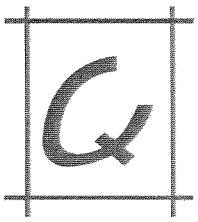

Queensland Council of Unions

Queensland Council of Unions submission to the Standing Committee on Education, Employment and Workplace Relations into the Fair Work Bill 2008

9 January 2009

QUEENSLAND COUNCIL OF UNIONS SUBMISSION TO THE STANDING COMMITTEE ON EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS INTO THE FAIR WORK BILL 2008

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Glossary

ACTU: Australian Council of Trade Unions
AEC: Australian Electoral Commission
AREOs: Authorised Representatives of Employee Organisations
FWA: Fair Work Australia
FWB: Fair Work Bill 2008
HREOC: Human Rights and Equal Opportunity Commission
IC Act: Independent Contractors Act 2006
IRA: Industrial Relations Act 1999 (Qld)
IR Act: Industrial Relations Act 1996 (NSW)
NES: National Employment Standards
QCU: Queensland Council of Unions
QIRC: Queensland Industrial Relations Commission
SDA: Sex Discrimination Act 1984
TERC: Training and Employment Recognition Council
VETE: Vocational Employment, Training and Education Act 2000
WHS: Workplace health and safety

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 takes an active involvement in state and federal industrial relations policy issues.

3. The QCU has participated in the Senate Inquiry process for the introduction of various pieces of industrial relations legislation, more relevantly since the early 1990s. This has included the adoption within the state jurisdiction of mirrored legislation to that operating in the federal jurisdiction during the course of 1992-1994.

4. The QCU has actively participated in inquiries that have been established at a state level around the existing (and predecessor) state industrial relations legislation.

5. The QCU submission to this Inquiry is designed to assist in comparing and contrasting the operation and application of the proposed Fair Work Bill 2008 (FWB) to the Industrial Relations Act 1999 (Queensland) (IRA). The basis upon which such a comparison is undertaken is clearly as a result of the policy decision by the federal government to create a national industrial relations system.

6. To secure this outcome, the government has highlighted the transfer of the non-incorporated private sector into the federal jurisdiction. Such a transfer would require the support of the state regulators, along with the adoption of a preferred method to accommodate for such transfer.

7. As the next stage of legislative activity, the adoption of a transitional Bill has not been completed; along with any effective indication by the states to supporting a transfer arrangement, there is no clear understanding of how such a transfer would be accommodated.

8. As such the QCU has worked on the premise that to fully consider the Fair Work Bill 2008 (FWB) requires a comparison to what operates within each of the states' jurisdictions, or in the QCU's instance, the Queensland jurisdiction, to establish areas of synergy and of difference.

9. The QCU also notes that in developing holistic legislation such as that reflected in the FWB, it remains an anomalous situation that a separate legislative framework can continue to operate for a sector such as the building and construction industry.

10. The QCU rejects that notion.

BACKGROUND

11. Workers and employers in Queensland are principally subject to the Industrial Relations Act 1999 (Queensland) (IRA). The Industrial Relations Act 1999 is one of the most important pieces of legislation to be introduced this century for the Queensland community. The Queensland Government's view at the time of introducing the legislation was that to bring about jobs growth and enhanced economic performance it was necessary to work constructively with both workers and employers in delivering these outcomes.

12. The Queensland Government established an independent tripartite Industrial Relations Taskforce in July 1998. The Taskforce's terms of reference reflected the government's view that the industrial relations system must contribute to a strong and competitive economy, job creation, fairness and equity, and consultation and cooperation.

13. The Queensland Government set the following terms of reference for the review of Queensland's industrial relations legislation: the new legislation will result in the development of an industrial relations system which:

    a) improves the strength of the economy, provides for job growth and enhances job security;
    b) meets the needs of emerging labour markets and work patterns;
    c) is fair and equitable;
    d) provides an effective balance between collective and individual rights;
    e) is flexible, responsive and accessible; and
    f) a system which protects the wages and conditions of workers;

14. Examples of the elements which formed the basis of the legislative review included:

    a) strengthening and enhancing job security and addressing the issue of non-standard forms of work and related employment conditions;
    b) creating a responsive and accessible industrial relations system;
    c) fair and equitable arrangements for wages and conditions which meet the needs of industry, employers and employees including the public sector; and
    d) the need for a viable, relevant and up-to-date award system which protects the wages and conditions of workers.

15. The establishment of the Industrial Relations Taskforce allowed for the most extensive and comprehensive review of Queensland's industrial laws ever undertaken. This provided an opportunity for the Taskforce and all those who participated in the process to focus on the key issues concerning the changing nature of employment and work today.

16. This legislation in its current guise was prepared subject to tripartite endorsement through a review Taskforce chaired by Professor Margaret Gardner, and involving senior representatives from Commerce Queensland

(ACCI's state counterpart) and the AIGroup. Professor Ron McCallum was also a member of the Taskforce. Its deliberations were far reaching and in the context of a tripartite activity, broadly inclusive of agreement for the changes that are now a feature of the Queensland system.

17. Indeed that broad agreement reflects the constituency of those organisations who have maintained an alliance with a state industrial relations system.

18. Reference to the outcomes from the Taskforce review will form a factor of the submission that the QCU will make to this Inquiry.

19. The submission will deal with key areas where the QCU contends that a great degree of synergy exists between what is proposed for adoption within the Fair Work Bill 2008 (FWB) and that which exists within the Industrial Relations Act 1999 (Queensland) (IRA); and where that synergy has failed to occur.

20. The submission identifies at the outset the potential impact that the FWB will have on the Queensland jurisdiction as a result of the policy position advanced by the Federal Government for extending the Bill (with agreement) to the non-incorporated private sector. The submission will additionally cover, in order of their appearance in the federal Bill, the following areas:

    a) the application of the FWB;
    b) the National Employment Standards (NES);
    c) modern awards;
    d) agreement making and workplace determinations;
    e) equal remuneration;
    f) transfer of businesses;
    g) unfair contracts;
    h) unfair dismissal;
    i) industrial action; and
    j) right of entry.

21. The submission will, where appropriate, highlight areas where the QCU proposes legislative amendment could secure a more robust piece of legislation.

SIZE OF THE STATE JURISDICTION

22. For the purposes of this section of the submission, note should be made that reliance has been placed on statistical data collected and publicly released by the Queensland Government as a set of estimates of the impact that WorkChoices had on the Queensland industrial relations landscape.

23. This data confirms that prior to the operation of WorkChoices, around 28% of employees in Queensland were covered by the federal jurisdiction, and around 55% of employees were covered by an award or agreement in the

state jurisdiction. These estimates translate to around 1 000 000 employees covered by state awards or state agreements.

24. In addition, there were estimated to be a further 17% of employees in Queensland who are not covered by awards and agreements but have some minimum entitlements protected by the IRA and are entitled to receive the Queensland Minimum Wage. These employees are effectively covered by the state jurisdiction. This brings the estimated total coverage of the Queensland state jurisdiction, before WorkChoices, to around 72% or over 1.19 million employees.

25. The coverage of the state jurisdiction prior to the introduction of WorkChoices comprised both incorporated and unincorporated employers. The legal or corporate status of an employer was not a determining factor in what jurisdiction an employer operated in.

26. This changed with the introduction of WorkChoices. Under s.4b(a) of the Workplace Relations Act 1996 (WorkChoices Consolidation), an employer covered by the federal legislation now includes, automatically, all constitutional corporations (most, but not necessarily all, incorporated entities).

27. This means the estimate of the reach of the state industrial relations jurisdiction now covers only unincorporated entities, including the public sector, as constitutional corporations excluded from the state jurisdiction.

28. Using data from the 2004 ABS Survey of Employee Earnings and Hours presented in table 1 below, it was estimated that the unincorporated sector, including the State Government, made up around 40% of employees in Queensland.

29. This estimate has increased since the decorporatisation of statutory authorities and local authorities in 2007 and 2008.

30. The data more accurately points to around 27.3% of Queensland employees engaged by non-incorporated private businesses; plus 12.8% engaged by the State Government; 2.3% engaged by local governments; and 3.3% engaged by statutory authorities. Excluded are employees (2.3%) engaged by the Federal Government. This results in 45.7% of Queensland employees engaged by non-incorporated entities.

31. The greatest proportion of employees engaged by unincorporated private businesses is in the property and business services sector (43.5%); with the retail trade sector, health and community services sector, cultural and recreational services sector and personal and other services sector all around 35%. Accommodation, café and restaurants (26.8%) and construction (30%) sectors also have substantial proportions of employees engaged by non-incorporated private businesses.

Table 1: Estimated coverage of the unincorporated sector

	Incorporated sector + Australian government + State owned corporations + Local government =potential federal sector		Unincorporated sector +State government =potential state sector		Range of potential state sector	
	%	No. non-farm emps 000s	%	No. non-farm emps 000s	Low %	High %
NSW	75.2	2078.7	24.8	685.5	21.8	27.8
VIC	100.0	2156.1	0.0	0.0	0.0	0.0
QLD	59.9	989.8	40.1	662.6	36.9	43.3
SA	59.2	364.4	40.8	251.1	35.0	46.6
WA	59.9	513.7	40.1	343.9	33.3	46.9
TAS	62.3	112.7	37.7	68.2	29.3	46.1
NT	100.0	85.0	0.0	0.0	0.0	0.0
ACT	100.0	164.9	0.0	0.0	0.0	0.0
AUST	76.3	6465.3	23.6	2011.4	21.7	25.7

Source: Unpublished data, ABS Survey of Employee Earnings and Hours (Cat. no. 6306.0) May 2004, ABS Labour Force Survey (Cat. no. 6202.0)

32. A state industrial relations jurisdiction covering around 1 000 000 employees represents a significant proportion of the Queensland workforce.

33. The next table below shows the strong association between workplace size and the likelihood that a business will be unincorporated. While unincorporated organisations make up just over a quarter of all workplaces, they make up about half of workplaces in Queensland with fewer than 20 employees.

34. Within the 27.3% of non-incorporated private businesses, almost 50% of those businesses engage less than 20 employees, with almost 83% engaging less than 100 employees.

Table 2: Workplace size and type of legal organisation.

	Incorp	**Unincorp**	**Aust Govt**	**State Govt**	**State Govt Co**	**Local Govt**	**Total**
1 to 19 employees	49.5	49.9	0.0	0.4	* 0.1	** 0.1	100.0
20 to 99 employees	63.3	33.0	0.3	** 0.1	** 0.3	* 3.0	100.0
100 to 499 employees	71.8	19.2	** 2.2	** 3.2	** 0.7	** 3.0	100.0
500 + employees	38.4	8.1	5.4	35.3	9.2	3.6	100.0
Total	52.0	27.3	2.3	12.8	3.3	2.3	100.0

Source: Unpublished data, ABS Survey of Employee Earnings and Hours (Cat. no. 6306.0) May 2004

Notes:

np not published

na not available

* Estimate has a relative standard error of between 25% and 50% and should be used with caution.

