QUEENSLAND GOVERNMENT SUBMISSION TO THE PRODUCTIVITY COMMISSION

Inquiry into the Workplace Relations Framework

March 2015

• Introduction

The Queensland Government welcomes the opportunity to provide a submission to the Productivity Commission's Inquiry into Australia's Workplace Relations Framework ('the Inquiry'), encompassing the *Fair Work Act 2009* (FW Act) including institutions and instruments that operate under the FW Act and the *Independent Contractors Act 2006*.

In 2009, the Queensland Government referred its responsibility for regulating private sector industrial relations to the Commonwealth Government in accordance with the *Fair Work (Commonwealth Powers) and Other Provisions Act 2009 (Qld)* and relevant provisions within the FW Act. The Queensland Government approval of Queensland's participation in the National Workplace Relations System was based upon the endorsement by the Workplace Relations Ministers' Council (WRMC) of the Australian Government's substantive workplace relations legislation as providing the foundation for a uniform National Workplace Relations System for the private sector. The WRMC's endorsement was the culmination of extensive consultation and cooperation between governments in the development of a modern, fair and flexible workplace relations system for Australia.

The *Inter-Governmental Agreement for a National Workplace Relations System for the Private Sector* (IGA) was entered into by referring States, the Territories, and the Commonwealth, to outline each party's commitment towards achieving and maintaining a uniform National Workplace Relations System built on the following principles:

- A strong, simple and enforceable safety net of minimum employment standards;
- Genuine rights and responsibilities to ensure fairness, choice and representation at work, including the freedom to choose whether or not to join and be represented by a union or participate in collective activities;
- Collective bargaining at the enterprise level with no provision for individual statutory agreements;
- Fair and effective remedies available through an independent umpire;
- Protection from unfair dismissal;
- Seamless service delivery arrangements; and
- Cooperation between all governments in the development and implementation of a National Workplace Relations System.

The Queensland Government remains committed to cooperating and engaging with the Commonwealth Government on industrial relations policy and to maintaining a uniform National Workplace Relations Framework that recognises the aforementioned principles, consistent with the objects of the IGA. It is with this intention in mind that the Queensland Government's contribution to this Inquiry has been prepared.

The Queensland Government does not support any change to the current Fair Work Commission arrangements for penalty rates and the minimum wage.

The Queensland Government submission provides broad, high level comment on the suitability of the existing National Workplace Relations framework. More specific comment is made in relation to long service leave and public sector employment as matters within Queensland's jurisdiction.

The Queensland Government welcomes the opportunity to provide a more detailed response to the draft report of the Inquiry when released later in 2015.

- **Background**

The Inquiry was announced in November 2014 and followed a federal government commitment to review the federal Workplace Relations system with a view to take recommended changes to the next federal election. The Inquiry reports that the Australian Government has asked the Productivity Commission to undertake a wide-ranging inquiry into Australia's workplace relations framework and to evaluate the current system to consider the type of system that might best suit the Australian community over the longer term.

The Inquiry acknowledges that Australia has developed unique legal and institutional arrangements for the regulation of industrial relations. Those arrangements have evolved significantly over the last century in tune with social, economic and cultural change. The Inquiry's Issue Paper 1 notes a number of these developments.

The shift from centrally determined wages and conditions to enterprise-level bargaining, which occurred in legislative changes introduced in 1993, is described in Issues Paper 1 as "the biggest break from the past". Bargaining under these changes occurred above a safety net of minimum wages and conditions set by awards. This significant shift in regulatory approach was achieved as part of the Hawke Government's Prices and Incomes Accord (the Accord). The Accord also saw the establishment of a program for the simplification of award content and extended options for bargaining and individual agreement making[1].

The Work Choices era commenced in 2006 with fundamental changes to the regulation of workplace relations. The Work Choices legislation was short lived and subject to much legislative change during that short period. Although the Inquiry does not refer to Work Choices in its brief review of workplace relations regulatory developments, it is relevant because of the widespread opposition of Australians to the approach to the regulation of workplace relations taken in the legislation.

The FW Act, which came in effect from 2010, is a logical evolution of the earlier changes introduced under the Accord, entrenching a system of enterprise bargaining based on minimum conditions legislated in the National Employment Standards (NES) and in simplified and modernised awards[2]. The Queensland Government referred its residual power for private sector industrial relations to the Commonwealth (the referral) with effect from 1 January 2010, in order to create a single National Workplace Relations System. Importantly the FW Act offered a fair and balanced workplace relations system and the Queensland Government was able to negotiate to preserve industrial entitlements of Queensland workers in the move to the national system.

