

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 38C(2) – Review of ss. 29A-29D

Commission of its own initiative pursuant to s. 38C to review ss. 29A-29D of the *Industrial Relations Act 1999*

Matter Number (IRA/2009/1)

DISCUSSION PAPER

1. Overview

22 May 2009

In February 2006, the *Industrial Relations Act 1999* (the IR Act) was amended to implement family leave provisions, which included rights for employees to request part time work after returning from parental leave. These provisions are as follows: section 29A (Extending period of parental leave by agreement), section 29B (Employee on parental leave may apply to work part-time), section 29C (Application for extension or part-time work) and section 29D (Employer to give proper consideration to application for extension or part-time work).

Section 38C of the IR Act provides that a full bench of the Queensland Industrial Relations Commission (QIRC) must conduct a Review of these provisions on its own initiative or on the Minister's direction. In the absence of a direction from the Minister, the QIRC must start a Review within three years after the commencement of that section. The Full Bench of the Commission must report the results of a Review and make recommendations to the Minister.

Section 38C also provides that in undertaking a review, the Full Bench must consider in particular:

- (a) whether the sections are meeting the reasonable needs of employees; and
- (b) the impact the operation of the sections is having on the ability of employers to conduct their business efficiently.

2. The Review Process

On 30 January 2009, the Industrial Registrar issued a Statement in relation to the Review, advising of a hearing of the Full Bench charged with conducting the Review (Appendix 1). On 19 February 2009, that Full Bench – Vice President Linnane, Commissioner Fisher and Commissioner Asbury – held a hearing to commence the Review process. Following on from that hearing, conferences were held before Commissioner Asbury on 25 February and 24 April 2009, for the purposes of ascertaining the views of industrial organisations on the process for the conduct of the Review.

The process of the Review includes:

- The establishment of a link on the website of the Queensland Industrial Relations Commission from which relevant information can be obtained: <http://www.qirc.qld.gov.au/inquiry/review/index.htm>;
- The placing of an advertisement in the Courier Mail and regional newspapers advising that the Inquiry is underway and where relevant details may be obtained (Appendix 2);
- The release of this discussion paper;
- Invitation to interested persons or organisations to make written or oral submissions;
- Public hearings; and
- Preparation of a Report and Recommendations by the Full Bench.

A form which can be used by persons or organisations with an interest in the Review is available on the QIRC website (Appendix 3).

3. Submissions

Interested persons or organisations are invited to make submissions to the Review. Submissions can be made in the following ways:

1. Mail Review of Parental Leave Provisions
Queensland Industrial Relations Commission
GPO Box 373
Brisbane Qld 4001

2. Delivery Industrial Registrar's Office
18th Floor
Central Plaza II
66 Eagle Street
Brisbane Qld 4000

3. Email qirc.registry@deir.qld.gov.au

If submissions are mailed or delivered, four copies are required, and should be accompanied by an electronic version.

All submissions will be published on the Review page of the QIRC website at <http://www.qirc.qld.gov.au/inquiry/review/index.htm>. Persons may seek an exemption from this policy on the grounds of concerns about privacy.

The closing date for written submissions is Friday 31 July 2009.

Expressions of interest in making oral submissions should be notified in writing by Wednesday 12 August 2009. Notification is to be made in the same way as written submissions. A short dot point summary of the areas covered in the oral submissions is to accompany the notification.

The Full Bench may also invite people or organisations who have made written submissions to make oral addresses.

Notification is also required to be given to the Industrial Registrar's office by Wednesday 12 August 2009 if evidence is required to be called and from whom. A short summary of the evidence to be called is to be provided. The notification and the summary of evidence should be made in the same way as written submissions.

A preliminary hearing is scheduled for Monday 17 August 2009 at 2.30 pm to program any oral submissions and evidence which might be sought to be called.

Public hearings and oral submissions will be held in Brisbane in the week commencing Monday 31 August 2009.

The Full Bench intends to sit in various regional centres if required.

4. Origin of provisions subject of the review

On 24 June 2003 the Australian Council for Trade Unions (ACTU) filed an application with the Australian Industrial Relations Commission (AIRC) seeking a test case standard for work and family entitlements in federal awards. A major element of the application included giving full-time

employees returning from parental leave a right to part-time work until the child reaches school age, and allowing employees to request changes to their hours, and start and finish times.

The Queensland Government responded to the ACTU work and family claim and provided support for an employee's 'right to request' part-time work after returning from parental leave and flexible working arrangements.

On 8 August 2005, the Full Bench of the AIRC released its decision in the Family Provisions Test Case, introducing a new parental leave provision. The bench decided to provide employees a 'right to request' his/her employer to:

- permit an employee to return from parental leave on a part-time basis until the child reaches school age;
- increase simultaneous unpaid parental leave to 8 weeks; and
- extend unpaid parental leave from 52 to 104 weeks.

