

# **INDUSTRIAL RELATIONS ACT AMENDMENT BILL 2001**

## **EXPLANATORY NOTES**

### **GENERAL OUTLINE**

#### **Objectives of the Legislation**

This Bill will amend the *Industrial Relations Act 1999* to:

- (a) implement an election commitment to introduce a work and family package to give casual employees access to unpaid parental leave, carer's leave and bereavement leave after 1 years service (currently, casuals have access to unpaid maternity leave after 2 years service) and to protect all casuals from dismissal on discriminatory grounds or because of their family responsibilities;
- (b) implement an election commitment to introduce the recommendations of the Pay Equity Inquiry conducted by the Queensland Industrial Relations Commission (QIRC);
- (c) specify the circumstances in which legal representation will be permitted before the QIRC;
- (d) clarify the intention of the Act in relation to the awarding of costs;
- (e) clarify the intention of the transmission of business provisions in relation to unfair dismissal applications;
- (f) correct potential anomalies in the operation of the Act relating to annual leave and the power to declare persons employees;
- (g) introduce provisions relating to the exercise by the QIRC of its arbitration powers in relation to certified agreements; and
- (h) make technical amendments to address drafting anomalies.

**Reasons for the Bill**

The primary reason for the Bill is to incorporate the legislative changes necessary to implement the Government's commitments, contained in its election policy document *Putting People and Workplaces First*, to –

- (a) introduce a work and family package to give casual employees access to unpaid parental leave, carer's leave and bereavement leave after 12 months' service and protect all casuals from dismissal on discriminatory grounds or because of their family responsibilities;
- (b) implement the outcomes of the Pay Equity Inquiry which found that there is a continuing gender pay gap ratio between women and men workers in Queensland workplaces;

The Bill also introduces amendments to clarify the intention of the legislation and to ensure that it operates efficiently.

**How objectives will be achieved**

The objectives of the Bill will be achieved by -

- (a) reducing the qualifying period for access to unpaid maternity leave by casual employees from 2 years to 1 year and providing access to all other forms of parental leave after 1 year;
- (b) providing long term casual employees with 2 days unpaid bereavement leave and 5 days unpaid carer's leave;
- (c) preventing casuals from being dismissed on discriminatory grounds or because of their family responsibilities;
- (d) ensuring that awards and agreements provide for equal remuneration for men and women employees for work of equal or comparable value;
- (e) providing that at least once each year, the full bench of the QIRC makes a general ruling about a Queensland minimum wage for all employees;
- (f) specifying the circumstances in which legal representation will be permitted before the QIRC;
- (g) clarifying that the awarding of costs in proceedings before the Industrial Court and the QIRC may include costs for representation by persons who are not lawyers and include witness and other expenses;

- (h) clarifying the QIRC's role and responsibilities when using its arbitration powers when parties are seeking to make a certified agreement;
- (i) clarifying the relationship between section 69 (transfer of calling) and the dismissal provisions;
- (j) clarifying the provisions of section 265 in relation to the QIRC conducting an inquiry at the direction of the Minister;
- (k) rectifying a potential anomaly in the operation of the Act that arises from annual leave being exclusive of public holidays;
- (l) rectifying a potential anomaly in the operation of the Act relating to the power to declare persons to be employees;
- (m) ensuring that time and wages records and pay statements contain the name of the employer; and
- (n) making a number of technical amendments to the legislation.

### **Administrative cost to Government**

The costs of the QIRC are not expected to increase as a result of implementing the pay equity amendments. Given the appointment of two additional Commissioners since 1999, it is considered that the QIRC can accommodate any increase in workload which may result from the amendments.

### **Fundamental legislative principles**

While clause 6 of the Bill applies retrospectively from 1 July 1999, it is considered that this does not breach a fundamental legislative principle.