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Despite its short operation, the FW Act has already been the subject of a review. Furthermore, an interim review of modern awards was conducted over 2012-13; and a full review of modern awards is now underway, having commenced in 2014.

A post implementation review of the legislation was carried out by the FW Act Review Panel (the Review Panel) in 2012. The terms of reference for that review required "an evidence based assessment of the operation of the Fair Work legislation, and the extent to which its effects have been consistent with the Objects set out in Section 3 of the FW Act". The Review Panel found that the effects of the Fair Work legislation have been broadly consistent with the objects set out in s. 3 of the FW Act and that the legislation is operating broadly as intended. The Review Panel made 53 recommendations, including various legislative changes, which were broadly aimed to "encourage productivity growth", "enhance equity in the workplace"

[1] Giudice, G. 2014 Industrial Relations law reform – What value should be given to stability? *Journal of Industrial Relations* v. 56 no.3. pp 343

[2] op cit

and "correct anomalies that have been revealed in the operation of the (FW) Act." Twenty-two of these recommendations were implemented, in whole or part, by the then Rudd/Gillard Labor government and the Commonwealth Government currently has legislation in Parliament that proposes to implement several more of the outstanding recommendations.

In addition, the Fair Work Commission's (FWC's) *Future Directions* change program has picked up the Review Panel's recommendation that the Fair Work institutions' roles be extended to include active encouragement of more productive workplaces. The most recent phase of the FWC's change program, launched on 8 May 2014, highlights a number of measures fostering more productive workplaces, including:

- A qualitative research project to identify clauses in enterprise agreements that enhance productivity or innovation (the *Productivity and innovation in enterprise agreement clauses* report was released in December 2014); and
- In conjunction with key stakeholders, the development and implementation of a strategy for the promotion of cooperative and productive workplace relations that facilitate change and foster innovation.

These two initiatives are among 30 that the FWC intends to implement over the next 18 months under its *Future Directions – Continuing the Change Program*. Other educative initiatives by the FWC, such as the proposed publication of a Benchbook for Enterprise Agreements, will further serve to clarify some of the uncertainty associated with key concepts, such as "good faith bargaining", in the FW Act.

The FWC (then Fair Work Australia) interim review of modern awards also commenced in 2012. The FWC was required to conduct a review of all modern awards (including transitional provisions), other than modern enterprise awards and State reference public sector modern awards, as soon as practicable after the second anniversary of the FW Act. The review was to consider whether the modern awards were (a) achieving the modern awards objective; and (b) operating effectively, without anomalies or technical problems arising from the award modernisation process. This process was completed in 2014 with the four- yearly review of modern awards also commencing in 2014.

The FW Act requires the FWC to review all modern awards every 4 years. This review process is broader than the interim review and allows industrial parties to seek to vary awards to achieve necessary changes. The current review process is well underway with a number of common issues being considered as well as single award issues and is due to be completed in 2016. Although application to vary or amend awards can be made outside these processes, there are limited grounds on which such application can be made. As awards provide a safety net of wages and conditions for employees, it is appropriate that such stability exists in the modern award system.

In short, Australia's legal and institutional arrangements for the regulation of industrial relations have demonstrated a capacity for evolution and change over the last century while maintaining an emphasis on fairness and balance. The last decade, in particular, has seen several large scale changes to the regulation of workplace relations. The FW Act has been in operation for only four years.

• Support for the current National Workplace Relations System

As previously mentioned, the Queensland Government referred its residual industrial relations jurisdiction for the private sector to the Commonwealth to create a fair and balanced single National Workplace Relations System under the FW Act. The Queensland Government maintains its commitment under the IGA to achieving and maintaining a uniform National Workplace Relations System built on the aforementioned principles:

- A strong, simple and enforceable safety net of minimum employment standards;

- Genuine rights and responsibilities to ensure fairness, choice and representation at work, including the freedom to choose whether or not to join and be represented by a union or participate in collective activities;
- Collective bargaining at the enterprise level with no provision for individual statutory agreements;
- Fair and effective remedies available through an independent umpire;
- Protection from unfair dismissal;
- Seamless service delivery arrangements; and
- Cooperation between all governments in the development and implementation of a National Workplace Relations System.

