INDUSTRIAL RELATIONS AND OTHER ACTS AMENDMENT BILL 2005

EXPLANATORY NOTES

GENERAL OUTLINE

Objectives of the Bill

This Bill amends the *Industrial Relations Act 1999,* the *Trading (Allowable Hours) Act 1990* and the *Workers' Compensation and Rehabilitation Act 2003*.

The amendments to the *Industrial Relations Act 1999* will:

(a) increase the statutory protection of clothing outworkers;

(b) support more family-friendly work practices;

(c) determine a method to calculate annual and long service leave payments for employees who are entitled to receive commissions in their leave payments;

(d) provide protection from dismissal for an invalid reason for short-term casual employees and employees engaged for a specific period or task.

(e) provide a more effective process for applicants in freedom of association matters;

(f) overcome problems with the flow-on of certified agreements into awards;

(g) remove obstacles to negotiating a certified agreement after the expiry of a determination under section 149;

(h) clarify the financial and administrative arrangements for the Industrial Court of Queensland, the Queensland Industrial Relations Commission (QIRC), their members and associates;

(i) increase the effectiveness of the unpaid wages jurisdiction of the QIRC;

(j) restrict the QIRC's powers to amend or declare void contracts of employment due to the provision or lack of provision for accident pay or other payment on account of a worker sustaining an injury under the *Workers' Compensation and Rehabilitation Act 2003*;

(k) replace the President's Advisory Committee and the Industrial Relations Advisory Committee with more informal consultation;

(l) amend section 638 (concerning deregulation of industrial organisations) to conform with Australia's international obligations;

(m) remove the ability of employers to opt out of the superannuation fund nominated in their industrial instrument;

(n) improve enforcement remedies for breach of an industrial instrument;

(o) allow the QIRC to designate a relevant industrial instrument for the purpose of assessing aged or infirm persons' wages, where no industrial instrument exists in the relevant calling;

(p) insert a number of minor amendments to clarify the intention of provisions and correct drafting anomalies.

The Bill also amends the *Trading (Allowable Hours) Act 1990* to give the QIRC jurisdiction over trading in South-East Queensland on Boxing Days and New Year's Days that fall on a Sunday where there is a substituted public holiday.

Two amendments to the *Workers' Compensation and Rehabilitation Act 2003* are contained in the Bill, which will:

(a) ensure that workers or prospective workers are not prejudiced in employment because they have sustained an injury under the Act or a former Act; and

(b) ensure the continued effective and efficient administration of Queensland's workers' compensation arrangements.

Reasons for the Bill and How Objectives will be Achieved

Clothing Outworkers

A key component of the Bill is the introduction of provisions to assist clothing outworkers to recover unpaid wages and superannuation

contributions. This is part of a broad-ranging strategy to address the exploitation of outworkers in the clothing industry. The Bill also provides for a mandatory code of conduct to govern the industry, if this is thought to be necessary in the future.

The provisions with respect to wage recovery are modelled on statutory schemes in force in New South Wales and Victoria. Once enacted in Queensland, there will be a uniform regulatory scheme for the recovery of wages by outworkers across the eastern seaboard of Australia, where most of these employees live and work.

A special process for wage recovery is considered to be necessary for clothing outworkers because of the unique characteristics of the industry in which they find themselves. These characteristics put outworkers at a special disadvantage. In particular, there is widespread evidence that complex contracting arrangements are used in the industry to obscure the identity of participants in the contracting chain who have legal obligations, such as employers. These arrangements make it easier for persons to evade their legal responsibilities, such as paying proper wages to employees. The disadvantage caused to outworkers by these arrangements is compounded by the fact that the majority of outworkers in Queensland are from non-English speaking backgrounds (predominantly Vietnamese), who have greater difficulty in understanding their rights as employees. The combined result of these factors is that clothing outworkers often face considerably greater obstacles to recovering their lawful entitlements than other employees. The Bill will address these difficulties.

The Bill puts the primary responsibility for identifying the legal employer of an outworker on the participants in the contracting chain, rather than on the outworker. The Bill achieves this by allowing outworkers to serve a claim for unpaid wages and superannuation on the person whom the outworker believes is his or her employer (called the 'apparent employer' in the Bill). The outworker's claim must be supported by a statutory declaration. The apparent employer will remain liable for the amount claimed unless he/she can show that the work was not done, the amount claimed is incorrect or that the amount has already been paid.

The claims procedure will apply to all participants in the contracting chain other than a person whose sole connection with the clothing industry is the sale of clothing by retail. The claims procedure will thus entitle the outworker to serve a claim upon the principal manufacturer who ultimately receives the finished work.

The apparent employer will be able to refer the claim to the person for whom the apparent employer reasonably believes the work was done. If that person does not accept liability, the apparent employer may recover any amount paid to the outworker from the outworker's legal employer, through proceedings in the Queensland Industrial Relations Commission (QIRC) or Industrial Magistrates Court. The apparent employer may also deduct any amount he/she pays to an outworker from any money he/she owes to the person for whom the apparent employer reasonably believes the work was done.

Alternative means of achieving policy objectives

It is considered that statutory regulation is the best option for achieving the policy objectives. Although Queensland has been proactive in its measures to address the problem of outworker exploitation, there still appear to be many unscrupulous operators in the industry. In addition, regulatory consistency across the eastern seaboard is desirable to remove incentives for unscrupulous manufacturers to relocate to the weakest link in the regulatory chain.

Work and Family

The Bill contains a number of provisions to assist employees to balance their work and family lives, in accordance with the recommendations of a Ministerial Taskforce on Work and Family established in November 2001.

The Ministerial Taskforce on Work and Family recommended, and the Bill implements, a requirement that awards take family responsibilities into account and that they facilitate agreement at the workplace or enterprise level on balancing work and family responsibilities. The Bill also provides extra unpaid bereavement leave for people who have to travel long distances to attend the funeral of a family member and five days' unpaid cultural leave to people who are required by Aboriginal or Torres Strait Islander tradition or custom to attend a ceremony, subject to the employer's agreement, which must not be unreasonably refused.

Alternative means of achieving policy objectives

There are no alternative means of implementing the policy in conformity with the recommendations of the Ministerial Taskforce on Work and Family.

Providing a default calculation for the commission component of annual and long service leave

The Bill provides a default calculation for working out the commission component of annual leave and long service leave payments, for employees whose earnings are made up of, or include, payment by commission.