As from 1 July 1999, the *Industrial Relations Act 1999* extended the minimum annual leave entitlements of employees covered by industrial instruments to employees who were not covered, providing that annual leave is exclusive of public holidays falling during the leave.

The effect of the amendment was that the provision applied to all employees, including those who were compensated, by award or agreement, by an additional week's leave for work on particular public holidays. When any of those holidays fell during annual leave, the leave was not to be exclusive of the holiday because of the additional compensation.

Section 11 (Annual leave) is being amended so that the legislation reflects the correct entitlements of employees when the particular public holidays occur during annual leave. It is essential that the amendment operates from 1 July 1999 to ensure that a claim cannot be made for public holidays which have fallen during annual leave since that date and for which compensation has already been granted by way of additional leave.

### **Consultation**

There has been strong support from unions and the Office of Women for the improved work and family entitlements for casual employees.

There has been extensive consultation in relation to implementing the recommendations of the Pay Equity Inquiry. All of the organisations and individuals who made submissions to the Inquiry were invited to provide further comment on the Inquiry's recommendations. The resulting 13 submissions were then considered in developing the legislation. The Industrial Relations Advisory Committee (IRAC) has noted the amendments.

A number of industrial organisations and other parties made representations regarding the payment of costs for the utilisation of lay advocates in the QIRC. Industrial organisations also raised the issue about legal representation in the QIRC. IRAC has endorsed the provisions relating to legal representation and costs.

IRAC has also endorsed the amendments relating to time and wages records and the relationship between the transfer of a business and the dismissal provisions.

## **NOTES ON CLAUSES**

### **PART 1—PRELIMINARY**

#### **Short Title**

*Clause 1* sets out the short title of the Bill.

**Commencement**

*Clause 2* provides for the commencement of the Bill.

Clauses 16, 18-21 and 28-30 commence on 1 May 2002. Clauses 16, 18, 19, 20 and 21 provide for new requirements in relation to the introduction of pay equity. Clauses 28-30 require an employer to ensure that time and wages records and pay statements show the employer's full name. The commencement date of 1 May 2002 is to provide sufficient time for all persons affected to become aware of the new obligations and entitlements.

Clause 6, which deals with the issue of public holidays occurring during annual leave, commences on 1 July 1999. The reason for the retrospective date of operation is outlined earlier in the comments upon fundamental legislative principles.

The remaining provisions of the Bill commence on the date of assent.

**PART 2—AMENDMENT OF INDUSTRIAL RELATIONS ACT 1999****Act amended**

*Clause 3* provides that the Bill amends the *Industrial Relations Act 1999*.

**Amendment of s 3 (Principal object of this Act)**

*Clause 4* separates section 3(c) into two distinct objects. Section 3(c) currently combines the objects of preventing and eliminating discrimination in employment and ensuring equal remuneration for men and women.

The phrase in section 3(c), “*ensuring equal remuneration for men and women*”, is amended to “*ensuring equal remuneration for men and women for work of equal or comparable value*”.

**Amendment of s 6 (Who is an employer)**

*Clause 5* adds to the definition of ‘employer’ ‘*a person declared to be an employer under section 275*’. This is to ensure consistency with clause 23, which amends section 275 to provide that when the QIRC declares a class

of persons to be employees, it also declares who is the employer of those employees.

### **Amendment of s 11 (Entitlement)**

*Clause 6* inserts a new subsection 11(4) to introduce conditions to the operation of section 11(3) (which provides that annual leave is exclusive of public holidays). Where an employee receives additional annual leave as compensation for being required to work on particular public holidays and where one or more of those public holidays falls during the employee's annual leave, the amendment provides that annual leave is inclusive of the particular public holiday.

The amendment reflects the arrangements applying prior to 1 July 1999 and ensures that an employee does not receive further compensation for particular public holidays should compensation already be granted.

### **Renumbering of ch 2, pt 2, divs 1-4**

*Clause 7* renumbers divisions 1-4 of chapter 2, part 2 as divisions 2-5 because of the insertion of a new division 1 into the part.