The 'right to request' model adopted by the AIRC in its decision in the Family Provisions Test Case was based on a similar model introduced in the United Kingdom in April 2003. Initially, the UK legislation gave eligible employees with children under six and employees with disabled children under 18, the right to request flexible work arrangements, including hours, times and place of work. The right was extended to carers of adults in April 2007. From 6 April 2009 the right to request flexible work arrangements is being extended to parents of children aged 16 or under.

The Queensland Government decided to implement the AIRC's test case decision by amending the IR Act. The amendments were passed by Parliament on 15 February 2006 and commenced on 22 February 2006. In addition, there are two relevant Queensland awards the *Family Leave Award 2003* and the *Family Leave (Queensland Public Sector Award) State - 2004*. The terms of these awards have not been varied to reflect the test case. However section 41 of the IR Act makes clear that all the statutory family leave provisions prevail over less favourable entitlements in industrial instruments. The effect of reading the State awards with the IR Act is that the employee is entitled to the most beneficial outcome. This is examined in more detail later.

5. Review of provisions

The AIRC decision included a provision for the new parental leave provisions to be reviewed after three years, with parties able to make submissions at that time. Because of the introduction of Work Choices no such review has been conducted at the national level.

Based on the AIRC decision to review the parental leave provisions, a similar review mechanism was considered appropriate in the Queensland context. It was considered that a review would provide an opportunity for unions and employers to address any of their concerns with the provisions after they had operated for a reasonable period.

Consequently, the Full Bench of the QIRC is required by section 38C of the Act to review the operation of the new parental leave provisions in sections 29A-29D within 3 years of the enactment. The QIRC is required to report to the Minister.

6. Rationale behind section 29D

Section 29D requires the employer to give proper consideration of employees' requests for an extension of parental leave, or a return to work on a part-time basis, and sets out the matters that must be considered by the employer when making the decision. These criteria draw on the principles established by anti-discrimination case law.

The criteria set out in section 29D are directed to identifying reasonable business considerations. The criteria also require consideration to be given to the employee's caring need and the impact on the employee and their dependents of the request not being granted. This model permits a balancing exercise to be carried out against the backdrop of objective and clear criteria – which apply in every case, but without mandating a particular outcome in every circumstance.

The 'right to request' model is intended to offer a number of benefits, by providing a balance between the family and caring needs of employees and their families and business imperatives, within a framework of rights and responsibilities. The model is also intended to permit each individual case to be considered on its merits at the workplace level, within the same framework of considerations. In addition, it is designed to formalise a practical and simple process for requests to be made by the employee and considered by the employer.

Adoption of this model is also directed towards raising awareness and encouraging cultural change. The criteria required to be considered by the employer are designed to promote the acceptance in workplaces that there are "two sides to the story": the needs of the business, and the family responsibilities of the employee. Previously, employee requests for leave or flexible working arrangements for family or caring reasons were not adjudged by reference to any particular criteria. The "right to request" model, in contrast is intended to promote fairness and consistency of approach. An objective standard of "reasonableness" is applied by employers to the assessment of requests. This provides a structure to the assessment by employers of such requests – and provides a basis for generating an acceptance of the sorts of matters required to be taken into account in performing such an assessment.

Where the employee and employer cannot reach agreement in relation to a request, the matter can be dealt with in accordance with the dispute settling procedure in the relevant industrial instrument (award, certified agreement, employer policy). Ultimately the QIRC can provide assistance under sections 229 and 230 of the Act.

The 'right to request' model adopted in the Act is intended to offer a practical mechanism for dealing with requests and, as a fall-back, a dispute settling procedure is available.

7. Interaction between family leave Awards and IR Act provisions for parental leave and part-time work

Neither of the Queensland family leave Awards has been changed in line with the changes to the IR Act in February 2006, following the Family Provisions Test Case decision. The *Family Leave Award 2003* does not provide for an extension to the period of parental/adoption leave (including short parental/adoption leave and long parental/adoption leave). The *Family Leave (Queensland Public Sector) Award – State 2004* provides that the chief executive may extend the period of leave if, in the chief executive's opinion, there are reasons that warrant an extension being granted.

Both awards already provided that with the agreement of the employer, the employee may work part-time from the date of birth of the child until its 2nd birthday or in relation to adoption from the date of placement of the child until the 2nd anniversary of the placement. However, this provision is also arguably weaker compared to that provided in the IR Act, for the following reasons:

- The provision is available only with the agreement of the employer, which is weaker than providing it as a right to request. Under the latter provision, the employer is required to give proper consideration to an application for part-time work and cannot unreasonably refuse;
- Under the IR Act, part-time work can be requested on return from parental leave up to the child reaches school age (not just until 2nd birthday).