The provisions only apply where the employee is entitled to receive an amount representing commissions in their leave payment (for example, because of a term in a relevant industrial instrument or contract of employment) and there is no agreement as to how the amount should be calculated.

Alternative means of achieving policy objectives

It is considered that a statutory default for the calculation of the commission component of annual and long service leave payments is necessary to achieve certainty in this matter.

Invalid dismissal

The Bill will extend protection from dismissal for an invalid reason to short-term casual employees and employees engaged for a fixed term or task. This will improve the fairness of the invalid dismissal provisions.

Alternative means of achieving policy objectives

Legislative amendment is the only means of achieving this objective.

Freedom of association

The Bill will reverse the onus of proof when a party alleges conduct for a prohibited reason under the freedom of association provisions in Chapter 4 of the *Industrial Relations Act 1999* (IR Act).

This will overcome a significant problem for persons alleging breach of these provisions in proving their claim, eg proving the motives of the other person. It is desirable that such a fundamental right as freedom of association be supported as strongly as possible.

Alternative means of achieving policy objectives

Because the amendment is intended to strengthen provisions in the IR Act, there are no alternative means of achieving the policy objectives.

Flow-on of certified agreements

The Bill will amend section 129 of the IR Act to facilitate the incorporation of provisions from certified agreements into awards, where the parties to the relevant certified agreement consent.

Section 129 of the IR Act currently permits provisions from certified agreements to be incorporated into awards but only if the QIRC is satisfied that the provisions are consistent with wage fixing principles and are not contrary to the public interest. The section has proven too limited on some occasions to achieve its objective of ensuring that awards are kept relevant and up-to-date.

The provisions flowed into an award under this section will apply only to the parties to the relevant certified agreement who are also parties to the award.

Alternative means of achieving policy objectives

Because these amendments are intended to overcome a limitation in the IR Act, there are no other means of achieving the policy objective.

Remove obstacles to negotiating a certified agreement after the expiry of a determination made under section 149

The Bill addresses a problem in the operation of the IR Act with respect to section 149 determinations. The problem is as follows. Protected industrial action, for the purposes of negotiating a certified agreement, cannot be taken while a determination operates. A determination operates until it is revoked under the IR Act. Once a determination is revoked, the entitlement of employees to the terms and conditions set by the determination is removed. This constitutes a significant obstacle to employees who wish to replace a determination with a certified agreement once the nominal expiry date has passed. Determinations are not intended to be disincentives to agreement making.

The Bill addresses this problem by providing in section 181 that protected action may be taken after the nominal expiry date of a determination. It also puts procedures in place for revoking a determination after its nominal expiry date which are more consistent with the procedures for terminating a certified agreement.

Alternative means of achieving policy objectives

Because the amendment is intended to overcome a limitation in the IR Act, there are no alternative means of achieving the policy objectives.

Arrangements concerning QIRC, commissioners and associates

The statutory basis for a number of arrangements concerning the QIRC, commissioners and their associates is unclear. These arrangements include the appointment, terms and conditions of commissioners' associates and responsibility for the QIRC in terms of the *Financial Administration and Audit Act 1977*. These arrangements are made explicit by the Bill.

Alternative means of achieving policy objectives

There are no alternative means of clarifying the statutory basis of arrangements for the QIRC, commissioners and their associates.

Increase effectiveness of unpaid wages jurisdiction of the QIRC

The Bill increases the jurisdiction of the QIRC over wage recovery matters from the current $20,000 claim limit to $50,000.

Increasing the QIRC's jurisdiction over wage claims of up to $50,000 will provide better access to an economical and efficient recovery mechanism for a larger number of employees who have been underpaid, while reducing the number of claims that have to be filed in the Industrial Magistrates Court.

Alternative means of achieving policy objectives

Because the monetary jurisdiction of the QIRC is set by legislation, there is no alternative means of achieving this policy objective.

Addressing breach of the ILO *Convention on Freedom of Association and Protection of the Right to Organize*

One of the objects of the IR Act is to assist in giving effect to Australia's international obligations in relation to labour standards (section 3(n)). However, in April 2004, the International Labor Organisation issued a report, '*The Application of International Labour Standards 2004*', which noted that section 638(b) of the Act breaches the *Freedom of Association*

and Protection of the Right to Organize Convention. Australia is a signatory to this Convention.

Section 638(b) of the IR Act allows the deregistration of organisations for 'engaging in industrial action that has prevented or interfered with trade or commerce or providing a public service'. This section was carried forward from the *Industrial Organisations Act 1997*, which mirrored federal legislation that required, among other things, a basis in 'trade or commerce' to give the provision validity. Removal of section 638(b) removes this ground for deregistration to achieve conformity with ILO requirements. Other parts of section 638 sufficiently protect the community from harmful industrial action, for example section 638(c) allows an industrial organisation to be deregistered for taking industrial action which has, or is likely to have, a substantial adverse effect on the safety, health or welfare of the community or a part of the community.

Alternative means of achieving policy objectives

There is no other means of achieving conformity with the relevant Convention.

Remove ability of employers to opt out of the superannuation fund nominated in their industrial instrument

The Bill removes the ability of employers and employees to agree to contribute to a superannuation fund other than one of the funds specified in their industrial instrument. Removing this ability means that employers will be required to pay superannuation contributions into one of the funds nominated in their industrial instrument.

Removing section 405 will not affect the operation of federal legislation regarding "choice of superannuation".

Employers who are paying into a fund other than one of the funds specified in their industrial instrument, in exercise of their right under the repealed section 405, will not be obliged to change funds.

Alternative means of achieving policy objectives

Amending the IR Act is the only means of achieving this policy objective.

Trading hours

Amendments were passed to the *Trading (Allowable Hours) Act 1990* in late 2004 requiring certain non-exempt shops in South-East Queensland to close on Boxing Day 2004. This amendment was necessary, in part, because the QIRC did not have jurisdiction to reduce trading hours in South-East Queensland on a public holiday that fell on a Sunday. The Bill will allow the QIRC to exercise jurisdiction over trading hours on Boxing Days and New Year's Days that they fall on a Sunday where there is a substituted public holiday.

Alternative means of achieving policy objectives

There are no alternative means of conferring the necessary jurisdiction on the QIRC.