### **Insertion of new ch 2, pt 2, div 1**

*Clause 8* inserts a new division 1 into chapter 2 (General Employment Conditions), part 2 (family leave). The new division consists of section 15A which defines a '*long term casual employee*' for the purposes of the family leave provisions. Long term casual employees are casual employees who have been engaged by a particular employer on a regular and systematic basis for at least 1 year. Previously the qualifying period was 2 years. The definition in section 15A is applicable to section 16 (parental leave), section 39 (carer's leave) and section 40 (bereavement leave).

*Clause 8* provides that periods of employment served before and after the commencement of the section are to be included when working out whether a casual employee is a long term casual employee. For example, should a casual employee work on a regular and systematic basis for an employer for 9 months prior to the commencement of the section and continue to work on that basis, the employee would meet the requirements of a long term casual 3 months after the commencement of the section.

**Replacement of s 16 (Who this division does not apply to)**

*Clause 9* provides that parental leave entitlements apply to the newly defined long term casual employees by providing that parental leave does not apply to casual employees other than long term casual employees.

**Amendment of s 33 (Employer's obligations)**

*Clause 10* clarifies that '*this subsection*', referred to in section 33(2), is section 33(1).

**Amendment of s 39 (Entitlement)**

*Clause 11* confers on long term casual employees an entitlement of up to 5 days unpaid leave per year, to be known as carer's leave. The conditions applying to the taking of carer's leave operate in the same way as to other employees, except that for long term casual employees the entitlement is not related to sick leave and is unpaid.

*Clause 11(3)* provides that employees who are entitled to sick leave may take carer's leave as unpaid leave if the employer agrees.

**Amendment of s 40 (Entitlement)**

*Clause 12* confers on long term casual employees an entitlement to at least 2 days bereavement leave per year on the same conditions as apply to other employees, except that for long term casual employees the leave is unpaid leave.

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

*Clause 13(1)* allows short term casual employees access to the dismissal provisions of Chapter 3 if the dismissal was based on the invalid reasons of discrimination or because of the grounds previously contained in section 34 (these grounds are now set out in section 73 - see clause 14).

*Clause 13(1)* also extends the provisions of Part 2 to employees participating in a labour market program for a specific period or task who are dismissed before the period ends or the task is complete. Should this occur, the employees now have the right to apply for reinstatement.

*Clause 13(3)* inserts a new subsection into section 72 to clarify that upon the transmission of a business, periods of employment with a former employer are taken to be service with a new employer for determining -

- (a) the probationary period in section 72(1)(a); and
- (b) whether an employee is a short term casual employee for the purpose of section 72(1)(c) and (8).

Section 69 is intended to apply for determining whether or not an employee is a probationary or short term casual employee under section 72 and thus whether the employee has or has not a right to make an application for reinstatement under section 74.

### **Amendment of s 73 (When is a dismissal unfair)**

*Clause 14* simplifies section 73 by replacing the cross-reference to section 34 in subsection 73(2)(i) with the specific reasons for dismissal contained in section 34. Necessary renumbering has been made.

### **Replacement of ch 3, pt 4**

*Clause 15* corrects an anomaly, which occurred in drafting the *Industrial Relations Act 1999*, to ensure that orders in relation to severance payments apply to all dismissals and are not restricted to situations where 15 or more employees are dismissed. It renames the heading of Part 4 from “*Dismissal of 15 or more employees*” to “*Additional requirements for dismissal*” and divides Part 4 into two divisions, Division 1 dealing with orders giving effect to article 12 of the Termination of Employment Convention and Division 2 dealing with orders giving effect to article 13. Division 1 applies to applications about severance allowance or other separation benefits and Division 2 applies if an employer decides to dismiss 15 or more employees for economic, technological or structural reasons.

The reconstruction of the provisions adopts the structure which applied under the *Workplace Relations Act 1997*.