** Estimate has a relative standard error greater than 50% and is considered too unreliable for general use.

35. The size of the state jurisdiction is an important factor when considering the development of any new federal legislative system particularly if the legislation is designed to capture or extend its application into what was traditionally state coverage.

36. Any consideration for transfer arrangements into the federal jurisdiction requires an assessment of the impact such change will have on the industrial relations environment employees (and their employers) have experienced within the states' jurisdiction.

APPLICATION OF THE FAIR WORK BILL 2008

37. The Fair Work Bill 2008 (FWB) will apply to national system employers. This concept, similar to that in the current Act, will include constitutional corporations; some specified employers engaged in interstate trade and commerce; the Territories; and state referred employers (if and when those states refer powers).

38. Like WorkChoices, some provisions of the legislation (relating to unlawful termination of employment, parental leave, and some of the general protections) will apply to all employers and employees disregarding whether they are national system employers or not.

39. The Bill expressly "covers the field' to the exclusion of certain state laws but expressly preserves other state laws. The list of preserved state laws has been expanded to include workplace surveillance and trading hours (s.27(2)).

Vocational Education and Training (VETE)

40. The FWB provides at ss.26 and 27(2)(f) for the exclusion of 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 provision is altered from the text that appeared in WorkChoices.

41. 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.

42. This was recognised by the Queensland Industrial Court in the decision of *Murrays Australia Ltd V The Training Recognition Council and Ors*[2] when

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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)

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 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.*

43. 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.

44. 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 FWB has extinguished this provision with respect to employees of constitutional corporations

45. 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.*

46. The FWB 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.

47. The potential impact of the FWB on the Queensland training legislation is outlined below; along with (for completeness) a comparator to the impact with WorkChoices.

Table 3: Comparison between Queensland legislation, WorkChoices and FWB – level of impact

Training arrangement VETE Act TERC Delegation	**Impact – WorkChoices legislation** Employers under pre and post reform federal awards or agreements	**Impact - FWB**
Nominal term of a training contract s. 49 VETE Act Delegation 12	Cannot be overridden by a federal award or agreement as it is a non-allowable award matter and is not mentioned in Regulation 1.5. Therefore the federal awards or agreements are subject to the state law. If federal award or agreement is silent, VETE Act provisions will apply.	No longer excluded as non-allowable award matter. May be included in a modern award. VETE Act provision excluded.
Probationary period s. 50 VETE Act Delegation 10 (Extension or reduction of probation)	Can be overridden by a specific provision in a federal award or agreement under Regulation 1.5(8). If federal award or agreement is silent, VETE Act provisions will apply.	May be included in a modern award. VETE Act provision excluded.
Ending apprenticeship or traineeship in probationary period s. 51 VETE Act s.138A IR Act	Can be overridden by a specific provision in a federal award or agreement under Regulation 1.5(8). If federal award or agreement is silent, VETE and IR Act provisions will apply.	May be included in a modern award though could be considered an administrative arrangement and therefore excluded under s.27(2). VETE Act provision excluded.
Registration of training contract s. 54 VETE Act Delegation 1 a) Restriction on employment of casual employees as apprentices or trainees.	Can be overridden by a specific provision in a federal award or agreement under Regulation 1.5(7). If federal award or agreement is silent, VETE Act provisions will apply.	May be included in a modern award though could be considered an administrative arrangement and therefore excluded under s.27(2). VETE Act provision excluded.

Training arrangement VETE Act TERC Delegation	**Impact – WorkChoices legislation** Employers under pre and post reform federal awards or agreements	**Impact - FWB**
b) Part time and school based apprentices and trainees - Minimum hours of work set by TERC	Non-allowable award matter. Can not be overridden by a federal award. Possibly could be overridden by a specific provision in a federal agreement under Regulation 1.5(16). If federal award or agreement is silent, VETE Act provisions will apply.	No longer excluded as non-allowable award matter. May be included in a modern award. VETE Act provision excluded.
c) Restrictions on whether a person may be employed as a school based apprentice or trainee	Can be overridden by a specific provision in a federal award or agreement under Regulation 1.5(7). If federal award or agreement is silent, VETE Act provisions will apply.	May be included in a modern award though could be considered an administrative arrangement and therefore excluded under s.27(2). VETE Act provision excluded.
Suspension and cancellation for serious misconduct S. 64 VETE Act Delegation 6	Can be overridden by a specific discipline provision in a federal award or agreement under Regulation 1.5(14). Employer must still apply for cancellation of the training contract under VETE Act, but will most likely be able to satisfy s 63(1)(a)(ii) for cancellation.	May be included in a modern award. VETE Act provision excluded.
Discipline s. 71 VETE Act Delegation 7	Can be overridden by a specific provision in a federal award or agreement under Regulation 1.5(14). If federal award or agreement is silent, VETE Act provisions will apply.	May be included in a modern award. VETE Act provision excluded.
Delayed completion of a registered training contract s. 77 VETE Act Delegation 11	Cannot be overridden by a federal award or agreement as it is a non-allowable award matter and is not mentioned in Regulation 1.5. Therefore the federal awards or agreements are subject to the state law.	No longer excluded as non-allowable award matter. May be included in a modern award.

Training arrangement VETE Act TERC Delegation	**Impact – WorkChoices legislation** Employers under pre and post reform federal awards or agreements	**Impact - FWB**
	If federal award or agreement is silent, VETE Act provisions will apply.	VETE Act provision excluded.
Temporary stand down under registered training contract s. 86 VETE Act Delegation 16	Can be overridden by a specific provision in a federal award or agreement under Regulation 1.5(10). If federal award or agreement is silent, VETE Act provisions will apply.	May be included in a modern award. VETE Act provision excluded.

48. 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.

Recommendation

49. **A review of the consequences whether intended or unintended of the extension of terminology within the application section of the FWB should occur to ensure that the impact of such extension does not result in a diminution of the training and employment protections that are available to Queensland apprentices and trainees.**

The application and operation of two distinct contracts, one for training and one for employment, that are intrinsically related, is a clear determinant for ensuring that vocational education and training issues are regulated within the one jurisdiction. To this end the Inquiry members should propose that the application of the FWB be limited so that VETE areas are jurisdictionally maintained by state legislation.

NATIONAL EMPLOYMENT STANDARDS (NES)

50. Note should be made that the application of the legislative employment standards operating under Queensland legislation generally apply to both award regulated and award free employees. The legislation does provide in some instances for a caveat in regard to reading between an award and the legislation for the purposes of determining which is the applicable employment condition.

51. The capacity for a range of legislative minimum conditions to have equal application to both award and award-free employees, and employees disregarding wage level, is a feature of the Queensland statute. See for example ss.10 (sick leave) and 11 (annual leave).

52. The QCU notes that in developing the NES that the discussion paper[3] indicated (at point 24) that "modern awards are intended to complement the NES". In Queensland it is often the case that the statutory employment condition complements the award.

53. The matters that arise in regard to the proposed NES and the statutory minimum conditions that operate in Queensland are issues of intercession. The NES are couched in terms where the NES would be the minima and the capacity to build on that minima would be through the award or agreement but cannot derogate from them, in the sense of providing a term that is detrimental to the employee when compared to the NES (unless permitted by regulations: see ss.55 and 127). This is the inverse of the Queensland system where in some instances the legislative prescription is the detailed provision, and the award contains a referral point, or provisions less than the legislation.

54. The impact of the NES on workers who were previously regulated by the Queensland industrial relations system is evident in a number of areas. Note should also be made that in other areas a degree of synergy now exists between the NES and the Queensland legislative minima. These are matters that the QCU has previously raised during the NES consultation stage and are a positive change to that which appeared in the original NES provisions.

55. Areas in which the NES show difference in application to the provisions found in the Queensland legislation include underlying principles such as the definition of service; request for flexible working arrangements; parental leave; annual leave; carer's leave; and notice of termination and redundancy.

Definition of service

56. The FWB provides a definition of "service" that is largely consistent with the IRA. However the IRA goes further than the FWB in addressing the impact of a number of specific circumstances on service. For example service is not broken for re-employment of the employee if the employee terminated their employment as a result of injury or illness and the employee has not been re-employed in a calling between termination and re-engagement. See ss.71(4).

57. Also re-employment of the employee within a period of three months (see ss. 71(5)) results in there being no break in service.

58. Service is also not broken if the employer terminates an employee with the intent to avoiding any employment obligations; or as a result of an industry dispute and the employer subsequently re-employs the employee. See ss. 71(6).

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[3] DEEWR (2008) *National Employment Standards Exposure Draft Discussion Paper* Commonwealth of Australia

59. And finally service is not broken if termination occurs as a result of slackness of trade and where the employer re-employs the employee. See ss. 71(7).

60. Note that service with a corporation includes service with any of its subsidiaries. See ss. 71(8).

61. Further, the IRA (s.11) provides that any period of approved leave over three months will not be counted as service for the purposes of calculating recreational (annual) leave. This means that annual leave accumulates for the approved leave absence of less than three months. The FWB is silent on this point.

62. In respect to the accumulation of leave, amendments to previous drafts of the NES have already seen a matching of entitlements proposed under the federal regime and the existing Queensland entitlement. With respect to the taking or accruing leave or absence while receiving workers' compensation, Queensland Workcover legislation provides for accrual of leave entitlements whilst absent on illness or injury for which they are receiving workers' compensation. The FWB (s. 130) now supports the Queensland regime by allowing the taking and accumulation of leave during compensation periods where permitted and if allowed under a compensation law.

Request for flexible working arrangements

63. The IRA (ss.29B-C) entitles an employee returning from parental leave to request part time work. The FWB (s.65-66) is more generous than the IRA in that it creates an entitlement to request flexible working arrangements at any time, while a child is less than school age. Unlike the IRA, the entitlement in the FWB is not limited to part time work, nor is it limited to when an employee returns from parental leave.

64. Despite having a less generous entitlement, the IRA more broadly articulates what must be considered by an employer when considering an application for flexible working arrangements. Under the Queensland Act (s.29D), an employer must not only consider reasonable business grounds. An employer must also consider the impact of a refusal on the employee as a carer. When considering an application under the FWB, an employer must only consider "reasonable business grounds" (s.65).