Ensure workers are not prejudiced in employment because they have sustained an injury

The Bill amends the *Workers' Compensation and Rehabilitation Act 2003* (WCR Act) to prohibit the practice of persons obtaining and using any personal workers' compensation claims information for employment or prospective employment purposes, due to the potential for a worker or prospective worker to be treated unfavourably if they have had a workers' compensation claim.

In 2003-04, the Workers' Compensation Regulatory Authority (Q-COMP) received 39,965 requests for workers' compensation claims histories. There is evidence to suggest that some organisations are requiring prospective workers to provide a claims history before they will be considered for employment.

There is concern that a workers' compensation claims history does not provide sufficient detail for an employer to match a worker's capabilities to specific job duties. In addition, previous injuries from sporting events or motor vehicle accidents would not be included.

The Bill achieves the above objective primarily by making an amendment which introduces an offence provision to prohibit the practice of persons obtaining and using any documents that relate to a person's application for compensation or claims for damages in relation to employment or prospective employment purposes.

Alternative means of achieving policy objectives

The Department of Industrial Relations and the Q-COMP developed an awareness strategy including warning notices being placed on the work history documentation alerting workers and most particularly any employer in possession of the form, to relevant provisions of Queensland's *Anti-discrimination Act 1991*. The effectiveness of this strategy was monitored however requests for this information continued to increase with 39,965 requests received in 2003-04.

It is therefore considered that legislation is necessary to achieve the policy objectives mentioned above.

Ensure continued and effective administration of Queensland's workers' compensation arrangements

The Bill makes amendments necessary to enhance the operation of the WCR Act. As a result of the decision of the QIRC in *Gersten v Cape York Land Council* (No. B2041 of 2003), the ability for contracts of employment to provide for accident pay or other payments to an incapacitated worker requires clarification and alignment with industrial instruments.

The Bill achieves this objective by making consequential amendments to ensure the restrictions on provisions of accident pay and other payments to incapacitated workers in industrial instruments equally apply to contracts of employment and to restrict the QIRC's power to amend or declare void a contract due to the provision, or lack of provision for accident pay or other payment on account of the worker sustaining an injury.

Alternative means of achieving policy objectives

A legislative amendment is the only means of ensuring the restrictions on provisions of accident pay and other payments to incapacitated workers in industrial instruments equally apply to contracts of employment.

Other amendments

The Bill contains a number of other amendments to the IR Act to clarify and improve its operation in light of developments since the introduction of the IR Act in 1999. These amendments include:

- allowing orders to be made to enforce the payment of any money that has not been paid by an employer in breach of an industrial

instrument, if the order cannot be made elsewhere under the IR Act;

- removal of the President's Advisory Committee and Industrial Relations Advisory Committee;
- allowing the QIRC to designate an appropriate industrial instrument for the purposes of granting an aged or infirm person's permit where the person is not covered by an industrial instrument;
- a number of technical amendments to correct drafting anomalies, provide for consistency in wording in certain sections, and clarify the meaning of the legislation.

Administrative Cost to Government for Implementation

There are no anticipated increases in costs for government arising from this legislation.

The Bill will reduce administrative costs in relation to Q-COMP, which administers requests for workers' compensation claims history information. The amendments to the WCR Act do not impact on the current financial state of the worker's compensation scheme.

Consistency with Fundamental Legislative Principles

The Bill has been drafted with regard to the fundamental legislative principles prescribed by the *Legislative Standards Act 1992*.

The clothing outworker provisions will allow Departmental industrial inspectors to enter a workplace in domestic premises where clothing outwork is being performed, without having to obtain a warrant or the occupier's permission first. Before exercising their power of entry, inspectors must first have a reasonable belief that clothing outwork is being carried on in the premises. They will only be able to enter that part of the premises where it is reasonably believed that outwork is being, has been or is about to undertaken.

Departmental industrial inspectors have had a long-standing statutory right to enter any workplace which is "open for business", without a warrant and without the occupier's consent, to monitor and enforce compliance with the IR Act. For workplaces in domestic premises, inspectors may enter that part of the place where "members of the public are ordinarily allowed to enter". It is difficult to use these powers in connection with workplaces

where clothing outworkers are employed. Premises used for clothing outwork are often "sweatshops" deliberately concealed from public scrutiny. They do not "open for business" and members of the public are not "ordinarily allowed to enter". Inspectors would not have the power to enter them under the IR Act as currently drafted and would therefore not be able to effectively enforce the IR Act in relation to clothing outworkers.

Another aspect of the clothing outworker provisions which raises fundamental legislative principles is that the onus of identifying an outworker's employer has effectively been shifted from the outworker to participants in the contracting chain. It is considered that the unique nature of the industry justifies such an approach. The complex webs of contracting that occur in the industry can easily be used to disguise the identities of persons with legal liabilities, such as employers. Outworkers will usually only know the identity of the person who hired them or who gives them work. This person may or may not be the legal employer.

The participants in the contracting chain are in a better position to know who is intended to be responsible for wages and they can also insulate themselves from liability through their commercial arrangements with one another. It is considered that an expectation that the parties in the contracting chain sort out who is responsible for outworkers' wages is not unreasonable or unduly unfair in these circumstances. Contractors and subcontractors also have recourse under the Bill to an inexpensive and efficient forum (the QIRC) to claim reimbursement from the legal employer of any amounts paid.

Reversing the onus of proof in freedom of association matters raises fundamental legislative principles. It is considered that there is adequate justification for reversing the onus because the evidence required to prove a claim is usually within the peculiar knowledge of the party engaging in the prohibited conduct.

Consultation

Consultation with government agencies, employer organisations, unions and State peak councils has occurred on the Bill.

NOTES ON PROVISIONS

Short title

Clause 1 sets out the short title of the Bill.

Act amended in part

Clause 2 provides that Part 2 of the Bill amends the IR Act.

Amendment of s 6 (Who is an employer)

Clause 3 amends section 6(2)(e) to provide that, for the purposes of proceedings for an offence, the word "employer" also means a former employer.

Amendment of s 8 (Provisions about appointments and procedures of committees)

Clause 4(1) amends section 8 to delete the reference to "committees" in the heading because the Bill removes the statutory advisory committees established under the Act.

Clause 4(2) amends section 8(a) to insert references to the "vice president" and "deputy presidents" in accordance with the present composition of the QIRC.

Clause 4(3) amends section 8(d) to remove the references to the "statutory advisory committees" and to insert a reference to "associates", for whom provision is made in schedule 2.

