for Fair Work Inspectors and appropriately authorised officials of organisations to have powers to investigate the genuineness of an independent contract for these sham contract provisions to be effective and enable FWA to test the relationship where it is, possibly incorrectly, labelled a contract for services.

It is submitted that the sham contracting provisions should also include:

- powers enabling Fair Work Inspectors and appropriately authorised officials of organisations to require proof that the contract is a *bona fide* contract for services such as with:
    - Powers to require the production of documents, in particular the purported contract;
    - Powers to inspect and copy documents
    - Powers to require information with respect to the purported contract;
    - Powers to require names and addresses;
    - Powers of entry into premises to exercise the above powers.
- provisions in relation to what orders the court may make with respect to a contravention (in addition to the civil penalty provisions under s.539) namely:
    - A provision that enables a person affected by sham contracting arrangement to apply to a court of competent jurisdiction for declaration that they are an employee; and
    - Provisions that grant power to the court to order the (deemed) employer to pay to the (deemed) employee, wages and other entitlements the employee would have been entitled to as an employee under any relevant fair work instrument that covers their employment where the employee was paid less.
- Provisions granting power to the court to order remedies including injunction, interim injunction, and compensation.

Section 358 Dismissing to engage as independent contractor

This provision provides that an employer must not dismiss, or threaten to dismiss, an individual who is an employee of the employer and performs particular work for the employer, in order to engage the individual as an independent contractor to perform the same, or substantially the same, work under a contract for services.

It is submitted that this provision should include a sub-clause that expressly permits the granting of an injunction or interim injunction for a breach of this section and/or compensation for loss suffered as a result of the dismissal or threatened dismissal.

This is what is currently provided for under s.902 of the *Workplace Relations Act 1996* (Cth) and so it would be a case of maintaining that right.

Comment:

- The QWRO has encountered alarming levels of sham contracting. Industry investigations have shown that it is particularly prevalent in highly competitive areas including, but by no means limited to, Contract Security, Fruit and Vegetable Harvesting and Building and Construction.

Section 382(b)(iii) When a person is protected from unfair dismissal

Firstly, it is submitted that fairness is best served by entitling all employees to a procedurally fair dismissal process and the ability to challenge an allegedly unfair dismissal.

This sub-section provides that a person is protected from unfair dismissal at a time if, at that time "the sum of the person's *annual rate of earnings*, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is *less than the high income threshold"*. (Emphasis added).

"Earnings" include wages and the reasonable money value of non-monetary benefits (s.12 and s. 332). If these amounts, in total, amount to less than the high income threshold, the unfair dismissal protections apply, otherwise they do not. It is submitted that, subject to what the regulations might provide in relation to an extended definition of "earnings", an employer may be able to artificially inflate an employees "earnings" above the high income threshold by the provision of non-monetary benefits such as a work vehicle, car parking, education and training courses, meals, electronic equipment (e.g. computer equipment) etc for the exclusive use of the employee and of the kind that would otherwise simply be provided so that the employee can perform their duties but not considered "earnings". This is the case because the definition of "Non-monetary benefits" at s.332(3) is not limited to benefits provided to an employee to keep and own, but could be interpreted broadly as benefits provided for the employee's use that remain the property of the employer.

It is submitted that this provision as it currently drafted could be utilised to avoid the unfair dismissal protections through the provision of non-monetary benefits that are subject to an "agreed value". The provision creates an area of potential dispute that could be otherwise avoided. The high income threshold should be simplified to be a set monetary figure (subject to annual review) that is the upper limit for access to unfair dismissal protection and is expressly defined as discussed above under s.333.

This provision, as it stands, could create confusion for both employers and employees as to whether unfair dismissal protections apply to an employee from year to year.

It is submitted that, to provide certainty and consistency with respect to rights and obligations that are triggered by reaching a certain income level, the definition of "base rate of pay" at s.16 of the Bill should be used to calculate the "high income threshold".