Accordingly, the Queensland Government supports the current objects of the FW Act. History has demonstrated the capacity of the system for the regulation of workplace relations to evolve and change. The FW Act has recently been reviewed and found to be operating as intended and recent reviews of modern awards have provided opportunities for industrial parties to seek to amend and vary terms and conditions as necessary. The FWC *Future Directions – Continuing the Change Program* and the further research it recommends will also contribute towards a better understanding of methods for enhancing workplace productivity and innovation.

The last decade has seen large scale and significant changes to the regulation of workplace relations in Australia. A number of academics, including former President of the Fair Work Commission Geoffrey Giudice AO, have cautioned that any further review of workplace relations regulation needs to be approached carefully. Giudice[3] advocates the adoption of stability as a key objective in any further workplace relations reform. He goes on to suggest that many of the fundamental elements of the current system are widely accepted and that this agreement should be built on in reforming other elements of the system on which there is disagreement. Professor Emeritus Ron McCallum[4] has made similar calls for caution in considering further reform and has highlighted the need for broad consultation in any further review. Furthermore, Borland's[5] economic analysis suggests that the continued calls for workplace relations reform are based more on sectional interests rather than on economic evidence of the need for significant reform. Giudice and Borland also question the cost of ongoing reform in light of uncertain gains.

Given the broad suitability of the objects of the FW Act, the demonstrated capacity of the current National Workplace Relations System to accommodate change, and the large scale changes only recently made to this system, the Queensland Government supports the current arrangements and advocates a cautious and considered approach to any further reform.

• Minimum Wages and Penalty Rates

Minimum and Award Wages

The economic, social and industrial objectives of the existing framework are set out in the objects of the *Fair Work Act 2009* (**FW Act**), with a specific minimum wages objective in s284:

> *"284 The minimum wages objective*
> *What is the minimum wages objective?*
> *(1) FWC must establish and maintain a safety net of fair minimum wages, taking into account:*
> *(a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and*
> *(b) promoting social inclusion through increased workforce participation; and*

[3] ibid pp 440

[4] McCallum, R. 2013 21st Annual Labour Law Conference, Sydney, 22 July 2013 as reported in *Workplace Express* 22 July 2013.

[5] Borland, J. 2012 Industrial Relations Reform: Chasing a Pot of Gold at the End of the Rainbow *Australian Economic Review* Vol. 45, no. 3 pp 269 - 89

(c) relative living standards and the needs of the low paid; and
(d) the principle of equal remuneration for work of equal or comparable value; and
(e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability."

Queensland is a 'referring State' under Division 2B, Part 1-3 of Chapter 1 of the FW Act. From 1 January 2010, Queensland's private sector has been regulated by the national Fair Work system. The Queensland Government supports the objectives set out in the Act in relation to minimum and award wages and submits that the existing framework for minimum and award wage setting is appropriate, efficient and effective in relation to the objectives.

An increasing number of jurisdictions internationally are also finding minimum wage regulation an effective policy mechanism: 29 of the 34 OECD countries now have minimum wage regulation.

Overall, Australia's wage burden is relatively low. In the September quarter, 2014, the wages share of total factor income in Australia was 53.4%, the seventh lowest in the OECD and also below the averages for the US, Euro area (18 countries) and European Union (28 countries) [6]. Australia's minimum wage, measured as a percentage of the median wage for international comparison, is currently ninth highest of the 29 OECD countries with minimum wage regulation[7].

Approximately 416,700 (21.3%) of Queensland employees, as at May 2014, rely on the national award system to determine their rate of pay.[8] Minimum and award wage increases serve an important social function by directly targeting and benefiting those employees who are not able to negotiate wage increases with their employer through enterprise bargaining. This helps to ensure that those workers with little or no bargaining power are not left behind.

To date, the FWC's annual wage reviews have produced outcomes that have maintained the value of real value of minimum and award wages. Maintenance of the real value of these wages should be a threshold benchmark.

Penalty Rates

A penalty rate is a higher rate of pay than the base rate for work done outside standard working hours. Section 139 of the FW Act provides that modern awards may contain penalty rates provisions for employees working unsociable, irregular or unpredictable hours, on weekends or public holidays and for shift workers. Penalty rates have been part of employment conditions in Australia for almost a century. They are not a new entitlement nor a departure from previous entitlements.

Federal and State industrial tribunals have consistently reiterated the position that penalty rates should compensate employees for unsociable hours of work to compensate for disturbance of family and social life, the lack of opportunity to participate in social, sporting and community events and religious observance and to discourage employers from working employees on weekends ([1950] AR (NSW) 260). In 1999 and 2004, the Australian Industrial Relations Commission (AIRC) determined that the extension of Sunday trading did not diminish the unsociability of weekend work in two separate test cases ([1999] AIRC Q9229 and [2004] AIRC PR941526).