Amendment of s 13 (Payment for annual leave)

Clause 5 inserts new subsections (3), (4) and (5) in section 13 to provide a default method of calculating the amount representing commission (the default average commission) in the annual leave payment of an employee, if the employee is already entitled to receive an amount representing commission as part of their annual leave payment.

The default average commission is payable unless a term in the relevant industrial instrument or contract between the employer and employee provides otherwise or where, on application to the QIRC, the QIRC

considers that the amount calculated would not represent a fair amount in the circumstances of the particular case.

The QIRC may make the order it considers appropriate in the circumstances if the QIRC considers the default average commission would not represent a fair amount in the circumstances of the particular case.

Subsection 13(5) provides the method of calculating the default average commission.

Amendment of s 40 (Entitlement)

Clause 6 amends section 40 by deleting subsections 40(2) and 40(3) and replacing them with two new subsections.

In doing so, the words "in Australia" have been removed from the two replaced subsections to remove doubts about a person's entitlement to bereavement leave when a family or household member dies overseas.

Subsections 40(2)(b) and 40(3)(b) provide an entitlement to additional unpaid bereavement leave if the employee reasonably requires extra time to travel to and from the funeral or other ceremony of the member of the person's immediate family or household. The additional leave allowed is the amount of time equal to the extra time reasonably required to travel.

Insertion of new ch 2, pt 2, div 4A

Clause 7 inserts a new division 4A about cultural leave.

Division 4A Cultural Leave

Section 40A Entitlement

Section 40A provides that an employee who is required by Aboriginal tradition or Island custom to attend an Aboriginal or Torres Strait Islander ceremony may take up to 5 days unpaid cultural leave in each year with the employer's agreement.

Subsection 40A(2) provides that the employer must not unreasonably refuse the leave.

Subsection 40A(3) sets out a number of matters that the employer must take into account when considering the employee's request for the leave.

Under subsection 40A(4), the employee must, if practicable, give notice of the intention to take the leave before taking it, provide the reason for taking the leave and indicate the period the employee estimates he or she will be absent.

Under subsection 40A(5), if it is not practicable for the employee to notify the employer of the intention to take the leave before taking it, the employee must notify the employer at the first opportunity.

To ensure that there are no misunderstandings about the purpose of the section, subsection 40A(6) declares that it is a welfare measure for the purposes of section 104 of the *Anti-Discrimination Act 1991*.

Subsection 40A(7) provides a definition of "employee" for this section.

Amendment of s 46 (Payment for long service leave)

Clause 8(1) amends section 46(6) by renumbering it as section 46(12).

Clause 8(2) inserts a new subsection (6) in section 46 to provide a default method of calculating the amount representing commission (the default average commission) in the long service leave payment of an employee, if the employee is already entitled to receive an amount representing commission as part of their long service leave payment.

The default average commission is payable unless a relevant industrial instrument or contract between the employer and employee provides otherwise or where, on application to the QIRC, the QIRC considers that the amount calculated would not represent a fair amount in the circumstances of the particular case.

The QIRC may make the order it considers appropriate in the circumstances if the QIRC considers the default average commission would not represent a fair amount in the circumstances of the particular case.

Clause 8(3) inserts the method for calculating the default average commission.

Amendment of s 49 (Payment for long service leave)

Clause 9 amends sections 49(3) to (6) by relocating them and renumbering them as sections 46(8) to (11). This amendment rectifies an error made in

previous drafting of the IR Act when sections 49(3) to (6) were inadvertently placed in Division 3 about casual and regular part-time employees instead of in Division 2 which applies to employees generally.

Amendment of s 71 (Continuity of service - generally)

Clause 10 amends section 71(9) to provide that periods an employee is away from work under subsections 71(4), (5), (6)(b) or (7) are not to be counted as service but those periods do not break the employee's continuity of service. The Bill's transitional provisions provide that this amendment only applies to an employee's service after the commencement of the amendment.

Amendment of s 72 (Who this chapter does not apply to)

Clause 11(1) amends section 72(1)(c) to protect short-term casual employees from dismissal for any invalid reason mentioned in section 73(2). The protection is currently limited to the invalid reasons set out in section 73(2)(i), (j), (k) and (m).

Clause 11(2) amends section 72(1)(d) to protect employees engaged for a specific period or task from dismissal for any invalid reason mentioned in section 73(2).

Amendment of s 73 (When is a dismissal unfair)

Clause 12 inserts a definition of 'parental leave' in section 73, which refers to the definition of parental leave in section 17 (i.e. parental leave means long parental leave, short parental leave or adoption leave).

Insertion of new s 122A

Clause 13 inserts a new section 122A to reverse the onus of proof when it is alleged that conduct has been engaged in for a prohibited reason under Chapter 4 of the IR Act.

Section 122A provides that, in proceedings under Part 4 of Chapter 4 where it is alleged that conduct was carried out for a particular reason or with a particular intent that would constitute a contravention of Part 4, the conduct is presumed to have been carried out for the particular reason or intent alleged, unless it is proved otherwise.

Amendment of s 126 (Content of awards)

Clause 14 amends section 126 by inserting subsections (i)(iv) and (j), which require the QIRC to ensure, whenever possible, that awards contain facilitative provisions that allow agreement at the workplace or enterprise level to be reached on work and family responsibilities and that awards take into account employees' family responsibilities.

Amendment of s 129 (Flow-on of certified agreements)

Clause 15 amends section 129 by inserting subsections (2) and (3) to facilitate the incorporation of provisions from certified agreements into awards where the parties agree.

Section 129 currently allows provisions from certified agreements to be incorporated into awards but only if the QIRC is satisfied that the provisions are consistent with wage fixing principles and are not contrary to the public interest. The new subsection (2) provides that the QIRC must flow on provisions of a certified agreement into the award if the parties to the agreement agree and the parties to the agreement are bound by the award.

Subsection (3) provides that the provisions included in an award under subsection (2) must apply only to the parties to the certified agreement.

Amendment of s 137 (Order setting minimum wages and conditions)

Clause 16 changes the title of the Training Recognition Council to the Training and Employment Recognition Council, consequential upon amendments to the *Training Reform Act 2003*.

Amendment of s 138 (Order setting tool allowance)

Clause 17 changes the title of the Training Recognition Council to the Training and Employment Recognition Council, consequential upon amendments to the *Training Reform Act 2003*.