Should the "agreed value" provision remain unchanged, it is submitted that the Bill be amended to provide that the agreed value of any non monetary benefit be established at the commencement of the employment relationship or, if the benefit is provided after commencement, at that point. This would assist in avoiding disputes which could drain the finances and resources of the parties and FWA.

Section 383(a)(i) Meaning of minimum employment period

It is submitted that this provision should be re-drafted in the following terms:

"the time when the person is given notice of the dismissal" should be omitted and replaced with "the time when the person's dismissal takes effect".

Also refer to the submissions regarding s.121 and s.123(3)(a).

Section 384(2)(b)(ii) Period of employment (employee transferring in relation to a transfer of business)

This provision permits a new employer to deny an employee (who has satisfied the minimum employment period with an old employer) continuity of service for the purposes of unfair dismissal protection. It is submitted that this provision is unfair and should be omitted.

Comments:

- An employee who has worked for the old employer for more than 6 months (or 12 months in the case of a small business employer) has, during that time, contributed to the success and viability of the old employer's business. Consequently that contributes to the business having a value, enabling it to be sold.
- The potential new employer would logically bear this in mind during the purchasing process.
- Industries where there is a high turnover of business owners such as retail, contract cleaning, security contracting, service stations and the like would, as a result of this provision, see the employees in those businesses put back on probation (losing unfair dismissal protections and other entitlements) each time there is a transfer of business.
- The Bill already provides for situations of, for example, underperforming employees and presumably further guidance will be provided in the Small Business Fair Dismissal Code in regard to managing those issues. This should adequately protect employers while also providing job security for employees. In light of these provisions it is unfair and unnecessary to keep putting employees back on probation each time a business changes hands.
- It is strongly submitted that this requirement be abandoned.

Section 385(d) What is unfair dismissal

This provision provides that where a person who has been dismissed in a case of genuine redundancy, that dismissal is not unfair. It is submitted that there should be scope to consider whether a genuine redundancy or other genuine restructuring related dismissals have been handled fairly or otherwise by the employer.

Comments:

- Notwithstanding that the genuineness of the redundancy is challengeable, this provision provides that the fairness of the process undertaken in the termination (because of genuine redundancy) is not challengeable.
- It may be that the termination satisfies all the elements of a redundancy and is held to be a genuine redundancy, but the process of the termination was harsh, unjust or unreasonable. It is submitted that there should be scope for an employee who claims to be dismissed unfairly, notwithstanding the termination satisfies the elements of a genuine redundancy, to apply for reinstatement and if successful, where reinstatement is not possible/appropriate, be granted compensation.

- For example, it is entirely possible that an employer, having correctly and soundly established that a position was to be made redundant, acts unfairly, harshly or unreasonably in the process of implementing the decision to make an employee redundant.

  A stark example within my knowledge occurred when an employer, having genuinely identified a need to reduce staff numbers announced to the redundant employee, in front of assembled co-workers, that the employee was redundant and the employee was useless. The employer then threw the employee's pay packet containing the employee's severance pay on the floor and proclaimed "this is the most begrudged money I've ever paid". The employee was humiliated in the extreme. Clearly a genuine redundancy can be carried out in a manner that is harsh, unjust and unreasonable and it is submitted that these circumstances should be challengeable.

Section 387 Criteria for considering harshness etc

Sub clause (c) should be amended from:-

"whether the person was given an opportunity to respond …"

to

"whether the person was given a reasonable opportunity to respond …"

Sub clause (e) should be amended to include capacity and conduct as well as performance as a ground for the provision of warning. Suggested amendment:-

Delete

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

Insert

"if the dismissal related to unsatisfactory conduct, capacity or performance—whether the person had been warned in a manner which allowed the employee to correct the offending conduct, capacity or performance before the dismissal; and"

Section 394(2) Application for unfair dismissal remedy

This provision provides that the application must be made within 7 days after the dismissal took effect or such further period as FWA allows. It is submitted that a 7 day window of opportunity to commence proceedings is insufficient and unfair and should be amended to the 21 day limit that has been operating for many years.