65. Significantly the recent Senate Inquiry into the effectiveness of the *Sex Discrimination Act 1984* in eliminating discrimination and promoting gender equality has recommended that the *Sex Discrimination Act 1984* (SDA) be amended to create a positive duty on an employer to reasonably accommodate a request for flexible working arrangements.[4]

66. The Senate Inquiry went on to recommend the insertion of a provision consistent with section 14A of the *Equal Opportunity Act 1995 (Vic)*. The

[4] Recommendation 14

Victorian provision requires consideration of the employee's circumstances, including:

a) the nature of his or her responsibilities as a parent or carer;
b) the nature of the employee's role;
c) the nature of the arrangements required to accommodate those responsibilities and the financial circumstances of the employer;
e) the size and nature of the workplace and the employer's business;
f) the effect on the workplace and the employer's business of accommodating those responsibilities including the financial impact of doing so, the number of persons who would benefit from or be disadvantaged by doing so, the impact on efficiency and productivity and, if applicable, on customer service of doing so, and the consequences for the employer of making such accommodation; and
g) the consequences for the employee of not making such accommodation.

Parental leave

67. The FWB at (s.743–757) extends parental leave provisions to non-national employees except to the extent that state provision are more generous. The IRA is more generous than the provision proposed under the FWB in a number of respects. The result is an untenable situation where non-national employees will operate under a patchwork of federal and state legislative arrangements, while national employees will operate under inferior federal arrangements.

68. Examples follow.

69. **Casual - eligibility:** A long term casual is defined in s.15A of the IRA as a casual employee engaged on a regular and systematic basis for at least 12 months. A long term casual is eligible for parental leave under the IRA (s18). The FWB (s.67(2)) does away with the 12 months service requirement but significantly reduces access to the entitlement by imposing the additional caveat that a long term casual must have reasonable expectation of continuing employment in order to be eligible for parental leave.

70. **Special maternity leave:** The IRA at s.26 clearly provides that an employee make take either unpaid special maternity leave and/or paid sick leave for as long as the doctor certifies it as necessary. The special maternity leave provision in the FWB (s. 80) is unclear as to relationship between paid personal/carer's leave and unpaid "special" maternity leave.

71. **Transfer to safe job:** The FWB at s.81 appears to improve the IRA by creating an entitlement to paid leave where a transfer to safe job is not available. Under the IRA, where safe work is not available, an employee must take unpaid leave (s.36). However the FWB is inferior to the IRA as it is limited to pregnancy. The IRA at s.36 creates an entitlement to a transfer to safe job for pregnant women and breastfeeding mothers.

72. The recent Senate inquiry into the effectiveness of the SDA in eliminating discrimination and promoting gender equality has recommended that the SDA be amended to include breastfeeding as a specific ground of discrimination.[5] Such an amendment creates greater protection for breastfeeding mothers in the workplace. However this is not equivalent to the clear entitlement to safe work articulated in the IRA.

73. **Return to work and casuals:** The IRA (s. 32(5)) provides greater protection for casual employees by specifically ensuring that if a long term casual employee's hours are reduced because of pregnancy then those hours must be restored when the employee returns to work. The FWB is silent on the re-engagement of casuals.

74. **Consultation:** The FWB at s.83 requires an employer to consult an employee on parental leave in respect of change that has a significant impact on the status, pay or location of an employee's substantive position. The IRA at ss.38A – B contains a broader requirement for an employee to be consulted about any "significant change in the workplace", not just change directly related to their substantive position.

75. **Ceasing to have responsibility for child:** The FWB (s. 78) allows for the ceasing of parental leave where an employee ceases to be responsible for a child. The IRA (s. 31) anticipates more complex circumstances and requires consideration of all the factors where determining if an employee is no longer a primary care giver.

76. **Dismissal:** The IRA at s.34, expressly states that an employee cannot be dismissed due to pregnancy. The FWB includes no express protection against dismissal due to pregnancy.

77. **Extending leave beyond 12 months:** The IRA at s.29D requires an employer to give consideration to a broad range of factors, most specifically the impact of a refusal on the employee as a caregiver and the employee's dependants. The FWB (s.76) only requires the employer to make the decision in terms of 'reasonable business grounds'. What constitutes 'reasonable business grounds' is not defined.

78. In contrast to the deficiencies in the proposed federal legislation outlined above, there are instances where amendments to the original exposure draft of the NES have resulted in the proposed federal provisions aligning with Queensland provisions. For example the IRA defines spouse broadly to include same sex couples (Schedule 5). The FWB definition of defacto partner has been extended to include a couple living on a genuine domestic basis regardless of gender (s.12).

79. A further example is in relation to the notice period for parental leave. The IRA requires 10 weeks notice of intention to take leave but exact start and

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[5] Recommendation 12

finish dates do not need to be provided until four weeks prior to commencing leave (s.19).

80. Amendments to the previous draft NES have seen the insertion of (s.74(4). This amendment has reduced the onerous notice requirements in previous NES drafts and brought the FWB into line with IRA. The FWB now requires an employee to give written notice of dates for parental leave 10 weeks prior to taking leave however these dates must be confirmed and changed four weeks prior to intended commencement of leave (s.74)

Annual leave

81. The IRA (s. 13) expressly precludes the cashing out of leave except in the case of termination of employment. The FWB at ss.92-93 expressly permits the inclusion of such provisions in modern awards. Similarly at s.101 the FWB permits the inclusion of provisions permitting cashing out personal/carer's leave.

82. In regards to the cashing out of annual leave entitlements, the AIRC in the recent award modernisation decision[6] observed that should cashing out provisions become widespread, the purpose and prescribed levels of annual leave could be undermined. The AIRC considered cashing out of annual leave to be more appropriately dealt with in bargaining.

83. The same argument could be applied to the cashing out of personal/carer's leave.

Personal/carer's leave and compassionate leave

84. The IRA is more generous that the FWB with respect to access to personal/carer's leave for casuals. The IRA at ss.39A and 39B outline a casual employee's entitlement to unpaid personal/carer's leave. The IRA and FWB (ss.95-107) both allow casual employees two days of unpaid carer's leave on each occasion. The IRA goes further, providing long term casuals (see definition s.15A) an entitlement of up to 10 days unpaid carer's leave in each year.

85. In addition to the entitlement to unpaid leave, the IRA provides a further protection for a casual employee (long term or short term) by providing in both ss.39A and 39B the express requirement that an employer must not fail to re-engage casuals who take their entitlement. The FWB is silent on the re-engagement of casuals.

Notice of termination and redundancy payment

86. The redundancy payment available under s.119 of the FWB is more generous than the Queensland standard in respect of employees with less than 10 years service. The Queensland standard is more generous in respect

[6] [2008] AIRCCFB 1000, AIRC, 19th December 2008 see para [99] –[100]

of an employee with more than 10 years service. The provisions in contrast follow:

Queensland and NES redundancy pay:

Period of Continuous Service	Severance Pay (weeks' pay)	
	Qld	**NES**
Less than 1 year	nil	nil
1 year but not more than 2 years	4	4
More than 2 years but not more than 3 years	6	6
More than 3 years but not more than 4 years	7	7
More than 4 years but not more than 5 years	8	8
More than 5 years but not more than 6 years	9	10
More than 6 years but not more than 7 years	10	11
More than 7 years but not more than 8 years	11	13
More than 8 years but not more than 9 years	12	14
More than 9 years but not more than 10 years	13	16
More than 10 years but not more than 11 years	14	12
More than 11 years but not more than 12 years	15	12
More than 12 years	16	12

87. Note that although the FWB provides that more beneficial state legislative provisions will continue to apply (see ss.758-768), the redundancy quantum is not a legislative feature but rather the QIRC standard.

88. The QCU notes that in the recent decision of the full bench of the AIRC for the award modernisation[7] that accommodation was made on a transitional basis for superior redundancy entitlements that were reflected in NAPSAs. The clause provided indicates that *an employee whose employment is terminated by an employer is entitled to redundancy pay in accordance with the term of the NAPSA that would have applied to the employees immediately prior to 1 January 2010 if the employee had at that time been in their current circumstances of employment ...*

89. The clause ceases to operate on the 31 December 2014.

90. The transitional nature of this award provision does not address the diminution in entitlement post 2014.

Recommendation

91. **The QCU contends that in areas where there is a diminution in employment standards between the NES and the state legislative (or policy) minima, then provision should be made to protect those entitlements for workers who transfer into the federal jurisdiction either as a result of a state "referring" those workers into the federal**

[7] [2008] AIRCCFB 1000, AIRC, 19th December 2008 see para [99] –[100]

jurisdiction; or alternatively as a result of WorkChoices having swept them into the federal jurisdiction.

The QCU notes that in the industrial relations policy initiatives of the Federal Government provision is made for *appropriate transitional arrangements* to be *put in place so that those currently covered by state industrial relations systems will not be disadvantaged as a result of the creation of the new industrial relations system*. See page 6 of the implementation guidelines.

The application of this commitment should be clearly outlined to ensure that where disadvantage may occur in the NES area, that such disadvantage does not occur for those employees previously regulated by the state industrial relations system.

MODERN AWARDS

92. The FWB provides that modern awards have the objective (the 'modern award objective') of providing a fair and relevant minimum safety net of terms and conditions, having regard to:

a) relative living standards and the needs of the low paid;
b) the need to encourage collective bargaining;
c) the need to promote social inclusion through increased workforce participation;
d) the need to promote flexible modern work practices and the efficient and productive performance of work;
e) the principle of equal remuneration for work of equal or comparable value;
f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden;
g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

93. These objectives are not dissimilar to the objectives within the Queensland legislation. The Queensland objectives were developed from the basis that the state industrial relations system had traditionally had a high proportion of employees covered by state awards. Although state award coverage has declined since the 1980s, this decline was the result of two separate changes: a general decline in the level of award coverage; and a shift from state to federal awards as employees were transferred to the federal system. In addition some 17% of Queensland employees have no award coverage.

Table 4: Proportion of Employees Covered by State Awards (percentage)

Jurisdiction	1983	1990	1998
Queensland	64	57	55
Western Australia	63	57	44
New South Wales	54	49	49
South Australia	53	48	48
Tasmania	51	46	38
Victoria	40	40	15*

Note: This is the percentage for 1996, prior to the Victorian Government's decision to relinquish its state industrial relations jurisdiction to the Federal Government.
Source: DETIR and DWRSB estimates based on ABS 1983, 1990
Note: This data has not been updated but reference to the data provided in regard to federal intrusion assists.

94. Despite these reported declines in award coverage, the reach of awards in terms of their coverage of employees is still extensive and in Queensland, state awards remain very important for setting the terms and conditions of employees. While many employees are covered by an award and an agreement, there are many employees who are solely reliant on awards for setting their terms and conditions. In rural and regional Queensland, there is continued heavy reliance on awards, with over 50% of employees being reliant solely on state awards for setting their minimum rates of pay.

Wage adjustments

95. Part 2-3 of the FWB set out (FWA) Fair Work Australia's power to set and adjust minimum wages and to make and vary awards. Together they provide for annual reviews of wages in awards and the National Minimum Wage; regular four yearly reviews of awards (commencing in 2013); and review of awards between the four-yearly reviews, but only to remove ambiguity, uncertainty or discriminatory terms or if it is necessary to achieve the modern awards objective.