Amendment of s 138B (Wages payable to former apprentices or trainees)

Clause 18 changes the title of the Training Recognition Council to the Training and Employment Recognition Council, consequential upon amendments to the *Training Reform Act 2003*.

Amendment of s 140 (Orders for wages and employment conditions)

Clause 19 changes the title of the Training Recognition Council to the Training and Employment Recognition Council, consequential upon amendments to the *Training Reform Act 2003*.

Amendment of s 140A (Vocational placement)

Clause 20 changes the title of the Training Recognition Council to the Training and Employment Recognition Council, consequential upon amendments to the *Training Reform Act 2003*.

Amendment of s 150 (Determinations made under s 149)

Clause 21 provides that a determination operates until it is revoked under subsection 150(5) before its nominal expiry date has passed or it is replaced by a certified agreement or revoked under section 150(6) after its nominal expiry date has passed.

A new subsection 150(4) is inserted to clarify that an application may be made to the QIRC to revoke a determination and setting out who may make the application. The eligible applicants are the employer, a majority of the employees to whom the determination applies or an employee organisation bound by the determination which has at least 1 member who is an employee bound by the determination.

Subsection 150(5) replicates existing subsection 150(4).

Subsection 150(6) provides a new process for revoking a determination after its nominal expiry date has passed. This process creates greater consistency between ending a determination and ending a certified agreement. Under the new subsection, the QIRC must revoke the determination after its nominal expiry date if it is satisfied that any conditions in the determination for revoking it have been met or, for determinations that do not provide for the way in which they may be revoked, that it is in the public interest to do so.

Under subsection 150(7), the revocation takes effect when the QIRC's approval takes effect.

Subsection 150(8) clarifies that while a determination is in operation it prevails over any award, industrial instrument or order under section 137 to the extent of any inconsistency. Subsection (8) also provides that a determination may not be amended while it operates (this provision is currently contained in section 150(2)).

Amendment of s 160 (When an agreement passes the no-disadvantage test)

Clause 22 amends section 160(5) to replace "president" with "vice president" to reflect the current administrative arrangements in the QIRC.

Amendment of s 173 (Terminating agreement after its nominal expiry date)

Clause 23 replaces the word 'certain' with the word 'particular' in line with current drafting conventions. It is not intended to change the meaning of the section.

Amendment of s 181 (When industrial action must not be taken)

Clause 24 amends section 181(1)(b) to provide that industrial action must not be taken from the time a determination under section 149 starts operating until its nominal expiry date has passed.

Amendment of s 209 (When does a QWA pass the no-disadvantage test)

Clause 25 amends section 209(4) to replace "president" with "vice president" to reflect the current administrative arrangements in the QIRC.

Insertion of new ss 242A and 242B

Clause 26 inserts two new sections after section 242, as follows:

242A Official seal

Section 242A makes direct provision for an official seal of the Industrial Court of Queensland.

242B Finances of court

Section 242B provides that the Industrial Court of Queensland is part of the Department of Industrial Relations for the purposes of the *Financial Administration and Audit Act 1977.*

Amendment of s 252 (President's annual report)

Clause 27 amends section 252 by inserting a new subsection (1A) which gives the registrar statutory responsibility for preparing a report on the workings of the registry for inclusion in the president's annual report.

Omission of ch 8, pt 1, div 5

Clause 28 omits division 5 of part 1 of chapter 8, which is about the establishment of the President's Advisory Committee.

Insertion of new ss 255A and 255B

Clause 29 inserts two new sections after section 255, as follows:

255A Official seal

Section 255A makes direct provision for an official seal for the QIRC.

255B Finances of commission

Section 255B provides that the QIRC is part of the Department of Industrial Relations for the purposes of the *Financial Administration and Audit Act 1977.*

Amendment of s 263 (Removal of commissioners from office)

Clause 30 amends section 263 to correct a grammatical error by changing the word "to" to the word "of".

Amendment of s 269 (Commissioner administrator to consider efficiencies that may be achieved by using dual commissioners)

Clause 31 amends the heading to section 269 to replace "commissioner administrator" with "vice president" to reflect current administrative arrangements in the QIRC.

Amendment of s 276 (Power to amend or void contracts)

Clause 32 amends section 276 which provides the powers of the QIRC to amend or void unfair contracts. The clause provides that the QIRC can not amend a contract to include, or declare void a contract because it does not contain, a provision for accident pay or other payment on account of a worker suffering an injury under the WCR Act. This ensures that the regulation of compensation payable to a worker on account of sustaining an injury is exclusively under the WCR Act.

Amendment of s 278 (Power to recover unpaid wages and superannuation contribution etc.)

Clause 33 amends section 278(2) by increasing the wage recovery limit in the QIRC from $20,000 to $50,000.

Clause 33(2) amends section 278 (11) to provide that an application may not be made under section 278 if an application has been made under section 400F (recovery of unpaid wages and superannuation contributions for outworkers) for the same matter.

Amendment of s 290 (Office of Industrial Magistrate)

Clause 34 amends section 290(a) and (b) to delete the word "stipendiary" as this term is obsolete (see *Justice and Other Legislation (Miscellaneous Provisions) Act 2000*).

Amendment of s 335 (Costs)

Clause 35 amends the heading to section 335 to more appropriately reflect the subject matter of the section.

Amendment of s 338 (Rules)

Clause 36(1) amends section 338(3)(a) to remove the word "stipendiary" as this term is obsolete.

Clause 36(2) amends section 338(3)(c) to require the president to consult with the vice president and another commissioner, rather than two commissioners, when considering the making of rules relating to the commission.

Amendment of s 353 (Entry to places)

Clause 37 amends section 353(2) by inserting subsection (c), which allows Departmental inspectors to enter that part of a workplace on or near domestic premises if the inspector reasonably believes clothing outwork is being, has been or is about to be carried on there.

Amendment of s 355 (Power to require documents to be produced)

Clause 38 amends section 355 by inserting a new subsection (7) which clarifies that section 371 is not intended to limit the powers of Departmental inspectors under section 355 but rather that the powers given to inspectors under section 355 are in addition to the powers given under section 371.

Amendment of s 391 (Wages etc. to be paid without deduction)

Clause 39 amends section 391(2)(b) to change the title of the Training Recognition Council to the Training and Employment Recognition Council, consequential upon amendments to the *Training Reform Act 2003*.