Comments:

- A short 7 day time limit (i.e. 5 business days) potentially prejudices an employee's ability to seek advice and complete and file proceedings in that time.
- Considering the substantial number of applications for extension of time in both the federal and Queensland jurisdictions (currently 21 day time limit to apply) it is submitted that the 7 day limit will give rise to numerous applications seeking an extension of time for the filing of proceedings, causing an unnecessary drain on the finances and resources of the FWA. and the parties involved.
- This provision is harsh and unfair and would cause significant difficulties for vulnerable employees (such as the low paid and those with low literacy levels) to meet such a short time limit.
- For example, it may be that the employer has also not paid the employee their termination pay before the 7 day limit is up, consequently the employee is not able to financially afford to make the application (which must be accompanied by the prescribed fee) and/or pay for advice or assistance.
- Harshness has previously been established in applications for reinstatement where an employer has not paid the appropriate severance benefits/termination pay to a departing employee. In the era of fortnightly pays and EFT it could be well over 7 days before this type of harshness was to become evident if the termination appeared otherwise fair.

Section 400 Appeal rights

Under this provision as it is currently drafted, the FWA may grant appeal rights where there has been a significant error of fact and only where it is in the public interest to allow the appeal. It is submitted that the appeal provision is unfairly restrictive and should be broadened to permit appeal rights where there is an error of law also.

Chapter 4 Compliance and Enforcement

Section 535 Employer obligations in relation to employee records

This provision requires an employer to keep employee records for 7 years but does not specify where those records must be kept. It is submitted that there should be an additional provision that requires the employer to keep the employee records at a premises that is a workplace of the employer.

Comment: Section 708 provides powers for an inspector to enter premises and s.709 empowers the inspector, while on the premises, to require the production of and inspect a record or document. However, the Bill does not require those records or document be kept at the premises that an inspector has right of entry to. This deficiency could frustrate an inspector's ability to perform this function.

Chapter 5 Administration

Section 706(2) Purpose for which powers of inspectors may be exercised

This provision may restrict an inspector in the performance of their functions because they can only exercise their powers once they "reasonably believe" that there has been a contravention of a safety net contractual entitlement (s.706(1)(b)), which means:

> ***"safety net contractual entitlement*** means an entitlement under a contract between an employee and an employer that relates to any of the subject matters described in:
> (a) subsection 61(2) (which deals with the National Employment Standards); or
> (b) subsection 139(1) (which deals with modern awards)."

Section 61(2) provides:

> **"61 The National Employment Standards are minimum standards applying to employment of employees**
>
> ...
>
> (2) The minimum standards relate to the following matters:
> (a) maximum weekly hours (Division 3);
> (b) requests for flexible working arrangements (Division 4);
> (c) parental leave and related entitlements (Division 5);
> (d) annual leave (Division 6);
> (e) personal/carer's leave and compassionate leave (Division 7);
> (f) community service leave (Division 8);
> (g) long service leave (Division 9);
> (h) public holidays (Division 10);
> (i) notice of termination and redundancy pay (Division 11);
> (j) Fair Work Information Statement (Division 12)."

Section 139(1) provides:

> **"139 Terms that may be included in modern awards—general**
>
> (1) A modern award may include terms about any of the following matters:
> (a) minimum wages (including wage rates for junior employees,
> employees with a disability and employees to whom training arrangements apply), and:
> (i) skill-based classifications and career structures; and
> (ii) incentive-based payments, piece rates and bonuses;
> (b) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities;

(c) arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours;
(d) overtime rates;
(e) penalty rates, including for any of the following:
(i) employees working unsocial, irregular or unpredictable hours;
(ii) employees working on weekends or public holidays;
(iii) shift workers;
(f) annualised wage arrangements that:
(i) have regard to the patterns of work in an occupation, industry or enterprise; and
(ii) provide an alternative to the separate payment of wages and other monetary entitlements; and
(iii) include appropriate safeguards to ensure that individual employees are not disadvantaged;
(g) allowances, including for any of the following:
(i) expenses incurred in the course of employment;
(ii) responsibilities or skills that are not taken into account in rates of pay;
(iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;
(h) leave, leave loadings and arrangements for taking leave;
(i) superannuation;
(j) procedures for consultation, representation and dispute settlement.