96. In any four yearly review (or interim review), wages can only be adjusted on work value grounds (see s.156).

97. The Industrial Relations Taskforce, which reviewed Queensland's legislation, believed that the process of award review begun in the early 1990s should be reinstituted and awards should be reviewed regularly by the commission. The previous award review provision that required review at least every three years was viewed as the standard to be adopted.

98. As the Taskforce indicated in its report at p.128 *awards should be reviewed in order to clarify and modernise their contents. However, the Taskforce also recommends that a party may apply to the commission for a variation of wages and conditions of employment, when their award is being reviewed or at another time. This could happen as a part of the award review process. A series of principles should guide the commission in reviewing and varying awards. These include providing for fair minimum standards*

for employees in the context of living standards generally prevailing in the community and providing for secure, relevant and consistent wages and employment conditions. Apart from attention to fairness, the commission should also ensure the award provides for efficient performance of work and that the variations take account of various economic and efficiency factors. While conditions won through agreements would be relevant to such variations, the restriction on automatic flow-on of terms in an agreement to an award should prevail. The Taskforce believes that allowing for application to vary awards will ensure that they remain relevant for those who are solely reliant on them for setting wages and conditions of employment. ...[8]

99. In the Queensland *Statement of Principles 2008* wage adjustments are not limited to adjustments associated with work value. The principles provide for award variation based on enterprise bargaining outcomes: see s.129 of the Queensland legislation. This reflects the legislative capacity for such variations.

100. The Industrial Relations Taskforce indicated in its Report that *enterprise bargaining increases should be able to be rolled into the relevant award. The majority believed that retaining restrictions on automatic flow-on will prevent difficulties that might arise from allowing agreements in certain enterprises to act as a 'whipsaw' for conditions across a common rule award. However, it should be noted that the commission has discretion in relation to flow-on of conditions, subject to its full bench principles. It would not be expected that agreement conditions would be easily incorporated in awards in most circumstances. However, it is worth noting that in the public sector there are special cases where such incorporation might not cause inappropriate enterprise-related outcomes to be imposed across a larger sector. Thus the relationship of conditions in agreements and in awards remains a matter for commission decision.*[9]

101. Such provision to reflect bargained settlements within award minima does not exist under the FWB. However the terms of a modern award are underpinned by ensuring the relevance of that award. Potentially a predecessor federal award may not have been reviewed (for wage levels) other than for minimum wage adjustments for over a decade. This undermines the objective of ensuring relevancy.

102. FWA will review awards on its own initiative, or else on the application of a party covered by the award (or a union that has a member covered by the award). The Human Rights and Equal Opportunity Commission (HREOC) can also apply to have discriminatory terms reviewed. These provisions are not dissimilar to those applying under the Queensland legislation.

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[8] DETIR (Dec 1998) *Review of the Industrial Relations Legislation in Queensland Report of the Industrial Relations Taskforce* Qld Government

[9] Op cit p.128

Application of awards

103. An employer may provide an employee with a written guarantee that their annual earnings will exceed the high income threshold ($100,000 indexed from August 2007 under Regulations). The employee must agree to the guarantee. If they do so, the award will not apply to them (although it continues to 'cover' them, for various purposes under the Bill). The payments that count towards the high income threshold include wages; the agreed value of non-monetary benefits; and superannuation top-ups.

104. Payments that are excluded include uncertain forms of pay, such as commissions, bonuses or overtime (unless the employer guarantees to pay them).

105. In the QCU's submission to the Senate Inquiry in February 2008 it noted *(T)he Explanatory Memorandum suggests that the Minister will direct the Commission to exclude 'high-income earners' from the operation of modern awards. It suggests (at page 8) that the relevant threshold will be an income of $100 000 per annum. An income of $100 000 per annum is no longer unusual in certain occupations and industries; indeed, it is the average wage in the mining industry.*[10] *Yet many employees earning these wages remain vulnerable, and should not be left award-free in the event that they cannot negotiate a suitable collective agreement or common law agreement. The QCU supports the ACTU submission on this point and, if a monetary figure is to be used to exclude certain employees from award coverage, the amount should be closer to $150 000.*

106. The QCU continues to support that position.

State based differentials

107. In the QCU's submission to the Senate Inquiry in February 2008 it noted that *(M)odern awards will not be permitted to contain state-based differentials after 2013 (proposed section 576T). There could however be a widely observed custom within a particular State or Territory for such differential. As such there is no good reason to exclude its inclusion in a modern award (provided it falls within the range of allowable matters), simply because there are, for historical reasons, geographical limitations upon the observance of the custom. The QCU submits that the Commission should have the discretion to allow state-based differentials, taking into account all relevant factors.*

108. The QCU continues to support that position.

[10] The average income in mining is $100,000 pa: ABS cat 6302.0.

Recommendation

109. **The Inquiry members should recommend that the breadth of activity surrounding the maintenance and review of modern awards should factor in the capacity to vary such awards for matters in addition to work value grounds. These matters could include outcomes from bargaining in a similar context to that existing within the IRA.**

AGREEMENT MAKING AND WORKPLACE DETERMINATIONS

Types of agreements

110. The FWB (s.172) provides for four different forms of enterprise agreement being: single-enterprise agreements; multi-enterprise agreements; greenfields agreements; and single interest employers.

111. The IRA (s.141) allows for a similar number of types of certified agreements being: single employer; multi-employer; and new business (greenfields). In addition the IRA provides for project agreements; which are not a feature of the FWB.

112. In the IRA (schedule 5) a multi-employer is defined as two or more associated employers whether associated because they are related corporations; are engaged in a joint venture or common enterprise; or undertaking similar work. This definition shows a commonality with a single interest employer (ss.172(5)) and multi-enterprise agreement (ss.172(3)) in the FWB. There is an obvious match between the single-enterprise agreements in the FWB and agreements for a single employer under the IRA.

113. In regard to multi-employer agreements in Queensland, the Industrial Relations Taskforce concluded that this type of agreement should be available. In the case of a proposed multi-employer agreement, all those parties who intend to bargain together must sign a document indicating their intention to be part of such a negotiation. This allows all parties who wish to be involved to be genuinely involved in the negotiations from the outset. It also clarifies the negotiation process by indicating the scope of the multi-employer agreement being proposed. The agreement proposed is the same agreement for all the scoped employers.

114. In addition the Queensland legislation provides for project agreements which may be entered into before the commencement of the project between an employer or employer organisation and all relevant organisations who wish to be a party to the agreement. The project agreement will be able to operate for the life of the project and will operate to the exclusion of all other agreements during its periods of operation. Where a project agreement is proposed to be made, all relevant employee organisation must be given the opportunity to participate in negotiations for the agreement and become a party if they elect to do so. Negotiations with the employer will take place

through a single bargaining unit of those who indicated they wished to participate in bargaining.

115. As Minister Braddy in his *Second Reading Speech* [11] indicated when these provisions were adopted: *These changes represent a significant improvement to the current arrangements for agreement, particularly as to how they operate on major projects in Queensland. First, they avoid the need to renegotiate agreements mid term during a project by extending the time in which the agreement may operate. Second, they can be entered into with an employer organisation prior to the commencement of the project, which will then subsequently bind all employers or contractors who would operate on the project. Third, the agreement will operate to the exclusion of any other agreement, which may otherwise bind a contractor, removing the conflict and confusion as to which employment conditions will apply on the project. Finally, it should remove the potential of industrial disputation by ensuring that all employee organisations who would otherwise have the right to represent employees on the project will be able to be a party to the agreement and participate within its framework.*

Content of agreement

116. When making an enterprise agreement, the IRA places no restriction on the content of the agreement. In contrast, the FWB (s.172) limits the content of an agreement to "permitted matters". The FWB also imposes requirements as to what provisions must be in an agreement (ss.202 – 205). These mandatory terms are not required under the IRA.

117. Note should be made that the Queensland legislation provides for an alignment in status between awards and agreements. This means, unlike the current FWB, or indeed the predecessor legislation, award regulation is seen as equally important and robust as agreement settlement. The capacity within the IRA to settle "industrial matters" within an award creates no limitation on the inclusion on any matter that is likely to give rise to an industrial dispute.

Bargaining process

118. The IRA and FWB diverge as to the commencement of bargaining. The requirement to give notice under the FWB is triggered by commencement of "notification time" (s.173). In contrast, under the IRA, the giving of notice is the first step in the bargaining process (s.143). Otherwise, the timeframe of 14 days between the giving of notice and actual bargaining is seen in the FWB (s.173) and the IRA (s.143).

119. The IRA and FWB outline a process for the approval (FWB) or certification (IRA) of an agreement. The process around the balloting of employees is largely similarly between the FWB and IRA except the IRA(s.144) requires a proposed certified agreement to be made available to employees for 14

[11] Hansard 25 May 1998

days prior to ballot while the FWB (s. 180) stipulates a much shorter period of seven days. The 14 day period under the Queensland legislation has enabled the participants in the agreement to more fully consider its content before the ballot is taken for approval, or not.

120. The IRA and FWB stipulates requirement to be satisfied prior to approval or certification. The IRA (s.156) and FWB (ss.186-187) similarly require that there be genuine approval by majority of employees; no coercion; that the procedural requirements of the Act are satisfied; the agreement is in writing; and a nominal expiry date is included.

121. The IRA (s.156(l) & (m)) also requires the QIRC to consider if the agreement remunerates all employees equally for work of equal or comparable value. The FWB imposes no requirement regarding pay equity. This provision is designed to ensure that outcomes contained within the agreement do not in themselves result in a pay inequity.

122. As part of the certification process, the QIRC is required by the IRA (s.156(j)) to ensure all employee organisations entitled to be party to the agreement are bound to that agreement. Under the FWB, employee organisations are not bound to an agreement but are entitled to notify FWA that they wish to be covered by the agreement (s. 183). The FWB does not require an employee organisation to be covered by the agreement.

Assistance in bargaining

123. The IRA and FWB significantly diverge in the powers granted to the respective tribunals to assist bargaining. The IRA empowers the QIRC to assist negotiation through conciliations (s.148) and ultimately, where the parties can not find agreement, then the QIRC has broad powers to arbitrate (ss.149-150). The powers to arbitrate arise where conciliation has been unsuccessful due to industrial action which has become protracted or may do harm; the QIRC considers further conciliation would not be successful taking into consideration any factors the commission considers appropriate including specifically the history of the industrial relations in that enterprise or history to which the agreement is to relate; or the parties to the negotiation ask the commission to arbitrate the matter.