[6] OECD.StatExtracts, Quarterly National Accounts

[7] OECD.StatExtracts, Labour, Earnings

[8] ABS, *Employee Earnings and Hours*, cat 6306.0, May 2014

The Queensland Government supports the view that it is appropriate to compensate employees for working unsociable hours because there is a level of social disadvantage associated with those hours. This impacts on labour supply, so that significant penalty rates would form part of the market equilibrium or clearance wage.

In 2012, 14.3% of employees usually worked Saturdays and 8.5% usually worked Sundays. Higher percentages of independent contractors and other business operators usually worked Saturdays and Sundays. Overall, 17.2% of working Australians usually worked Saturdays and 10.1% usually worked Sundays[9]. Allowing for people not in the labour force, it can be extrapolated that around 10.5% of Australians aged 15 and over usually worked Saturdays and 6.2% usually worked Sundays. With less than 11% of Australians at work on Saturdays or Sundays, it would be difficult to mount an argument that there is no social disadvantage associated with weekend work.

Family and extended family gatherings, socialising and special occasion celebrations all tend to be concentrated on weekends because this is when the majority of people are available. For example, an examination of unpublished data from the Queensland Registry of Births Deaths and Marriages shows that, for the 12 month period between 1 November 2012 and 31 October 2013, 60% of all marriages occurred on a Saturday with 13% on a Friday and 9% on a Sunday. This is a clear indication that Saturday is normative for celebrating marriages. While similar data is not available for other celebrations such as engagements, milestone birthdays, housewarmings, these events are also traditionally celebrated on a weekend.

Other forms of social disadvantage associated with weekend work are the inability to participate in organised sport and in religious worship. Some 22% of Australians aged 15 years and older play an organised sport and a further 4% are involved in a non-playing role only[10]. In addition, 60% of children aged 5 to 14 years participate in at least one organised sport outside school hours. An examination of the top 10 organised sports by participation in Queensland reveals the top four sports, soccer, golf, football sports and lawn bowls are predominately played on Saturdays. Martial arts and equestrian events are predominately played on Sundays. The majority of sports, with increasing pressures on facility availability, have activities on both Saturday and Sunday. Similarly, while traditionally religious worship was concentrated on a Sunday, many churches now offer Saturday alternatives to Sunday worship. Although attendance at religious services has declined considerably over the last 40 years, for the 62% of the Australian population who identify as members of a religion weekends remain an important time for religious worship.

With less than 11% of Australians at work on Saturdays or Sundays, it would be difficult to mount an argument that there is no social disadvantage associated with weekend work. Formal and informal social and family events, participation in sport and religious worship all occur on weekends when the vast majority of Australians are available. For people who work weekends, their ability to participate is curtailed and the Queensland Government accepts that this represents a social disadvantage.

- Long Service Leave

In Issues Paper 2, in its discussion on National Employment Standards (NES), the PC notes that although long service leave entitlements are included in the NES, the minimum entitlement is governed by different requirements in different states, rather than the one nationally–uniform set of provisions. The PC also asks about the costs associated with existing differences across states and asks whether these costs justify the adoption of a uniform national standard. It also asks if a uniform standard was to be adopted, how the disparities between state laws should be resolved.

The NES took effect from January 2010 and are minimum standards of employment applying to employees which cannot be displaced. They relate to a number of employment entitlements including long service leave.

[9] ABS Cat 6389.0, *Forms of Employment, November 2012*

[10] ABS Cat 6285.0 *Involvement in Organised Sport and Physical Activity, April 2010*

Long service leave (LSL) is a non-excluded matter under section 27 of the FW Act. As a result the States and Territories are free to make their own laws in respect of LSL and applicable conditions in pre-modern industrial instruments continue to operate. Generally an NES provides for nationally consistent entitlements but the LSL NES was introduced as a transitional entitlement for employees pending the development of a uniform national LSL standard.

The development of a national LSL standard has been on the national agenda for quite some time. Attempts to develop a harmonised system of LSL entitlements were sponsored and advocated by Victoria in 2003 and by the Commonwealth in 2008-2012 but no outcome was achieved in either case. Most recently, the 2012 Review Report recommended that the Commonwealth, state and territory governments should expedite the development of a national LSL standard with a view to introducing it by 1 January 2015.