(2) Any allowance included in a modern award must be separately and clearly identified in the award."

This sub-section, s.706(2) provides:

"(2) An inspector may exercise compliance powers for the purpose referred to in paragraph (1)(b) only if the inspector reasonably believes that the person has contravened one or more of the following:
(a) a provision of the National Employment Standards;
(b) a term of a modern award;
(c) a term of an enterprise agreement;
(d) a term of a workplace determination;
(e) a term of a national minimum wage order;
(f) a term of an equal remuneration order."

It is submitted that the restriction should be removed by omitting the words "reasonably believe".

Comments:

- The reasonable belief threshold removes an entire level of accountability in that it prevents random industry or district targeted audits of safety net contractual entitlements. These activities are critical to a strong compliance regime to deter contraventions.

- It imposes a subjective and objective test to be satisfied by an inspector before they can utilise their powers and limits the administration of the legislation.
- Requiring a "belief" has been considered by the courts as requiring a *positive belief* about the state of things, not mere ignorance. The High Court in *George v Rockett* (1990) 170 CLR 104 said a belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition, based on facts that are sufficient to create that inclination of mind in a reasonable person. It may be something less than knowledge, as a person can hold a belief while having a degree of doubt, but it has been held to be more than mere suspicion (*R v Raad* [1983] 3 NSWLR 344).
- For a Fair Work Inspector to satisfy the test of first "reasonably believing", the inspector must personally have grounds at the time for belief, even if they are subsequently found to be false or non-existent, the grounds must be objectively reasonable. Not until this preliminary test is satisfied does a Fair Work Inspector have powers to enter premises and then monitor compliance with the legislation so far as it relates to a safety net contractual entitlement.
- As a matter of practical application this provision would mean that an inspector has no power to investigate or administer compliance with the legislation until such time as they have formed a belief about the existence of non-compliance. This could mean that the inspector would have to have received information, such as by complaint, about non compliance.
- Even where a complaint is made, the provision requires that an inspector has a reasonable *belief* that there *has been a contravention*.
- It would be an unjustified leap of faith for an inspector for an inspector to "believe" the allegations of a complainant without having had input from a respondent.
- The restriction should be removed as it requires more than a "*suspicion*" but requires a "*belief*" and the belief has to be that "a person *has contravened*". The cumulative effect of the wording of this provision is that the administration of the legislation may be adversely affected.
- An injunction sought in order to prevent an inspector from performing an inspection could be argued on the basis of a challenge to the inspector's claim to have a reasonable belief. Such challenge might be difficult to meet given that a "reasonable belief" can only be arrived at by way of examining an initial suspicion and such examination would be hindered or prevented by the wording in the Bill.

Section 707(a) When powers of inspectors may be exercised

This provision permits an inspector to exercise compliance powers "at any time during working hours". It is submitted that this provision should be clarified and extended. The "working hours" should be expressed to *include* the working hours of the employer and/or the employer's employees (where the employees work at different hours to that of the employer such as in a 24 hour shift operation) and not simply "working hours".