124. When exercising its power to conciliate or arbitrate, the QIRC has powers equivalent to those available to it when resolving industrial disputes under s.230 (ss.148(2) and 149(2)). This grants to the commission the power to direct parties to stop or not proceed with particular action; make orders, or give directions, of an interlocutory nature; grant an interim injunction; or make another order or exercise another power the commission considers appropriate.

125. In addition, with respect to conciliation, the commission may make orders to promote the efficient conduct of negotiations; or ensure the parties negotiate in good faith; or otherwise help the parties to negotiate the agreement (s.148).

126. Under the FWB, FWA are not able to offer the same degree of assistance to negotiating parties. In contrast to the broad conciliation powers available to the QIRC, the capacity of FWA to make bargaining orders is limited to instances where the good faith bargaining requirements have not been met or bargaining is hindered by the number of bargaining representatives (s.228). FWA may then make a serious breach declaration if the bargaining order is not complied with (s.235).

Arbitration

127. In respect to arbitration, the difference between the IRA and FWB is at its greatest. The FWB limits the powers of FWA to arbitrate to instances where the parties agree to FWA arbitrating an agreement (s.240). Otherwise FWA may only make a workplace determination where a low-paid authorisation is in place (s.260: low-paid workplace determination); a termination of industrial instrument has been made (s.266: industrial action related workplace determination); or a serious breach declaration has been made (s.269: bargaining related workplace determination).

128. In order for FWA to make a determination in each instance, the FWB imposes onerous requirements beyond just the settlement of the agreement.

129. In the instance of a low-paid workplace determination, the determination will promote bargaining in the future, increase productivity and efficiency at the workplace and be in the public interest (s.262(4)).

130. In the instance of an industrial action related workplace determination there must be a termination of industrial action instrument (s.266); and for a bargaining related workplace determination, there must be a serious beach declaration (s.269(1)).

Good faith bargaining

131. The importance of good faith bargaining is clearly recognised in the IRA. Section 146 of the IRA requires all parties involved in the negotiation of an agreement to negotiate in good faith. The Act provides examples of what constitutes good faith bargaining including:

    a) agreeing to meet at reasonable times proposed by another party;
    b) attending meetings that the party had agreed to attend;
    c) complying with negotiation procedures agreed to by the parties;
    d) not capriciously adding or withdrawing items for negotiation;
    e) disclosing relevant information as appropriate for the negotiations; and
    f) negotiating with all of the parties.

132. The concept of good faith bargaining is present in the FWB. The FWB imposes an obligation on an employer to recognise and bargain with bargaining representatives identified by relevant employees (s.179). Further the FWB incorporates good faith bargaining as a requirement in the approval

process. FWA must be satisfied that approving an agreement would not undermine or be inconsistent with good faith bargaining (s.187(2)).

133. Section 228 of the FWB outlines the good faith bargaining requirement that must be met by a bargaining representative. This provision exhaustively defines what constitutes good faith bargaining. The IRA provision (s.146) has the advantage of being a list of examples of what constitutes good faith bargaining and accordingly is not an exhaustive list.

134. As the Industrial Relations Taskforce indicated in its report (at p.143) *bargaining in good faith provisions support constructive negotiations by the parties, and are consistent with the overall proposals for a framework for encouraging and supporting negotiations.*

Recommendation

135. **The Inquiry members should recommend that the bargaining process allow for participants to an agreement to have a period of 14 days to consider the content of the agreement before the ballot is taken for approval (or not).**

Further in the case of a proposed multi-employer agreement, the Inquiry members should recommend a process aligned to that operating within the IRA to ensure that the scope of the multi-employer agreement being proposed is the same agreement for all the scoped employers.

Further the requirement should be on the parties to ensure that the agreement provides for equal remuneration for work of equal or comparable value.

EQUAL REMUNERATION

136. The QCU, in conjunction with state peak union councils nationally and the Australian Council of Trade Unions (ACTU), made a submission to the House of Representatives Standing Committee on Employment and Workplace Relations Inquiry into Pay Equity and Female Workforce Participation (joint union's submission).[12] The recommendations in the joint union's submission comprehensively address the legislative and policy steps required by government to address pay equity.

137. As noted in the joint union's submission, the IRA is at the forefront of tackling pay equity. The IRA lists equal remuneration for work of equal and comparable value as a principle object of the Act (s.3(d)). Further the IRA requires the QIRC to ensure an award provides for equal remuneration for work of equal and comparable value (s.126(e)) and be satisfied prior to certifying an agreement that the agreement remunerates men and women equally for work of equal or comparable value (s.156(1)(l) and(m)).

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[12] http://www.aph.gov.au/house/committee/ewr/payequity/subs/sub125.pdf

138. The definition of pay equity as "equal remuneration for work of equal or comparable value" is also another important feature of the IRA (Schedule 5). As is the definition of remuneration as including wage or salary payable to an employee and any amount payable or benefit made available to an employee under a contract of service (Schedule 5). The principle of equal pay was extended to equal remuneration for work of equal or comparable value in the IRA. This change was made to remove ambiguity[13].

139. The inclusion of the concept of comparable work compliments the use of the word "remuneration" rather than "pay". The use of remuneration clearly demonstrates that the law is not solely concerned with the wage or salary but other payments made under the contract of employment[14]. The inclusion of comparable value removes any doubt that the pay equity principle is only limited to where the 'same' work is done. This inclusion extends the principle to clearly include 'similar' work.

140. The other significant feature of the IRA in regards to pay equity is the power of the QIRC to make equal remuneration orders (Chapter 2, Part 5, ss.59-66). Under this part of the Act, the QIRC can make any orders it considers appropriate to ensure equal remuneration for work of equal or comparable value. The equal remuneration orders are unique in that they are not an industrial instrument but override an industrial instrument otherwise made or approved by the QIRC. This includes awards and certified agreements.

141. The power to make equal remuneration orders complements the power under (s.125) of the IRA for the QIRC to make, amend or repeal any award to provide fair and just employment conditions. This includes ensuring equal remuneration for work of equal or comparable value.

142. The FWB adopts the definition of pay equity in the IRA being "equal remuneration for work of equal and comparable value" (s.302). This properly reflects the evolution in the thinking around pay equity. Unfortunately the FWB does not adopt a definition of remuneration consistent with the IRA. Nor does the FWB follow the Queensland example and entrench pay equity as a central tenet of the FWB. However the FWB does go some way forward by adopting the principle of equal remuneration for work of equal or comparable value as an objective of a modern award (s.134(1)(e)) and minimum wage objective (s.284(d)).

143. Significantly the FWB adopts a key strength of the IRA by granting to FWA under Chapter 2, Part 2-7, Divisions 2, the power to make orders "it considers appropriate" to ensure equal remuneration for work of equal or comparable value (s.302). The powers granted to FWA to make these orders are in line with the powers granted to the QIRC under the IRA.

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[13] QIRC March 2001 *Valuing Worth* para 3.2.1

[14] remuneration, for a provision relating to work of equal or comparable value, includes
(a) the wage or salary payable to an employee; and
(b) amounts payable or other benefits made available to an employee under a contract of service.

144. There is one notable exception.

145. The IRA gives a protection to applicants seeking an equal remuneration order by stipulating that an employer may not reduce an employees remuneration either because of an order of the QIRC or because an application has been made for an order (s.64). The FWB only protects against a reduction in the rate of remuneration by FWA by stipulating that an order may only increase rates of remuneration, it may not reduce the rate (s.303). Under the FWB, an applicant is not protected from an employer implementing a reduction in remuneration rate in response to the lodgement of an application for an order.

146. It must be noted that the application of this power benefits from a proper articulation of the equal remuneration principle. In Queensland this has been achieved through the QIRC's 2002 adoption of the Equal Remuneration Principle[15]. The adoption of such a principle, either through legislation or FWA, is vital to the proper operation of the FWA's power to make equal remuneration orders.

147. It is noted that by adopting the principle of pay equity as a minimum wage objective, the FWB creates the capacity for FWA to hear applications and make a determination regarding wages on the basis of ensuring equal remuneration for work of equal and comparable value under s.157. The exercise of this power is outside of the formal four yearly review cycle and annual wage review cycle. This power is consistent with the power granted to the QIRC under the IRA to make, amend or repeal an award (s.125). Significantly the FWB grants to FWA in s.157, the capacity to exercise the power on its own initiative.

148. A number of the recommendations in the joint union's submission relate to legislative provisions are not yet evident in the IRA. These are based on recommendations of the pay equity Inquiries conducted by the QIRC in 2000/01 and again in 2007.[16] Key amongst these recommendations are:

    a) the creation of a specialist Pay Equity Commissioner within FWA with jurisdiction across both the public and private sectors;
    b) the incorporation of an Equal Remuneration Principle (that mirrors the QIRC principle) into the industrial relations legislative scheme; and
    c) the establishment of a specialist pay equity unit/division in FWA with the function of promoting pay equity and assisting the Pay Equity Commissioner.

Recommendation

149. **The Inquiry members should recommend that the Bill accommodate for a definition of remuneration consistent with the IRA.**

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[15] http://www.qirc.qld.gov.au/prod_form_leg/rulings/equalremunprincip.pdf

[16] QIRC 30 March 2001 *Queensland - Worth Valuing*; QIRC September *2007 Queensland - Pay Equity, Time to Act.*

Further the Inquiry members should recommend that the FWB ensure that an employer may not reduce an employee's remuneration either because of an equal remuneration order or because an application has been made to secure an order.

TRANSFER OF BUSINESS

150. Under the FWB at Part 2.8 arrangements for the transferring of employees and industrial instruments when there is a transfer of business from one national system employer to another national system employer are outlined. A transfer of a business occurs where there is:

    a) **Asset transfer:** the first employer transfers an asset of their business (tangible or intangible) to the second employer; or

    b) **Outsourcing:** the first employer transfers the employee's work to a second employer, but remains the beneficiary of the work; or

    c) **In-sourcing:** the second employer transfers the employees' work from the first employer into its own business;

    d) **Corporate reshuffle:** the first employer transfers the employees' work to a second employer that is an 'associated entity' within the meaning of the Corporations Act; and an employee from the old employer goes to work for the new employer, within three months of the transfer. Section 311 of the FWB provides that an employee who takes up employment (and performs substantially the same work) with the new employer within three months of terminating employment with the old employer is deemed to be a transferring employee.

151. Part 3.2 of the FWB sets out the unfair dismissal provisions. Section 384 deals with the period of employment for dismissed employees. At s.384(2)(b) the provision states an employee's period of service with an employer at a particular time is the period of continuous service the employee has completed with the employer at that time as an employee. However, if the employee is a transferring employee in relation to a transfer of business from an old employer to a new employer; and the old employer and the new employer are not associated entities when the employee becomes employed by the new employer; and the new employer informed the employee in writing before the new employment started that a period of service with the old employer would not be recognised; the period of service with the old employer does not count towards the employee's period of employment with the employer.