Amendment of s 393 (Paying wages)

Clause 40 amends section 393(6) to provide that wages owing to an employee who stops work must be paid to the employee within 3 days of the employee stopping work unless an industrial instrument provides for a shorter time.

Amendment of s 399 (Recovery of unpaid wages etc)

Clause 41 amends section 399(6) to provide that an application may not be made under this section if an application has been made under section 400F for the same matter.

Amendment of s 400 (Enforcement of magistrate's order)

Clause 42 replaces sections 400(3), (4) and (5) to clarify that an order made by an industrial magistrate, for the purposes set out in the section, may be enforced in the manner set out under subsection (2) or in the manner set out under subsections (3) and (4). They are alternative methods of enforcement.

Subsection (5) is amended to expand the definition of "employer" to include an "apparent employer" to accommodate the new provisions about clothing outworkers.

Amendment of new ch11, pt 2, div 3A

Clause 43 inserts a new division 3A of part 2 of chapter 11, primarily to enable clothing industry outworkers to take proceedings for unpaid wages and superannuation contributions against an "apparent employer".

Division 3A Recovery of wages for clothing outworkers

400A Definitions

Section 400A contains the definitions for the division.

400B Claims by clothing outworkers for unpaid wages and super

Section 400B applies if an outworker in the clothing industry is not paid wages owed to the outworker by an employer or the employer does not pay superannuation contributions (defined in section 400A).

Subsection 400B(2) provides that the outworker may make a claim for unpaid wages and/or superannuation against a person the outworker believes is his or her employer (the apparent employer). This claim is referred to elsewhere in Division 3A as an unpaid wages claim.

Subsection 400B(3) provides that an unpaid wages claim cannot be made against a person whose only connection with the clothing industry is the sale of clothing by retail.

Subsection 400B(4) requires a claim for wages to be made within 6 months after the work is completed.

Subsection 400B(5) provides that the claim must be in writing and served on the apparent employer. The subsection also sets out the particulars that must be contained in the written notice.

Subsection 400B(6) provides that the particulars in the claim must be verified by statutory declaration.

Subsection 400B(7) limits claims to wages for work done and superannuation contributions payable after the commencement of section 400B.

400C Liability of apparent employer for unpaid wages and super

Section 400C(1) provides that an apparent employer served with an unpaid wages claim is liable to pay the amount claimed unless he/she proves (in proceedings under section 400F) that the work was not done, the amount claimed for wages is not correct or the amount claimed has already been paid.

Subsection 400C(2) provides that the apparent employer has 14 days after being served with an unpaid wages claim to refer it to a referred employer. A referred employer is a person whom the apparent employer knows or has reasonable grounds to believe is the person for whom the outworker did the work the subject of the unpaid wages claim.

Subsection 400C(3) prevents claims being served on persons whose only connection with the clothing industry is the sale of clothing by retail.

Subsections 400(4)(a) and (b) set out the details of how an apparent employer refers a claim by a clothing outworker to a referred employer for the purposes of the Act. A claim is referred by serving a written notice on the referred employer together with a copy of the outworker's unpaid wages claim and providing certain particulars of the referral in writing to the outworker.

Subsection 400C(5) provides that an apparent employer is not liable for any part of the amount claimed in an unpaid wages claim for which the referred employer accepts liability under section 400D.

400D Liability of referred employer for unpaid wages and super

Section 400D(1) provides that a referred employer may, within 14 days after the service of a referred claim, accept liability for the whole or any part of the amount claimed by paying it to the outworker or relevant superannuation fund. Subsection 400D(2) provides that a referred employer who accepts liability must serve a written notice on the apparent employer about the acceptance and the amount paid.

Subsection 400D(3) provides that an apparent employer who has referred a claim to a referred employer may deduct or set-off an amount owed to the

referred employer equivalent to the amount of the referred claim for which the referred employer does not accept liability. The amount deducted or set-off need not relate to the work the subject of the referred claim.

400E Reimbursement of apparent or referred employer

Section 400E provides that an application may be made to the QIRC or to an industrial magistrate for an order that any amount paid by an apparent employer or a referred employer to a clothing outworker, and/or to an approved superannuation fund for the outworker, be reimbursed to the payer by the clothing outworker's employer.

400F Recovery of unpaid wages

Section 400F(1)(a) & (b) provide that an application may be made to the QIRC or to an industrial magistrate for an order that the apparent employer pay an amount in an unpaid wages claim that has not been paid.

Subsection 400F(2) provides that the total amount claimed in the QIRC must not be more than $50,000. If the total amount is more than $50,000, the claim must be made to an industrial magistrate.

Subsection 400F(3) provides that a clothing outworker, an employee organisation of which the clothing outworker is a member or an inspector may make the application.

Subsection 400F(4) provides that an application for the payment of wages and/or superannuation contributions must be brought within 6 years after the amount claimed in the application became payable.

Subsection 400F(5) provides that the QIRC or industrial magistrate must order the apparent employer to pay the amounts claimed unless the apparent employer proves that the work was not done, the amount claimed for the work or for superannuation contributions is not the correct amount or an amount claimed has already been paid.

Subsection 400F(6) provides that if the QIRC or industrial magistrate is satisfied that an amount claimed is not the correct amount, the QIRC or magistrate may order the apparent employer to pay the amount that the QIRC or magistrate is satisfied is payable.

Subsection 400F(7) provides that the QIRC must order that any superannuation contributions payable are paid to the approved superannuation fund, a complying superannuation fund, a superannuation fund nominated by the outworker or an eligible rollover fund. If the

amount payable is less than the amount of total benefits that may revert to an employee under the *Superannuation Industry (Supervision) Act 1993 (Cwlth)*, then the amount must be paid to the outworker.

Subsection 400F(8) provides for superannuation contributions to be paid into the unclaimed moneys fund if the outworker has not nominated a superannuation fund and the order requires a nomination to be made.

Subsection 400F(9) defines "superannuation contributions" as including an amount equal to the return the superannuation contributions would have accrued if they had been properly paid to an approved superannuation fund.

400G Offences relating to claims under this division

Section 400G(a) makes it an offence to intentionally hinder, prevent or discourage a person from making an unpaid wages claim or an application under section 400F, by intimidation or other act or omission.

Subsection 400G(b) makes it an offence to make a statement a person knows is false or misleading in a material particular in any notice required to be given under sections 400C or 400D.