Comment: the above proposal seeks to eliminate arguments where for example:

- An inspector exercises their power to give a compliance notice (under s.716) and does this during the inspector's "working hours" where the recipient employer's "working hours" are other than what is the ordinary meaning of "working hours", such as for a bread baking operation. The employer may argue that the notice is invalid because the inspector failed to exercise their powers during "working hours". This interpretation, albeit arguably incongruous, is open to be made as the provision current reads.
- In terms of an inspector's power to enter premises at s.708, this power may be only exercised during "working hours" in accordance with s.707(a) therefore it should be clarified that the "working hours" for this purpose is the working hours of the employer's business and premises and not "working hours" generally.

Section 709 Powers of inspectors while on premises

It is submitted that the provision is quite limiting in terms of what an inspector has powers to do once they have entered the premises. For example, an inspector has no powers to require a person at the premises to provide the inspector reasonable assistance.

It is submitted that this section should be amended to permit an inspector to-

- Photograph or film any part of the premises or any work, process or object at the premises;
- Require a person at the premises to give the inspector reasonable assistance to exercise the inspector's powers;
- A civil penalty should apply should the person fail to comply unless they have a reasonable excuse; and
- When making a requirement for assistance the inspector must warn the person it is an offence to fail to comply unless the person has a reasonable excuse.

Comments:

- The inspector should be able to require a person at the premises to provide assistance in carrying out their functions and exercising their powers. Failing to provide such a fundamental power could render what powers the inspector does have, difficult or impossible to exercise.
- For example, an inspector has powers to inspect work, process or object (s.709(a)) but if the relevant person who carries out the work or process refuses to do so so that the inspector can inspect it, the inspector's powers are not able to be exercised.
- In that situation, a general power to make a requirement for assistance would enable the inspector to require the person to carry out the work or process.

Section 716 Compliance Notices

It is submitted that, in order to give efficacy to the legislation relating to the proper payment and remuneration of employees, this provision should be expanded to enable an inspector to also impose a penalty in the event that the matter requiring rectification relates to underpayment or non payment of wages. The penalty should be an amount not exceeding 10% (equal to infringement notice rate in s.558) of the total arrears allegedly due. It is further submitted that any revenue generated by this provision be paid to the Commonwealth.

The notice requiring the employer to make good underpayment and imposing a penalty would be challengeable in a court of competent jurisdiction at the election of the recipient.

The interaction with s.558 which provides that the regulations may provide for infringement notices provisions would need to be considered when considering this proposal.

Chapter 6 Miscellaneous

Section 772 Employment not to be terminated on certain grounds

This section lists out reasons for which an employer must not terminate an employee's employment (unlawful termination). It is submitted that the following reasons should be added to deem the termination unlawful:

- where an employee is terminated for the purpose of an employer avoiding its obligations under the *Fair Work Act 2009* [or as per the relevant title]; and
- where an employee is terminated due to an absence from work for jury service.

Section 800 Regulation dealing with exhibiting fair work instruments

It is submitted that the legislation should prescribe an obligation for a fair work instrument to be exhibited on the premises of an employer and not, as this provision currently reads, abrogate that law making power to the regulations where the making of such a regulation is discretionary. Further the entirety of the fair work instrument should be exhibited, without an option to display merely a term of the fair work instrument.

The legislation should be amended from:

"The regulations may provide for the exhibiting on the premises of an employer, of a fair work instrument or a term of a fair work instrument."

To either

"The regulations must provide for the exhibiting on the premises of an employer, a fair work instrument in a position readily accessible to all employees."

Or

"An employer must exhibit on the premises of the employer, a fair work instrument in a position readily accessible to all employees."

General Submissions: Opportunities to Enhance the Bill

Enforcement: Superannuation

Issue: The limited compliance and enforcement resources and resultant back-log of unpaid superannuation guarantee claims.

Firstly, to be clear, this particular submission is not in any way intended to be a criticism of the Australian Taxation Office ("**ATO"**) or its staff. It is made in good faith in an attempt to identify, for this Inquiry, the significant and ongoing problem of non-payment of superannuation by employers.