The *Industrial Relations Act 1999* (Qld) provides for long service leave entitlements of 8.6667 weeks after 10 years with a subsequent entitlement after a further five years. Pro rata entitlements are payable upon termination after seven years.

Harmonisation of LSL entitlements could potentially simplify current arrangements for both employers and employees as differing LSL provisions can create complications for businesses operating across jurisdictions. However, harmonisation of entitlements would inevitably mean that jurisdictions will see either an increase or decrease in current entitlements. Although transitional provisions can be used to phase in changes, any proposed changes are likely to attract some opposition. Appropriate genuine consultation and cooperation with industrial parties will be essential in achieving agreement on harmonisation. In addition, the introduction of such phasing in provisions would require the allocation of State and/or Federal resources to adequately inform employers and employees of the changes and to enable them to accurately calculate future entitlements. Once again appropriate and genuine consultation and cooperation between jurisdictions will be integral to the achievement of harmonisation.

The Queensland Government supports the current LSL NES as ensuring the maintenance of LSL entitlements. The Queensland Government is prepared to work with other jurisdictions towards improving the consistency of employee LSL entitlements through appropriate and genuine consultation with industrial parties and recognises that harmonisation is likely to be achieved over the longer term.

• Public Sector Employment

In Issues Paper 5, the PC asks 'How should Workplace Relations arrangements in state and public services (and any relevant state-owned enterprises) be regulated? In particular, to what extent and why, should Workplace Relations provisions vary with the public or private status of an enterprise?'

A number of exclusions applied to Queensland's referral of industrial relations jurisdiction to the Commonwealth including State Government and State owned corporations. It is appropriate for the Queensland Government to retain control over the industrial relations environment within which government policies are carried out and government services are delivered. This includes being able to regulate the ethical conduct of employees, matters of discipline, terms and conditions of employment and how industrial action is dealt with.

Queensland public sector employees are predominantly covered by the state industrial relations jurisdiction, under the *Industrial Relations Act 1999* (Qld) (IR Act). Some commercial statutory authorities, that have not been declared 'not to be national system employers' [s14(2) *Fair Work Act 2009*], government owned corporations (GOCs) and some government corporate entities (that are not GOCs under the *Government Owned Corporations Act 1993*) are subject to the federal workplace relations jurisdiction.

Queensland public sector employees number approximately 205,000. There is a "Core" public service agreement (*State Government Departments Certified Agreement 2009*) made under the IR Act which

regulates wages and conditions for approximately 48,000 employees of the core government departments. Another 42 agreements apply to individual state agencies, offices, statutory authorities, commissions etc.

Additional conditions of employment and key public service issues are made under the *Public Service Act 2008* (Qld) (PS Act), including by Ministerial or Public Service Commission CEO Directives which may be issued under the PS Act (e.g. Merit Recruitment and Selection, Early Retirement and Redundancy).

The Queensland Government has a policy position of setting wages and conditions by way of collective bargaining between public sector employers, public sector unions representing their members and employees. The independent Queensland Industrial Relations Commission (QIRC) has functions and powers under the IR Act to assist the parties in bargaining through conciliation, arbitration where necessary and managing protected industrial action.

The Queensland Government sets wages policy parameters so that there is some fiscal control around public sector wages outcomes. The Queensland Government also sets some broader industrial relations policies such as job security, use of contractors and outsourcing, which are to be applied to public sector employees.

The Directors-General of Queensland government departments and CEOs of statutory authorities, agencies, offices, commissions, are generally nominated in legislation and industrial instruments (awards and agreements) as the employer on behalf of the Queensland Government. There are various levels of delegations within departments and other agencies to enable effective operations and implementation of employment arrangements.

The International Labour Organisation Convention C098 – Right to Organise and Collective Bargaining Convention at Article 6 states – "This Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way." The Queensland Government acknowledges and respects the rights of its public sector employees and public sector unions to organise and collectively bargain with the various public sector employees and will ensure those rights continue.

As part of its commitments articulated in 'Restoring Fairness for Government Workers', the Queensland Government has pledged to 'reinstate employment conditions for Government workers that were lost as a result of the former Government's changes to the IR Act; re-establish the independence of the Queensland Industrial Relations Commission (QIRC) when determining wage cases; and return the QIRC to its position as a layperson's tribunal, where employees and union advocates operate on a level playing field with employers.

It is critically important that state governments adhere to principles of the Westminster system in their regulation of public sector employment. This includes an independent public service, mutual respect between the public service and the government and between public servants and merit based selection processes. Adherence to these principles provides the necessary checks and balances in the regulation of public sector employment.