Subsection 400G(c) makes it an offence to serve a referred claim on a person under section 400C without a reasonable belief that the person served is the person for whom the work under an unpaid wages claim was done.

400H Effect of sections 400B-400G

Section 400H(1) provides that the new sections 400B to 400G do not limit or exclude any other rights a clothing outworker may have to recover wages or superannuation contributions or any liability of any person in relation to the wages or superannuation contributions of the outworker, whether under the *Industrial Relations Act 1999* or another law or an industrial instrument. For example, an outworker may seek an order from the QIRC under section 278 instead of making an unpaid wages claim under section 400B.

Subsection 400H(2) provides that nothing in section 400D(3) limits or excludes any right of recovery that may arise under any other law in relation to amounts of money owed by the apparent employer to the referred employer.

400I Mandatory code of practice for outworkers

Subsection 400I (1) provides that the Governor in Council may make a code of practice for outworkers in the clothing industry to ensure that they receive their lawful entitlements.

Subsection 400I(2) provides that the code of practice may be made by the Governor in Council if it is considered that the present voluntary self-regulatory mechanisms are inadequate or that persons in the industry are not negotiating in good faith on improvements of or extensions to the self-regulatory mechanisms.

Subsection 400H(3) provides that the code may require employers and other persons in the industry to adopt the standards of conduct and practice in relation to outworkers that are set out in the code.

Subsection 400H(4) provides that the Governor in Council must give notice of the making of the code of practice.

Subsection 400H(5) provides that the notice is subordinate legislation.

Subsection 400H(6) provides a penalty of 100 penalty units for failure to comply with the code.

Subsection 400H(7) provides that an award prevails over a code of practice to the extent of any inconsistency.

Omission of s 405 (Agreement about superannuation fund)

Clause 44 omits section 405, which allows employers and employees to agree to the payment of superannuation contributions into a complying superannuation fund other than the fund specified in their industrial instrument.

Amendment of s 406 (Contributing occupational superannuation)

Clause 45 amends section 406 by inserting subsection 406(6), which provides that an employer does not commit an offence against subsection 406(1) if the employer continues to contribute to a fund other than an approved superannuation fund in accordance with an agreement made under the repealed section 405.

A new subsection 406(7) is inserted which defines ‘repealed section 405’ as the section 405 in force immediately before the commencement of this section.

Amendment of s 638 (General deregistration grounds)

Clause 46 omits section 638(b) to assist in giving effect to Australia's international obligations in relation to labour standards, which is one of the objects of the IR Act.

In April 2004, the International Labor Organisation issued a report, '*The Application of International Labour Standards 2004*', which noted that section 638(b) of the Act breaches the Convention on Freedom of Association and Protection of the Right to Organize. Australia is a signatory to this Convention. The removal of section 638(b) will bring section 638 into line with the Convention.

Amendment of s 666 (Non-payment of wages)

Clause 47 simplifies section 666(1) to replace the specific references to sections 8A and 136 of the IR Act with a reference to the IR Act. No change in meaning is intended.

Amendment of s 670 (Contraventions of industrial instruments)

Clause 48 amends section 670 by inserting subsections (5), (6), (7), (8), (9), (10) and (11).

Subsection 670(5) gives industrial magistrates jurisdiction to hear and decide complaints for offences under section 670. This enables industrial magistrates to hear and decide complaints for offences by incorporated bodies.

Subsection 670(6) provides that if the magistrate finds there has been a contravention of an industrial instrument and as a result of the contravention an amount has been unpaid (for example, because the employer has breached a clause requiring payment to a third party on the employee's behalf as part of the employee's salary package), the magistrate must order the defendant to pay a person or entity the amount the magistrate finds to be payable.

Subsection 670(7) provides that even if the magistrate does not find the defendant guilty of the contravention of the industrial instrument, the magistrate may order the defendant to pay a person or entity the amount that the magistrate, on the balance of probabilities, finds to be payable. This provides consistency with orders relating to the payment of wages under section 666 of the IR Act.

Subsection 670(8) provides that the magistrate has the power to order the amount to be paid in the way that the magistrate considers appropriate.

Subsection 670(9) provides that the orders that may be made under subsections (6) or (7) are in addition to any penalty the magistrate may impose for contravention of the industrial instrument.

Subsection 670(10) provides that an order for the payment of an amount must not be made for amounts that became payable more than 6 years before the proceedings were brought.

Subsection 670(11) provides that an order for the payment of an amount must not be made under section 670 if it could be made under another section of the Act. For example, if the order could have been made under section 666, it cannot be made under section 670.

Amendment of s 696 (Aged or infirm persons permits)

Clause 49(1) allows an applicant for an aged or infirm person's permit to have the aged or infirm person's wage assessed against an appropriate minimum wage.

Clause 49(2) provides that the minimum wage is the greater of the Queensland minimum wage, the minimum wage provided for by a relevant industrial instrument and the minimum wage determined by the QIRC, after considering the Queensland minimum wage and any industrial instrument that regulates similar work to that engaged in by the relevant worker.

Amendment of s 708 (Approved forms)

Clause 50 provides that the president and the vice president consult when approving forms for use by the QIRC, or registry.

This reflects the current administrative arrangements at the QIRC.

Omission of ch 16 (Industrial relations advisory committee)

Clause 51 omits Chapter 16 which refers to the establishment of the Industrial Relations Advisory Committee.

Insertion of new ch 20, pt 3

Clause 52 provides transitional arrangements for the amendments in the Bill by inserting a new Part 3 into Chapter 20, as follows.

Part 3 2005 amendment Act

Part 3 of Chapter 20 contains the transitional provisions for this Bill.

735 Definition for part

Section 735 inserts a definition of '2005 amendment Act'.

736 Continuity of service

Section 736 provides that the amendment to section 71(9) only applies to an employee's service after the commencement of the amendment.

737 Dismissals

Section 737 provides that the amendment to section 72(1)(c) and (d) only applies to a dismissal that takes place after the commencement of the amendment.

Amendment of sch 1 (Industrial matters)

Clause 53 inserts a new matter into the list of industrial matters in Schedule 1. The new matter is "balancing work and family responsibilities".

Amendment of sch 2 (Appointments and procedures)

Clause 54 (1) amends the heading of Schedule 2 by removing the words "and procedures".

Schedule 2 Appointments

Clause 54(2) amends the heading to section 4 of Schedule 2 to clarify that the relevant leave is leave under the *Judges (Pensions and Long Leave)Act 1957*.