Whilst both State and Commonwealth industrial laws provide for the recovery of unpaid occupational superannuation contributions, the entitlement to this benefit arises pursuant to the *Superannuation Guarantee (Administration) Act 1992* (Cth), an Act administered by and only by the ATO and recovery of amounts unpaid is pursued through the *Tax Administration Act 1953* (Cth). Historically and probably correctly, both the Federal Ombudsman and Queensland State inspectors have regarded the enforcement of the law as the province of the ATO and as such have had little or no involvement in this area for some years.

The ATO has limited resources and itself sees a risk of the Superannuation system not working as Parliament intended.[1] It reports that it receives around 20,000 complaints per year from employees about their employers not paying the correct superannuation contributions.[2] The ATO does not disclose an average time frame on how long it takes to finalise a complaint of this nature but it does say "[w]e have reduced the time it takes to resolve them …".[3] Information available to the Ombudsman indicates that there is a backlog of 18 months.

Proposed solution: It is submitted that the Government promptly establish a committee or body to examine ways of ensuring that the resources available in the form of Fair Work Inspectors (Commonwealth and State) are able to, in the course of their duties, undertake enforcement and compliance activities with respect to unpaid superannuation. This could possibly require the examination of complementary legislation and the interaction between taxation laws and industrial laws. Information sharing between State/Territory and Commonwealth agencies would also need to be considered.

It would seem eminently sensible to make the necessary changes to enable highly skilled Federal and State industrial inspectors who already visit workplaces for, *inter alia*, the purposes of inspection of records, to be used to supplement the apparently overstretched resources of the ATO.

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[1] *Australian Taxation Office: Compliance Program 2007-08* (2007) 5.
[2] *Australian Taxation Office: Compliance Program 2008-09* (2007) 32.
[3] *Australian Taxation Office: Compliance Program 2008-09* (2007) 32.

Redundancy pay and the General Employee Entitlements and Redundancy Scheme (GEERS)

Issue: Non payment of redundancy pay to eligible employees.

Comment:

- Notwithstanding some exclusions contained in the Bill, s.119 provides that an employee is entitled to be paid redundancy pay if their employment is terminated at the employer's initiative in circumstances where, for example, the employer no longer requires the job done by the employee to be done by anyone.
- In the foreseeable future the necessity to make redundancy payments is increasingly likely to arise given the current global financial crisis. For example, there are 55 ABC Learning Centres to be closed around Australia.[4] Reportedly that means that around 100 employees are owed entitlements totalling about $600,000.[5] It may be necessary for those payments to be paid out of the General Employee Entitlements and Redundancy Scheme (GEERS).
- A prudent business owner/manager makes provision for contingencies such as redundancy; imprudent ones do not. It is the latter who, when faced with insolvency, place the burden of redundancy payments on the public purse through GEERS.
- Currently GEERS funds, among other things, the entirety of redundancy payments in the event of insolvency at potentially incredible expense to the tax payer.

Proposal: QWRO is dealing with an increasing number of enquiries from employees concerned about the security of their redundancy entitlements. It is submitted that the government examine the feasibility of establishing a fund, possibly administered by GEERS, into which employers could make provision to meet future redundancy obligations.

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[4] 'Centres that will close and consolidate with other local ABC centres' (2008) ABC Learning Centres <http://www.childcare.com.au/media/Centres_that_will_close_and_consolidate_with_other_local_ABC_centres.pdf> at 5 January 2009.

[5] Dan Harrison, 'Union outrage over redundancies' The Age 13 December 2008 <http://www.theage.com.au/national/union-outrage-over-redundancies-20081212-6xli.html> at 5 January 2009.

Interaction with common law employment contracts

Issue: Employers and employees purporting to contract out of fair work instruments other than through the enterprise agreement making process under the Act.