152. In the circumstance where such written notice is provided the employment with the new employer would be deemed to be new employment and as such the employer would be able to engage the employee on a 'probationary' basis.

153. The IRA differs substantially in this regard. Part 6 of the IRA deals with continuity of service and employment. Section 69(1) states a transferred employee is a person who becomes an employee of an employer (the new employer) because of the transfer of a calling to a new employer from another employer (the former employer)

154. Section 71(5) prescribes that an employee's continuity of service with an employer is not broken if the employee's employment is terminated by the employer or employee; and the employer re-employs the employee within three months after the termination.

155. In view of the foregoing the IRA recognises the previous service with the former employer and deems it to not be broken by the transfer of the business, thus removing the capacity for newly initiated probationary periods potentially after each transfer of employment.

156. As the Industrial Relations Taskforce indicated in its report at pp.58-59 continuity of service on transmission of business should be extended to family leave, notice requirements and unfair dismissal. *This would prevent the current anomalous situation where an employee would find their entitlements to maternity leave or access to remedies for unlawful dismissal compromised on transfer of business, despite having many years of service.*

157. Prior to the adoption of these provisions the Queensland legislation provided in relation to long service leave and sick leave that where the business was transferred from one employer to another, the continuity of service of employees in relation to these conditions was deemed to be unbroken. In addition those state awards that contain provisions in relation to redundancy from the termination, change and redundancy case also deem service to be unbroken in relation to entitlements to severance pay

Recommendation

158. **The Inquiry members should recommend that the FWB be amended to ensure, consistent with the IRA, that in the instances of transfer of business that automaticity exists for the recognition of previous service; and that no additional minimum period of service needs to be provided for before access to unfair dismissal provisions apply.**

UNFAIR CONTRACTS

159. In the federal jurisdiction unfair contracts are not regulated through the industrial relations legislation but rather through the Independent Contractors Act 2006 (IC Act). As such provision similar to those appearing under s.276 of the Queensland legislation are not found in the FWB.

160. Note that the FWB does deal with sham arrangements connected with independent contractors at ss.357-359. However the accommodation is a dearth comparator in contrast to that which exists under the IRA.

161. Unfair contracts laws are concerned with circumstances in which a person performs work under terms which are 'unfair' in the sense that they are unfair, harsh or against the public interest. Parties to a contract for work can seek court orders to set aside the whole or part of the contract and/or to vary the contract.

162. The IC Act ensures that independent contracting arrangements are recognised as commercial, not workplace relations arrangements, and should not be subject to industrial tribunal influence. Therefore, the IC Act excludes State and Territory unfair contracts provisions but establishes a national unfair contracts review jurisdiction that extends protection to all states and territories.

163. The IC Act replaces unfair contracts provisions which existed in Queensland (under the IRA) and in New South Wales (under the Industrial Relations Act 1996 [NSW Act]).

164. The Queensland and NSW Acts applied to employers, employees, independent contractors and their principals. Both Acts were broader in scope than the IC Act in that commissions or tribunals could rewrite commercial contracts that both parties considered fair at the time of signing. Commissions or tribunals could order monetary compensation and extended arrangements and understandings as well as contracts, which the federal unfair contracts jurisdiction cannot do.

165. The IC Act does not allow for a transitional period preserving the state and territory unfair contract laws after the commencement of the IC Act.

166. Only a party to a services contract can make an unfair contracts application. However, unions and employer organisations can assist their members in preparing and managing unfair contract cases.

167. Both incorporated and unincorporated independent contractors can access the unfair contracts jurisdiction in the IC Act. However, proceedings can only be brought by an incorporated independent contractor if the work to which the contract relates is performed by a director of the body corporate or a family member of the director of the body corporate.

168. Parties cannot bring proceedings where the contract relates to work performed by an independent contractor for the private and domestic purposes of another party to the contract. For example, where an independent contractor contracts with a person to perform renovation work on that person's private property, the independent contractor cannot make an unfair contract application.

169. Parties can make unfair contracts applications in either the Federal Magistrates Court or the Federal Court.

170. Before proceeding to a court hearing, alternative dispute resolution processes (such as mediation) may be available to deal with all or some of the issues in dispute.

171. Parties can make an application to a court on the grounds that a services contract is unfair or harsh.

172. In determining whether a contract is unfair or harsh, a court may consider:

    a) the relative bargaining positions of the parties;
    b) whether undue influence or pressure was placed on, or unfair tactics used against, a party to the contract;
    c) whether the contract provides a total remuneration that is less than that of an employee performing similar work would receive; and
    d) Any other matter that the court considers relevant.

173. However, when considering these factors, the court may only have regard to these matters as they existed at the time parties signed the contract.

174. The Court may make orders setting aside all or part of the contract or varying the contract. The sole purpose for making an order is to place the parties to a services contract as closely as possible to the position they were in before the contract became unfair or harsh.

175. If courts find a contract to be harsh or unfair, they can also make interim orders. Parties to an unfair contracts proceeding will not have to pay court costs except where:

    a) proceedings were brought vexatiously or without reasonable cause; or
    b) a court is satisfied that a party to the proceedings has, by unreasonable act or omission, caused another party to the proceedings to incur costs relating to the proceeding.

176. Parties cannot seek an unfair contract remedy under the IC Act if they have brought 'other review proceedings' which can be defined in regulations made under the IC Act.

177. In the FWB reference is made to unfair contracts wherein (at s.357) an employer is limited from representing that contract of employment under which an individual is employed is a contract for service. In addition the courts will have original jurisdiction to hear claims about breaches of employees' contracts, where the terms in issue relate to matters covered in the NES.

178. This contrasts with the Queensland legislation wherein at s.276 provision is made for the Queensland Commission to amend or declare void (wholly or partly) a contract (which includes an arrangement or understanding; and a collateral contract relating to a contract) if it considers the contract is a contract of service that is not covered by an industrial instrument; or a contract for services; and the contract is an unfair contract.

179. In deciding whether to amend or declare void a contract, or part of a contract, the Commission may consider the relative bargaining power of the parties to the contract and, if applicable, anyone acting for the parties; or whether any undue influence or pressure was exerted on, or any unfair tactics were used against, a party to the contract; or an industrial instrument or this Act; or the Queensland minimum wage; or anything else the Commission considers relevant.

180. An application may be made by a party to the contract; or an inspector, for the party required under the contract to provide services; or an organisation of employees or employers of which a party is, or has applied to become, a member, is acting with the party's written consent.

181. The Commission may consider a contract to be an unfair one if it considers the contract was an unfair contract when it was entered into; or became an unfair contract after it was entered into because of the conduct of the parties, or a variation to the contract or for any other reason it considers sufficient.

182. The Commission may make an order it considers appropriate about payment of an amount for a contract amended or declared void.

183. The IRA provides that an unfair contract means a contract that is harsh, unconscionable or unfair; or is against the public interest; or provides, or has provided, a total remuneration less than that which a person performing the work as an employee would receive under an industrial instrument or this Act; or is designed to, or does, avoid the provisions of an industrial instrument.

184. The following table sets out on a comparative basis the contrast between the federal Independent Contractors Act and the Queensland legislation.

Table 5: Comparison between Independent Contractors Act (federal) and Industrial Relations Act (Qld)

***Independent Contractors Act* (federal)**	***Industrial Relations Act* (Qld)**
Operates as a commercial arrangement	Operates as an industrial arrangement
Contracts can only be set aside or varied	Contracts can be set aside, varied, rewritten or monetary compensation applied
Factors to be considered when assessing the contract include the bargaining power at the time of making the contract	Factors to be considered when assessing the contract include the bargaining power at the time of making the contract and the conduct of the parties after the contract was entered into
Legislation deals with an unfair contract	Legislation deals with an unfair contract or understanding or arrangement
Application to review contract by direct party	Application to review contract by direct party or union representing the party
Applications heard by the Federal Magistrates Court or Federal Court	Applications heard by the QIRC

185. The catalyst for the Queensland legislation was the Industrial Relations Taskforce's report which identified that Queensland has a lower proportion of its total workforce classified as employees and a higher proportion self-employed – i.e. contractors of various sorts, than for Australia as a whole. At the time of the report (1998) it was evident that the self employed had risen to around 12% of the Queensland labour force over the last 15 years, compared to about 11% for Australia. It appeared that among the self-employed generally, there may have been an increase in the number of "dependent" contractors – i.e. self-employed workers who have a small number of clients, compared to independent contractors.

186. This suggested to the Taskforce that among the self-employed, there were increasing numbers who work in arrangements that are closer to those of employees than independent contractors. The self-employed are concentrated in construction, wholesale trade and agriculture and workers are predominantly male (around two-thirds).

187. Some indication of the incidence of contracting-out in Queensland and Australia can assist. At the time of the report a greater percentage of Queensland firms were contracting-out compared to Australia as a whole. This was especially the case for small size firms employing one to four employees and for larger firms with more than 20 employees. Not all contracting out involves contractors, but some of its does rely on workers who are independent contractors as well.

Table 6: Contracting-out by firm size, Australia and Queensland, 1994/95

	Proportion of firms which engage in some contracting-out	
Size of Firm	*Queensland*	*Australia*
1-4	7.1	4.1
5-19	3.2	4.7
20+	11.1	9.2
Total	6.2	4.6

Source: DWRSB (1998b)

188. There is nothing to suggest that these proportions have reduced.

189. The accommodation for an industrial process for dealing with unfair contracts is an important feature of the IRA. The provision made within the IC Act does not meet the broad requirements of ensuring that contracts can effectively be reviewed and reconsidered.

Recommendation

190. **The Inquiry members should recommend that a review of the application and operation of unfair contracts occurs to ensure that the provision is recognised as an industrial responsibility and not a commercial responsibility.**

UNFAIR DISMISSAL

Access

191. Under the FWB all employees including fixed term and seasonal, may bring a claim for unfair dismissal except trainees; high-income employees who are not 'covered by' an award or agreement; and employees serving a qualifying period of either six or 12 months. Fixed term and seasonal may apply if they are dismissed.

192. This contrasts with s.72 of the IRA where probationary employees are divided by the section into three groups namely:

    a) those with no probationary period or a period of less than three months;
    b) those who have a three month probationary period (either expressly or by the Act); and
    c) those who have a probationary period of greater than three months.

193. Minister Braddy in his Second Reading Speech[17] stated that there had been substantial debate about the extent to which dismissal laws should apply when an employee is first employed by a business. The government accepted that when an employee first commences employment with an employer, there is a right to trial the employment relationship and that an employer should be given time to assess whether an employee is suitable for the particular job.