4 Leave under the *Judges (Pensions and Long Leave) Act 1957*

Clause 54(3) amends the heading in section 4A of Schedule 2 to clarify that the relevant leave is leave other than the leave mentioned in the *Judges (Pensions and Long Leave) Act 1957.*

4A Other leave

Clause 54(4) clarifies that the leave referred to in section 4A of Schedule 2 is leave other than the leave mentioned in the *Judges (Pensions and Long Leave) Act 1957*.

4B Other terms and conditions

Clause 54(5) introduces a new section 4B of Schedule 2, which provides that terms and conditions on which a member of the QIRC holds office and which are not provided for by the Act or the *Judges (Salaries and Allowances) Act 1967*, are decided by the Governor in Council.

Part 1A Associates

4C Appointment conditions

Clause 54(6) formalises the appointment of commissioners' associates.

Subsection 4C(1) provides that the Governor in Council may appoint associates to the members of the QIRC.

Subsection 4C(2) provides that associates hold office on the wages and conditions decided by the Governor in Council.

Subsection 4C(3) provides that an associate is to be appointed under the IR Act and not the *Public Service Act 1996*.

Clause 54(7) omits Schedule 2, parts 4 and 5 which refer to the President's Advisory Committee and the Industrial Relations Advisory Committee and which are both abolished by this Bill.

Amendment of sch 5 (Dictionary)

Clause 55(1) omits the definitions for an "approved superannuation fund", for "parental leave" and for "Training Recognition Council" and replaces them with new definitions.

Clause 55(2) inserts new definitions for:

"apparent employer" which refers to section 400A of the new subdivision 3A in part 2 of chapter 11, about the recovery of wages for clothing outworkers.

"approved superannuation fund" which means a complying superannuation fund nominated in an industrial instrument.

"referred employer" which refers to section 400A of the new subdivision 3A in part 2 of chapter 11, about the recovery of wages for clothing outworkers.

"referred claim" which refers to section 400A of the new subdivision 3A in part 2 of chapter 11, about the recovery of wages for clothing outworkers.

Training and Employment Recognition Council which means the Training and Employment Recognition Council established under the *Vocational Education, Training and Employment Act 2000*, section 167.

"unpaid wages claim" which refers to section 400A of the new subdivision 3A in part 2 of chapter 11, about the recovery of wages for clothing outworkers.

Clause 55(3) amends the definition of an industrial instrument to include a code of practice under section 400I.

Part 3 Amendment of Trading (Allowable Hours) Act 1990

Clause 56 provides that Part 3 amends the *Trading (Allowable Hours) Act 1990*.

Amendment of s 31B (Industrial commission order amended)

Clause 57 inserts a new subsection 31B(6A) which provides that subsection (6), which provides that the QIRC must not make an order

prescribing for the south-east Queensland area an opening time later than 9 a.m. or a closing time earlier than 6 p.m. on a Sunday or public holiday, does not apply to 26 December or 1 January of any year if either day falls on a Sunday and the day would have been a public holiday had there not been a substitution under the *Holidays Act 1983*, section 2(2) or (3) or 3.

Part 4 Amendment of Workers' Compensation and Rehabilitation Act 2003

Act amended in pt 4

Clause 58 provides that Part 4 amends the *Workers' Compensation and Rehabilitation Act 2003* (WCR Act).

Amendment of s 5 (Workers' compensation scheme)

Clause 59 amends section 5 of the WCR Act which establishes the workers' compensation scheme and outlines the provisions and objects for the scheme. This clause inserts a new subsection 4 (da) to provide for the protection of workers or injured workers from being prejudiced in employment because they have sustained an injury under this Act or a former Act.

Amendment of s 285 (Consequence of failure to give information)

Clause 60 clarifies section 285 by replacing 'the other party' with 'another party'.

Amendment of ch 14, pt 1, hdg

Clause 61 amends the heading of Chapter 14, part 1 to "Access to documents and information".

Amendment of s 572 (Claimant or worker entitled to obtain certain documents)

Clause 62 amends section 572 which allows workers or claimants access to certain documents. This clause modifies section 572(3) and clarifies the document holders obligations regarding the release of certain documents if they reasonably suspect the documents may be used for employment or prospective employment purposes.

Insertion of new s 572A (Access to particular documents for employment purposes prohibited)

Clause 63 inserts a new section 572A into Chapter 14, Part 1 which introduces an offence provision to prohibit persons from obtaining and using any documents that relate to a person's application for compensation or claims for damages for purposes related to selection for employment including decisions to continue employment, such as workers in their probationary period.

The new provisions apply to any documents relating to workers' compensation. However, the provisions exempt documents required for the purposes of assisting a worker's rehabilitation and early return to work under Chapter 4 of the *Workers' Compensation and Rehabilitation Act 2003*.

For example, where an injured worker is unable to return to their original employer or job it may be necessary to provide information to a host employer to allow for development of an appropriate suitable duties program that is consistent with the person's capability and medical advice.

The provisions do not affect an employer's obligations under the *Industrial Relations Act 1999* where employees cannot be dismissed within a certain time period after an employee becomes injured, because the employee is not fit for employment because of an injury.

The Bill does not limit the right of employers in relation to employment. If a position has specific physical requirements, an employer has the option of obtaining a pre-employment medical for the preferred applicant.

Amendment of s 573 (Permissible Disclosure of information)

Amendment of s 573 "Permissible disclosure of information".

Insertion of new s 585 (Entitlements to compensation under contract of employment prohibited and void)

Clause 65 inserts a new section into Chapter 14, Part 5 to ensure equality between workers under industrial instruments (s 107D) and those under other contracts of employment. The clause restricts contracts of employment from making provision for accident pay, or other payments on account of a worker sustaining an injury. It also provides that these provisions have no force or effect to the extent that it provides for accident pay, or other payments on account of a worker sustaining an injury. This was modelled on the restriction on industrial instruments in s 107D of the Act.

Insertion of new ch 17

Clause 66 inserts a new chapter into the Act which provides the transitional provisions for this Bill.

Compensation under contracts of employment

A new s 626 is inserted which details which contracts of employment the new s 585 (clause 67) applies to. The clause provides the section only applies to contracts entered into, or variations to existing contracts to provide for payment of accident pay or other payment on account of a worker sustaining an injury, from the sections commencement.

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