> **Comment**: While the Ombudsman is not suggesting that parliament interfere with a party's freedom to contract, what concerns the Ombudsman is where the work performed is covered by a fair work instrument and the parties purport to contract below the minimum provisions of the instrument. The Bill should make provision for when there are inconsistencies between fair work instruments and common law contracts. The fair work instrument should prevail to the extent of the inconsistency.
>
> **Proposed Solution**: Insert a general provision that prescribes that the fair work instrument (ie a modern Award or Enterprise Agreement) that applies to or covers the employment prevails over a contract of services to the extent of the inconsistency. Section 135 of the Queensland Act is a good example of such a provision:-
>
> > ***135 Inconsistency between awards and contracts***
> >
> > *(1) To the extent of any inconsistency, an award prevails over a contract of service that is--*
> >
> > > *(a) in force when the award becomes enforceable; or*
> > > *(b) made while the award continues in force.*
> >
> > *(2) The contract is to be interpreted, and takes effect, as if it were amended to the extent necessary to make the area of inconsistency conform to the award.*
> >
> > *(3) However, no inconsistency arises only because the contract provides for employment conditions more favourable to the employee than the award.*

Issue: Fair Work Inspectors do not have powers under the Bill to recover amounts in excess of fair work instrument rates of pay where those amounts have been agreed to between the employer and employee as the employee's rate of pay.

> **Comments**:
>
> - It is not uncommon for an employer and an employee to enter into an agreement which provides that the employee receive remuneration above that of the minimum.
> - The relevant above award agreed rate of pay forms a part of the contract of service and as such should be used in calculating all of the employees' entitlements. Our experience is that disputes arise when employers unilaterally resile from the payment of the agreed rates. The

employee should be entitled to expect to receive all their entitlements paid at the above award/agreement rate.

- On occasions where the employer fails to pay entitlements such as wages in lieu of notice of termination, annual leave, long service on termination (or at other times), redundancy pay etc, the Bill limits an inspector's powers of recovery to the minimum amounts and not the actual agreed amount being paid to the employee by the employer.
- This means that where an employee would have otherwise worked out their notice period and been paid at agree rate, that employee suffers a disadvantage if the inspector can only exercise powers limited to the provisions in fair work instruments or the national employment standards.
- Where an inspector can establish that the employer agreed to or knowingly paid an above award/agreement rate of pay to an employee, that rate should be the basis for the inspector's calculation of the employee's unpaid entitlements.

Proposed Solution: Insert provisions that give power to a Fair Work Inspector to enforce and recover:

- Entitlements calculated on rates of pay historically agreed to between employer and employee.

Issue: Fair Work Inspectors do not have powers under the Bill to investigate and recover wage arrears where the employment is not regulated by a fair work instrument, but subject to a common law contract that is more favourable than the National Employment Standards and national minimum wage order.

Where a national-system employer employs an employee to carry out work that is "award-free", the employee could already be at a disadvantage by having no applicable fair work instrument or industrial organisation to represent their interests. It is submitted that this position of disadvantage should not be further compounded by the fact that a Fair Work Inspector is unable to enforce what employment contract they have managed to negotiate for themselves.

Proposed Solution:

- Expand a Fair Work Inspector's powers under s.706 to enable them to exercise powers with respect to common law contracts of employment; and
- Expand a Fair Work Inspector's powers under Chapter 4 Part 4-1 which deals with civil remedies, allowing them to enforce a common law contract.
- Make provision for an employee (or their representative) who is employed on a common law contract, to which no fair work instrument applies, to apply to have their contract amended or declared void (wholly or partly) if the contract is a contract of service that is an unfair contract.

Taxi and Limousine Driver Industries

Issue: The QWRO has received a significant number of complaints and enquiries from taxi and limousine drivers. Workers engaged as taxi drivers and limousine drivers have historically been engaged under bailment arrangements rather than employment. Consequently, where this occurs these workers are denied entitlements that employees are afforded.