194. *There is capacity under the legislation for the employee and employer to agree in writing that the employee serve a period of probation that is shorter than probationary period; or no period of probation; or an employee serving a period of probation that is longer than the probationary period, if the period decided, by written agreement between the employee and employer before the employment started, is a reasonable period having regard to the nature and circumstances of the employment.*

    There is no doubt that new employees have no access to the unfair dismissal regime set up by the Queensland legislation if they are dismissed in the first three months of their employment. Access to unfair dismissal regime is available if the probationary period has been agreed to in writing to be less than three months or the service of a probationary period has been waived. Further, the statutory exclusion applies only if the dismissal was for a reason other than an invalid one as set out in s.73(2) of the Industrial Relations Act 1999. In other words, the dismissal was one which is said to be harsh, unjust or unreasonable.

    An employee serving a period of probation longer than three months is also excluded if the period is agreed to in writing before the employment

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[17] Hansard 25 May 1998

commences; and the agreed period is reasonable having regard to the nature and circumstances of the employment.

195. The QCU contends that the probationary period is too lengthy in contrast to that which exists within the Queensland jurisdiction. When considering the authorities around this point note should be made that in *Potter v ACT* (1997) 72 IR 163 Justice Moore said at 175: *The purpose of probationary employment is to provide for period in which an employee can be trained to do the work and in which an assessment made of their aptitude and capacity to do the work once the employee is trained or partly trained.*

196. The essential quality of a period of probation has been held to be a time of testing or trial: see *Phipps v Travel Insurance Australia Pty Ltd* (2006) 183 QGIG 769. The period permits the employee's suitability for the job in question to be assessed: see *Beck v Darling Downs Institute of Advanced Education* (1990) 140 IR 364.

197. In *Pisa v Country Fire Authority (*AIRC, Watson SDP, Print T0960, 19 September 2000, unreported), Watson SDP at p 9 discussed the matters to be taken into account when testing the reasonableness of a probationary period in the federal context and referred to the following matters: *the purpose of a probationary period is to prove a period for training to do the work and to allow an assessment to be made of his or her aptitude and capacity to do the work once trained. Whether a probationary period is reasonable is an exercise of judgement based on proved objective facts. The most important consideration will be the nature of the job with the commission considering the entire circumstances of the employment and not merely the circumstances of the position held. In addition it is relevant to consider a probationary employee's previous experience, training and employment in assessing the 'entire circumstances' of the employment coupled with regard to the situation at the date the employment commenced.*

198. Under the FWB a small business is defined as having fewer than 15 full-time, part-time or regular and systemic casual employees (regardless of length of service).

199. Small business employers have a longer qualifying period for their workers, 12 months, instead of six; and are subject to the Fair Dismissal Code wherein compliance with the Code will be a defence (at the jurisdictional stage) to an unfair dismissal claim. However, at the jurisdictional stage, FWA will be able to inquire into whether the requirements of the Code have been met.

200. This also contrasts with the Queensland legislation wherein no exemptions based on employer size apply.

201. The Industrial Relations Taskforce which considered the development of the Queensland legislation noted that Queensland had a very high proportion of small businesses (with less than 20 employees). Over 90% of businesses in the state (at that time) had less than 20 employees with 52% of

Queenslanders being employed in small business. The Taskforce considered that unlike an exemption to unfair dismissal related to salary there was no argument that these employees will be able to access remedies to their situation through the courts.[18]

202. Minister Braddy again in the Second Reading Speech introducing the new legislation in Queensland indicated that the government did not accept that an arbitrary cut-off for access to dismissal legislation, based on the size of a business, is fair or equitable to either employers or employees.

Process

203. Under the FWB an application must be filed within seven days of the dismissal, although FWA can grant an extension of time.

204. FWA must first consider whether the application is within jurisdiction. It can do this on the papers. If the application is within jurisdiction, it must hold a conference. If the matter cannot be settled at the conference, it may hold a hearing.

205. FWA can issue the usual orders (reinstatement or compensation, capped). Appeals can be made to a full bench, but the full bench can only grant leave to appeal if it is in the public interest to do so. For appeals on grounds of factual errors, the error must be 'significant' in order to get leave to appeal.

206. This also contrasts with the Queensland legislation. Applications for unfair dismissal are required to be generated within 21 days of the termination. Capacity exists in addition to this period for an extension of lodgement time.

207. Linnane VP of the QIRC set out the matters to be taken into account in an extension of time application: see *Erhardt v Goodman Fielder Food Services Ltd* (1999) 163 QGIG 20 where after referring to *Breust v Qantas Airways Ltd* (1995) 149 QGIG 777 said that in ordinary circumstances the key factors to be considered in the construction and operation of the section are as follows:

    a) the length of the delay;
    b) the explanation of the delay
    c) the prejudice of the applicant if the extension of time is not granted;
    d) the prejudice to the respondent if the extension of time is granted; and
    e) any relevant conduct of the respondent.

208. She also said that there are three caveats to the approach set out in *Bruest,* above, which are that s.74(2)(b) vests an unlimited statutory discretion which must always be exercised; that the time limit of 21 days provided for in s.74(2)(a) must be respected; and that the applicant's prospect of success at the substantive hearing is always a relevant matter – i.e. that where it appears an applicant has no, or very limited, prospects of success the commission should

[18] Op cit p.66

not grant an extension of time however those prospects for success (or otherwise) in a substantive hearing of the case must be clear cut.

209. The process, if it is determined that the dismissal was unfair, is that the Commission may order the employer to reinstate the employee to the employee's former position on conditions at least as favourable as the conditions on which the employee was employed immediately before dismissal. See s.78.

210. If the Commission considers reinstatement would be impracticable, it may order the employer to re-employ the employee in another position that the employer has available and that the Commission considers suitable. The Commission may also make an order it considers necessary to maintain the continuity of the employee's employment or service; and order the employee to repay any amount paid to the employee by, or for, the employer on the dismissal; and order the employer to pay the employee the remuneration lost, or likely to have been lost, by the employee because of the dismissal, after taking into account any employment benefits or wages received by the employee since the dismissal.

211. At s.79 it provides that if, and only if, the Commission considers reinstatement or re-employment would be impracticable, the Commission may order the employer to pay the employee an amount of compensation decided by the Commission.

212. The application of a 21 day period to file an application alleging unfair dismissal reflects the fact that in instances of termination of employment there is often a period of time required by the terminated employee to consider the impact of such termination; and for their representative to investigate fully the alleged unfair termination.

213. Within the Queensland environment the logistics of pursuing advice and then generating claims in rural and remote areas is likely to take more than seven days. The fact that capacity exists within the IRA to extend the period beyond the 21 days suggests that problems associated with generating an application within the 21 day timeframe can also be problematic.

Recommendation

214. **The Inquiry members should recommend that the probationary period consistent with the IRA be adopted wherein the probationary period is no more than three months; with the capacity to waive any period of probation.**

Further the Inquiry members should recommend that the period to file an application alleging unfair dismissal should be 21 days, with the capacity for extension of that timeframe if necessary.

INDUSTRIAL ACTION

Process

215. In developing the Queensland legislative parameters around industrial action, the Taskforce noted that there should be the opportunity to take industrial action in support of claims during negotiations for an agreement. Such action should be afforded immunity from common law liability. However, consistent with emphasising negotiation as a first resort, the Taskforce believed there should be a clear direction that negotiation is undertaken as a first resort.

216. Under the FWB industrial action by employees in support of a claim (employee claim action) or in response to employer action (employee response action) can be protected, provided it is taken during bargaining, and meets the criteria to gain protected status.

217. To be protected, the bargaining representatives must be genuinely trying to reach agreement as provided by the Act; have obtained authorisation from employees through a secret ballot, and have given the employer adequate notice.

218. The only action by an employer that constitutes employer industrial action is a lockout. Lockouts will only be protected employer action if they are taken in response to employee industrial action (employer response action).

219. Industrial action in pursuit of 'pattern bargaining' is not protected. Pattern bargaining is defined as bargaining for two or more agreements seeking common terms, where the bargaining representative is not genuinely seeking to reach an agreement with each employer. An employer may apply for an injunction to prevent pattern bargaining.

220. The IRA provides for multi-employer bargaining which correlates to single interest employer bargaining under the FWB. In the Queensland context, provided there is agreement with the employer parties, the agreement is the same agreement in content which applies to each of the employer parties. There are no limitations in accessing industrial action in the settlement of a multi-employer agreement under the IRA. This differs to the FWB wherein industrial action is limited in the instance of securing a single interest employer agreement.

221. Action must be authorised by secret ballot. See s.409(2) of the FWB.

222. Where parties have commenced bargaining (but have failed to reach an agreement), a bargaining representative may apply to FWA for a secret ballot order. To obtain a ballot order, the bargaining representative/union must be genuinely trying to reach agreement. The person seeking the ballot can choose which employees to ballot (ie a union can ballot members or all employees).

223. FWA must make a ballot order within two days, so far as is practicable. The Australian Electoral Commission (AEC) must conduct the ballot, unless FWA has authorised an alternative ballot agent (who is a fit and proper person). Where an alternative agent is appointed, FWA may appoint an independent advisor to whom complaints about the conduct of the ballot may be directed, and who must report those complaints to FWA.

224. The AEC (or ballot agent) must work with the applicant to determine the time and form of the ballot. Where the AEC conducts the ballot the Commonwealth will bear all costs, whereas if a ballot agent conducts the ballot, the union is responsible for all costs.

225. The requirement for a quorum is retained, meaning a majority of employees on the roll of voters must vote, and that a majority of those who vote must approve the proposed industrial action.

226. Section 177(1) of the IRA prescribes that before the commencement of industrial action it must be properly authorised by the organisation's management committee or someone authorised by the committee to authorise the industrial action. There is no requirement to ballot workers, to ascertain whether they support the action unless at the direction of the QIRC. In this regard s.176 prescribes that the QIRC may order a ballot of relevant employees if industrial action is being taken, or industrial action is threatened or probable in relation to a proposed agreement. The purpose of the ballot is to ascertain the attitude of the employees about the matters giving rise to the industrial action or to settle the matters.

227. Note that this section has operated for almost a decade and there has been no activity around the provision. This suggests that the process for endorsing the taking of industrial action has sufficed and the intervention by a third party (the QIRC in this instance) has not been sought.

228. Employees taking employee claim action must give the employer three working days notice of action (or, if ballot order provides for a longer period, then the longer period applies). This is aligned with the IRA wherein the Queensland legislation provides for at least three working days notice of the taking of industrial action. See s.175(1).

229. Although protected industrial action is not available during the life of an agreement, an application for a ballot may be made up to 30 days prior to the nominal expiry date of the current agreement. The Queensland legislation provides for a peace obligation period of 21 days after "proposing" that an agreement be made ending no earlier than seven days after the nominal expiry date of any existing certified agreement. See ss.143 and 147. Queensland legislation therefore provides for a total of 28 days whilst the federal Bill provides for 30 days.

230. Action can therefore commence the day after an agreement expires, provided the union has previously attempted to bargain in good faith, the action is authorised, and three days notice has been given.