### **Amendment of s 126 (Content of awards)**

*Clause 16* requires the QIRC to ensure that awards provide for equal remuneration for men and women employees for work of equal or comparable value.



**Amendment of s 149 (Arbitration if conciliation unsuccessful)**

*Clause 17* deals with a number of matters relating to the QIRC's role and responsibilities in the enterprise bargaining process when exercising its arbitration powers.

The amendments remove the QIRC's discretion in section 149(2)(b) to order that industrial action not be protected under section 174. Instead, industrial action is no longer protected while the commission determines the matter by arbitration.

*Clause 17* specifies that the QIRC, in exercising its arbitration powers under section 149, must confine its consideration to the matters that were at issue during the negotiations for the certified agreement. Clause 17 also specifies matters that the QIRC must consider in making its determination. The QIRC must publish the reasons for its determination and the reasons must address the matters it is required to consider.

**Amendment of s 156 (Certifying an agreement)**

*Clause 18* requires the QIRC to be satisfied, before certifying an agreement (other than a multi-employer or project agreement) that either of the following apply –

- (a) the employer remunerates all men and women employees of the employer equally for work of equal or comparable value; or
- (b) the employer will remunerate because of the agreement, if it is certified, all men and women employees of the employer equally for work of equal or comparable value; or
- (c) the employer is implementing equal remuneration for work of equal or comparable value for all men and women employees of the employer.

For an agreement to be certified, equal remuneration must already exist, or the agreement will result in equal remuneration or equal remuneration is being introduced, for all employees of the employer.

For a multi-employer or project agreement to be certified, the QIRC must be satisfied that the agreement provides for equal remuneration for all employees covered by the agreement.

This clause will be supported by an amendment to section 9 of the *Industrial Relations Regulation 2000* requiring the affidavit accompanying the certified agreement to provide information about the steps taken to ensure that equal remuneration has been or is being implemented.

Clause 18(3) specifies that in deciding whether to certify an agreement, the QIRC may consider, but must not review, any relevant industrial instrument for the purpose of determining whether the instrument provides for equal remuneration. The focus of the QIRC's deliberations must be on the certified agreement and the requirements of section 156(1)(1) rather than on determining whether any relevant industrial instrument provides or does not provide equal remuneration. The latter determination should be made in separate proceedings (such as a proceeding under section 125).

### **Amendment of s 157 (When commission to refuse to certify an agreement)**

*Clause 19* provides that the QIRC must refuse to certify an agreement if it seeks to prohibit or restrict an application being made for an equal remuneration order under chapter 2, part 5.

### **Amendment of s 193 (Matters to be included in QWA)**

*Clause 20* requires a Queensland Workplace Agreement (QWA) to provide that the employee covered by the agreement receives equal remuneration for work of equal or comparable value performed by other employees of the employer. If equal remuneration is not provided for, in terms of section 203 the QIRC must refuse to approve the QWA.

This clause will be supported by an amendment to section 13 of the *Industrial Relations Regulation 2000* requiring the affidavit accompanying the QWA to provide information about the steps taken to ensure compliance with equal remuneration provisions.

### **Amendment of s 203 (Approving QWA)**

*Clause 21* specifies that in deciding whether to approve a QWA, the QIRC may consider, but must not review, any relevant industrial instrument for the purpose of determining whether the instrument provides for equal remuneration. The focus of the QIRC's deliberations must be on the requirements of section 193 rather than on determining whether a relevant industrial instrument provides or does not provide equal remuneration.

**Amendment of s 265 (Commission's jurisdiction)**

*Clause 22* clarifies that the QIRC must hold an inquiry into or about an industrial matter if the Minister directs and must thereafter report the result of the inquiry and make recommendations to the Minister.