Comments:

- On the information provided to me by industry participants, I have formed the view that:-
    - The level of income of the drivers may not compensate for the lack of other employment-like conditions such as paid leave.
    - The operation of contemporary bailment contracts is becoming increasingly similar the operation of employment contracts.
    - There have been an inordinate number of complaints from drivers which could generally be summed up as collectively saying that bailment conditions for drivers in these industries are in need of review.

Proposal:

It is submitted that the Government establish a committee or body to examine the arrangements between owners of taxis and limousines and the drivers they engage with a view to ensuring that drivers (bailees) are provided with a basic safety net to the extent that they do not become an industrial underclass. A starting point may be to ensure that bailment contracts and any disputes between parties to bailment contracts are able to be examined by FWA.

APPENDIX 1

Functions of the Queensland Workplace Rights Ombudsman

Extracted from the *Industrial Relations Act 1999* (Qld)
(as in force 25 November 2008)

Chapter 8A Queensland Workplace Rights Office

Part 1 Preliminary

339A Definitions for ch 8A

In this chapter—
ombudsman means the Queensland workplace rights ombudsman.

QWRO means the Queensland Workplace Rights Office.

339B Purpose of ch 8A

The purpose of this chapter is to provide for the appointment of the Queensland workplace rights ombudsman and to establish the Queensland Workplace Rights Office.

Part 2 The Queensland workplace rights ombudsman

339C Ombudsman

There is to be a Queensland workplace rights ombudsman.

339D Functions of ombudsman

(1) The ombudsman has the following functions—

(a) to consult with any persons the ombudsman considers are affected by industrial relations and other work-related matters;

(b) to inform, educate and promote informed decision-making by persons the ombudsman considers are affected by industrial relations and other work-related matters;

(c) to facilitate and encourage fair industrial relations and work practices in Queensland, including by developing codes of practice;

(d) to investigate and publicise unlawful, unfair or inappropriate industrial relations and other work-related matters in Queensland;

(e) to refer instances of possible unlawful industrial relations and other work-related matters to appropriate authorities or services;

(f) to make representations to an appropriate person or body about industrial relations and other work-related matters;

(g) to monitor and report to the Minister on industrial relations and other work-related matters in Queensland;

(h) to investigate and report to the Minister on the impact of any aspect of industrial relations and other work-related matters affecting Queenslanders;

(i) to advise the Minister on the operation of this chapter and generally about industrial relations and other work-related matters;

(j) to inform the Minister about strategies to—

(i) mitigate the negative effects of legislation from any source about industrial relations and work-related matters; and

(ii) improve protection for vulnerable workers; and

(iii) promote fair and equitable industrial relations and work practices in Queensland;

(k) to ask for help or information from any public entity about work-related matters;

(l) other functions conferred on the ombudsman under this or any other Act.

(2) The ombudsman may carry out the ombudsman's functions and exercise the ombudsman's powers if asked by the Minister or any other person or entity or on the ombudsman's own initiative.

(3) In this section—

public entity means—

(a) a government entity under the *Public Service Act 2008*; or

(b) a corporation formed for a commercial purpose the shares of which are held beneficially on behalf of the State.

339E Ombudsman not subject to direction

The ombudsman is not subject to direction by any person about—

(a) the way the ombudsman performs the ombudsman's functions under this Act; or

(b) the priority given to investigations.

339F Powers of ombudsman

Without limiting the ombudsman's other powers under this part, the ombudsman may do anything necessary or convenient to be done for, or in connection with, the ombudsman's functions.

339G Restrictions on ombudsman's functions

(1) The ombudsman can not represent an individual in a proceeding or otherwise act as an agent for an individual.

(2) The ombudsman must not deal with, or continue to deal with, a matter if the ombudsman is or becomes aware that the matter is or has been the subject of a proceeding before an industrial tribunal.

(3) However, if the proceeding is discontinued or did not result in a decision being made, the ombudsman may start to deal, or resume dealing, with the matter.

(4) In this section—

industrial tribunal means the full bench, the commission, the registrar or any court of the State.