Stopping action

231. FWA can suspend or terminate protected industrial action (see ss.423, 424 and 426). FWA must suspend or terminate protected action (and make a workplace determination) if the action is causing (or threatening to cause) significant harm to the safety, health or welfare of the community or part of it, or to the economy. FWA may suspend or terminate protected action (and make a workplace determination) if the action is causing or threatening to cause significant harm to all of the bargaining parties. If harm is threatened the harm must be imminent.

232. In addition FWA must suspend industrial action where it believes this will assist the parties reach agreement (for 'cooling off'); FWA must stop industrial action by non-national system employees (or employers) that is causing significant loss to a constitutional corporation – even if the action is 'protected' under State law; and FWA must suspend protected industrial action where a third party is suffering significant harm.

233. Note that if FWA suspends protected industrial action, once the suspension period ends, employees can resume protected action (provided it is still authorised by the original ballot) without holding a fresh ballot.

234. This provision is not in the IRA however the QIRC could decide it is in the public interest to conciliate and/or arbitrate the matter on its own initiative or alternatively the Queensland Minister might ask the QIRC to deal with the matter. This request by the Minister may be enacted because of representations from a third party to the Minister. All parties to the bargaining have the right to seek the assistance of the Commission including seeking the Commission to stop industrial action. See ss.148 and 149. However it should be noted that this activity is a precursor to proceeding to an arbitrated settlement. In this regard there is a divergence with the FWB.

235. The Taskforce (at pp 113-114 of their Report) indicated that they were *concerned to ensure that there is an opportunity for parties who wish to bargain without the intervention of a third party are able to do so and to take responsibility for their negotiations. The Taskforce believes that the recommendations made above in relation to notification of negotiations, bargaining in good faith, the peace obligation and immunity from common law liability for industrial action after the expiry of that obligation provide a framework for such circumstances.*

There are circumstances, however, in which impasse in negotiations is reached and will not be satisfactorily resolved without assistance to the parties in the negotiations. It is important that the parties be assisted in these circumstances to enable them to move in most circumstances to a negotiated outcome. Without this assistance, parties new to bargaining may not develop stronger bargaining relationships. ...

There would be no opportunity for the parties to seek the assistance of the commission prior to the expiry of the peace obligation. Following the expiry

of this obligation and evidence of attempts to negotiate an agreement, one or more of the parties would be able to declare a breakdown in negotiations to the commission

...

... The commission could act on its own motion only in circumstances where there is industrial action causing significant damage to the economy or endangering the personal health and safety or welfare of the population.

236. In addition the FWB provides that the Minister make a declaration terminating protected industrial action that threatens the population or economy.

237. Whilst the Ministers can only intervene in this way in circumstances where the industrial action is endangering the life, personal safety or health or welfare of the population or part thereof; or will cause significant damage to the Australian economy or part of it, this power goes well beyond the provisions contained in the IRA. Only the QIRC can make orders/declarations stopping industrial action. See ss.273(g), 274(1) and 274A (1).

Payment during action

238. In the FWB, where action is unprotected, the employer must withhold wages for the period of the industrial action or four hours (whichever is longer). No similar provision exists under the Queensland legislation.

239. Where industrial action is protected industrial action, if the action is a strike (or overtime ban), the employer must withhold pay for the duration of the industrial action.

240. If the action is a partial work ban, the employer can elect to pay the employees their full wage; or stand down the employees, or lock out the employees and withhold all pay; or give the employees a notice informing them that if they continue to work, the employer will withhold an appropriate proportion of the employees' pay. FWA will be able to resolve disputes about the appropriate proportion of the employees' wages to withhold.

241. This is different to the IRA where s.238(1) states an employer may pay, or refuse to pay, an employee for a period when the employee engages in a strike.

242. Note that this Queensland provision was dealt with during the Taskforce review. The Taskforce (at page 110) agreed to an amendment to the prohibition on payment to members on strike. Given the definition of strike, the ability to withhold wages in the event of minor work bans or a refusal to perform contested new work assignments is very broad. The Taskforce recommends that the prohibition on payments for strikes be amended to indicate that an employer must not be compelled to pay an employee for a

period when an employee engages in a strike. If an employer decides without compulsion to pay employees then the employer and employee should be able to make that decision.

Recommendation

243. **The Inquiry members should recommend the removal of the capacity to stop industrial action by non-national system employees (or employers) that is causing significant loss to a constitutional corporation even if the action is 'protected' under state law. In addition the Inquiry members should remove the capacity for FWA to suspend protected industrial action where a third party is suffering significant harm.**

In relation to the payment of wages during industrial action, the Inquiry members should recommend consistent with the IRA that an employer may pay, or refuse to pay, an employee for a period when the employee engages in a strike.

RIGHT OF ENTRY

244. The FWB provides that statutory rights of entry are only available to permit holders. To be granted a permit, the official must be a fit and proper person. Permits can be suspended in certain cases, and must be suspended if the permit holder is guilty of certain offences.

245. A union official who holds a permit may exercise a statutory right of entry – i.e. they may enter a workplace to inspect breaches and records, or to hold discussions with employees. To exercise a statutory right of entry, the permit-holder must give 24 hours written notice.

246. FWA continues to be able to settle disputes over the right of entry provisions by arbitration (although its arbitral orders award cannot confer additional rights of entry on permit holders).

Discussions

247. Entry onto premises to hold discussions with employees will be available (during breaks) where the permit holder's union is eligible to represent the employees. The permit holder will need to declare that the employees are within the union's eligibility rules.

248. The employer may direct where a permit holder may hold discussions with employees. However the location must not be a location that is not 'fit for the purpose' of holding discussions, or if the employer's choice of location is made with the intention of making it difficult for workers to meet with unions. No similar provision exists under the Queensland legislation.

249. The Queensland legislation provides at s.372 that an authorised industrial officer may enter a workplace during the employer's business hours. On entering the workplace, the officer must first notify the employer or the

employer's representative of the officer's presence; and produce the officer's authorisation, if required by the employer or representative. These arrangements do not apply if on entering the workplace, the officer discovers that neither the employer nor an employer's representative having charge of the workplace is present.

250. An employer must not refuse an authorised industrial officer entry to the workplace if the officer complies with these requirements.

251. Further the Queensland legislation provides that in the request for information and records (see s.373) that the officer (the permit holder) may discuss matters under the Queensland industrial relations legislation with the employer; a member employee, or an employee who is eligible to become a member of the officer's organisation during working or non-working time.

252. Consistently with what is proposed in the federal FWB the officer may discuss any other matter with a member employee, or an employee who is eligible to become a member of the officer's organisation, during non-working time.

Compliance

253. Permit-holders will be able to enter premises where there are members working who are affected by the suspected breach. Permit holders will be able to view the records of non-members if this is necessary to substantiate that a breach has occurred. There are penalties for misusing non-member information collected this way.

Queensland WHS laws

254. Under Queensland workplace health and safety laws access to a workplace is either if a suspected breach exists (s.90I) or for the purposes of holding discussions (s.90J). In both instances the access is to an eligible member who is defined as either a member, or a person eligible to be a member.

255. If there is a suspected breach (has happened or is happening) then the permit holder may:

a) inspect;
b) observe work;
c) speak to a person with the person's consent;
d) speak to the employer;
e) require the production for inspection of documents including employment records relevant to the suspected breach;
f) copy a document relevant to the suspected breach; or
g) require the employer to give the permit holder reasonable help to exercise the permit holder's powers. See s.90I.

256. In relation to discussing workplace health and safety issues, then the permit holder can do so provided the employee wishes to take part in the

discussion. The discussion may take place only when the worker is on a work break, which includes a meal break. See s.90J.

257. A permit holder must not enter or remain at a workplace if the employer requires the permit holder to comply with health and safety requirements, and the request is reasonable, and the permit holder fails to comply with the request. See s.90M(2). Note that an example of an unreasonable request is provided in the Act as *requiring an authorised representative to undertake a site-specific induction if the authorised representative would normally be accompanied on the site by someone who had undertaken the induction.*

258. Written notice for entry under s.90J (discussions), or for inspection or production of documents under s.90I is at least 24 hours before the entry; but in relation to breaches or suspected breaches is as soon a practicable. See s.90K.
259. In instances where an "occupier" challenges the authorised officer's right to access the premise, the legislation provides for capacity for the WHS inspectors to facilitate these issues. Where their assistance does not resolve the matter then a referral to the QIRC can occur.

260. Note that since the introduction of the amendments to the legislation in May 2006 the role and responsibilities of Authorised Representatives of Employee Organisations (AREOs) have affectively balanced the rights and responsiblities of the AREO and the occupier. In instances where occupiers have disputed an AREO's powers, the WHS Inspectors have facilitated resolution of these matters.

Recommendation

261. Consistent with the Queensland IRA and the Queensland WHS legislation the Inquiry members should recommend that FWB is amended to allow a permit holder the capacity to discuss matters relating to the FWB with the employer; a member employee, or an employee who is eligible to become member of the officer's organisation during working or non-working time.

TRANSITIONAL ISSUES

262. The QCU notes that a range of matters that will impact on state arrangements will be captured in the transitional and consequential legislation.

263. As we understand it, such legislation has not been drafted.

264. The transitional and consequential Bill is an important component in ensuring that arrangements that have had their genesis in the state jurisdiction are accommodated within the federal jurisdiction.

265. The QCU believes active participation by the state bodies such as ours in the content of this Bill is imperative.

CONCLUDING COMMENTS

266. In preparing a submission such as this to the Senate Inquiry there is a real risk of being deemed parochial.

267. The QCU has endeavoured to establish the level of impact the FWB could have on Queensland workers. We have done so for no other reason then to ensure that organisationally our affiliated unions and their respective members are fully informed in relation to the impact the FWB may have on workers traditionally overed by the Queensland state system.

268. In comparing and contrasting the FWB with the IRA the QCU has in many instances identified a great degree of synergy in the drafting and content of the Bill. This is to be lauded.

269. In other areas there are obvious contrasts to what exists and operates within this state.

270. In light of the fact that there is no specific detail in relation to the content of the transitional Bill; nor is there any indication as to the intention of the federal government in its policy direction to ensure *appropriate transitional arrangements* to *be put in place so that those currently covered by state industrial relations systems will not be disadvantaged as a result of the creation of the new industrial relations system*; the QCU has provided this submission on the basis of highlighting areas where transitional arrangements will need to operate.

271. The recommendations the QCU has identified should be made by this Inquiry and are those that we contend would create a clearer alignment between what exists in this jurisdiction to that which is being proposed federally. Some more synergy!

272. The QCU contends that to make these changes will ensure an easier road in determining whether in fact transfer arrangements for the non-incorporated private sector are viable.

Queensland Council of Unions
9 January 2009