**Amendment of s 275 (Power to declare persons to be employees)**

*Clause 23* requires the full bench to declare a person to be the employer of persons declared to be employees under section 275. At present, section 275 gives the full bench the power to declare a class of persons who perform work in an industry to be employees but there is no corresponding power to declare who is the employer of those persons.

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

*Clause 24* clarifies that the contract referred to in section 276(1)(a)(i) is a contract of service.

**Amendment of s 287 (General rulings)**

*Clause 25* requires the full bench of the QIRC to make a general ruling about a Queensland minimum wage for all employees at least once in each calendar year. At present, the full bench may make a general ruling under section 287 about a Queensland minimum wage (whether or not it is the subject of an industrial instrument) but there is no requirement for it to do so.

The QIRC can make a minimum wage ruling for all employees either on application or, if there is no application, must do so on its own initiative.

**Amendment of s 319 (Representation of parties)**

*Clause 26* specifies with greater particularity the circumstances in which legal representation will be permitted in proceedings before the QIRC. Legal representation will be permitted -

- (a) as a matter of right in proceedings under chapter 4 (freedom of association), as is currently the case, except in relation to the union encouragement provisions in section 110;
- (b) by consent of the parties (as is currently the case); or
- (c) by leave of the QIRC in proceedings relating to -

- dismissals under chapter 3;
- union encouragement provisions under section 110;
- the power to declare persons to be employees and employers under section 275;
- the power to amend or void contracts under section 276;
- orders about representation rights of employee organisations under section 279;
- the registration of industrial organisations under chapter 12, part 2; and
- the deregistration of industrial organisations under chapter 12, part 16.

As at present, in deciding whether to grant leave, the QIRC must be satisfied that there are special circumstances that make legal representation desirable having regard to the matter or that the party or person can be adequately represented only by a lawyer.

Legal representation will not be permitted, even with the parties' consent, in proceedings relating to the recovery of wages (as is currently the case).

### **Amendment of s 335 (Costs)**

*Clause 27* provides that 'costs' include witness expenses and other expenses incurred by a party to an application.

*Clause 27* also clarifies the intention of the legislation that 'costs' include not only the costs of engaging a lawyer but also the costs of engaging a person who is not a lawyer.

### **Amendment of s 366 (Time and wages record – industrial instrument employees)**

*Clause 28* requires the time and wages record kept for each employee covered by an industrial instrument to state the employer's full name to ensure that the employer can be readily identified.

**Amendment of s 367 (Time and wages record – non-industrial instrument employees)**

*Clause 29* similarly requires the time and wages record kept for each employee not covered by an industrial instrument to state the employer's full name to ensure that the employer can be readily identified.

**Amendment of s 370 (Notation of wages details)**

*Clause 30* requires the employee's written pay details to contain the employer's full name.

**Amendment of s 532 (Obligation to admit)**

*Clause 31* specifies the correct division in section 532(1)(b).

**Amendment of s 580 (Exemption if federal election held)**

*Clause 32* corrects a drafting error in subsection 580(3)(c).

**Amendment of s 665 (Avoiding Act's obligations)**

*Clause 33* brings section 665(2) into line with section 43(2) and the changes to long service leave entitlements brought about by the *Industrial Relations and Another Act Amendment Act 2001*. It allows for the calculation of long service leave payments on the basis of 8.6667 weeks leave for 10 years' service.

**Amendment of s 670 (Contravention of industrial instruments)**

*Clause 34* replaces 'industrial agreement' with 'industrial instrument' to achieve consistency with the other provisions in the section which refer to 'industrial instruments'.

**Omission of sch 4 (Amendment of model election rules)**

*Clause 35* omits schedule 4 as the schedule lapsed when its authorising provision, section 711, expired on 31 December 2000.

**Amendment of sch 5**

*Clause 36* inserts two new definitions into the dictionary. The first, '*long term casual employee*', links that term to the definition set out in section 15A. The second, '*remuneration*', is defined for the purpose of provisions relating to equal remuneration for men and women employees for work of equal or comparable value.