However, in relation to adoption leave, the IR Act and both awards provide that a child for the purposes of adoption leave means a child under the age of 5. Under the IR Act part-time work can be requested on return from parental/adoption leave until the child is 6 years and 6 months of age (ie. compulsory schooling age). If, for example, the child is placed with the parent at the age of four and a half, the parent can only work **half a year** part-time on return of 12 months adoption leave. However, the provisions under both awards allow a parent to work part-time for two years after the date of placement of the child. This means that if a child is placed with the parent at the age of four and a half, the parent can work **one year** part-time on return of 12 months adoption leave.

Further details can be found below on the provisions in both awards.

8. Family Leave Award 2003 (State)

8.1 Extension of parental leave period:

For pregnant employees, the Award provides for 52 weeks unpaid maternity leave, with no provision to extend this period to 104 weeks.

For the spouse of the pregnant employee, the Award provides short parental leave for the spouse of 1 week, which can be taken concurrently with the pregnant employee. There is no provision to extend short parental to 8 weeks.

The Award provides a further unbroken period of up to 51 weeks for the spouse in order to be the primary caregiver of a child. This leave can not be extended.

The Award provides short adoption leave of 3 weeks. There is no provision to extend short adoption to 8 weeks. The Award provides a further unbroken period of up to 49 weeks for the primary caregiver of a child. This leave can not be extended.

8.2 Part-time work:

The awards provide that with the agreement of the employer an employee may work part-time in one or more periods at any time from the date of birth of the child until its **2nd** birthday or in relation to adoption from the date of placement of the child until the **2nd** anniversary of the placement. It is arguable that this provision is weaker than the right to request.

An employer may request, but not require, an employee working part-time under clause 2.4 to work outside or in excess of the employee's ordinary hours of duty provided for in accordance with clause 2.4.5. This provision is not found in the IR Act.

9. Family Leave (Queensland Public Sector) Award – State 2004

9.1 Extension of parental leave period:

For the pregnant employees, the award provides for 52 weeks unpaid maternity leave. The chief executive may extend the period of leave if, in the chief executive's opinion, there are reasons, for example, the health and well-being of the employee, the employee's spouse or the employee's child, that warrant an extension being granted. (This also applies to adoption leave).

For the spouse of the pregnant employee, the Award provides short parental leave for the spouse of 1 week, which can be taken concurrently with the pregnant employee. There is no provision to extend short parental to 8 weeks.

The award provides a further unbroken period of up to 51 weeks for the spouse in order to be the primary caregiver of a child. This leave can not be extended.

The award provides short adoption leave of 3 weeks. There is no provision to extend short adoption to 8 weeks. The award provides a further unbroken period of up to 49 weeks for the primary caregiver of a child. This leave can not be extended.

9.2 *Part-time work:*

The awards provide that an employee may work part-time in one or more periods at any time from the date of birth of the child until its **2nd** birthday or in relation to adoption from the date of placement of the child until the **2nd** anniversary of the placement. The chief executive may approve or reject the application. This provision is weaker than a ‘right to request’.

10. Implementation in other states

Table 1 (Appendix 4) summarises how the 2005 test case has been implemented in other States.

11. Effect of Work Choices

The Work Choices amendments to the *Workplace Relations Act 1996* had the effect of drawing many employees who had been covered by State industrial relations law and State awards into the federal system. Work Choices exclusively determined the employment rights of all employees of constitutional corporations – foreign, trading or financial corporations.

For these employees, their State awards and agreement were preserved as NAPSAs (notional agreements preserving State awards) or PSAs (preserved State agreements). Provisions of State industrial law were terms of NAPSA and PSAs. Thus sections 29A-D of the IR Act continued to apply to Queensland employees who were drawn into the national system by Work Choices.

There was little opportunity for unions and employers to flow the test case provisions into federal awards because of the commencement of Work Choices on 27 March 2006. Work Choices had the effect of “freezing” awards applying to employees of constitutional corporations.

12. ‘Right to request’ provisions in draft modern awards, and the National Employment Standards

The current federal Government commenced reforming industrial relations with the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (the Transition Act 2008). The Transition Act 2008 provided for the AIRC to commence modernising federal awards. Award modernisation aims to drastically reduce the number of awards and to create fair safety net awards on an industry basis and, where appropriate, on an occupational basis. The award modernisation process is still underway and is due to be completed by the AIRC by the end of 2009.

National Employment Standards (NES) which are statutory minimum conditions of employment were also released around the time of the Transition Act but did not have statutory force.

The *Fair Work Act 2009* (*Fair Work Act*) received Royal Assent on 7 April 2009. Its provisions, except those relating to the commencement of modern awards and the NES, will commence on 1 July 2009. Modern awards and NES will commence on 1 January 2010. The NES now form part of the *Fair Work Act*.

The modern awards will be reviewed 2 years after commencement and then every 4 years. Outside these reviews, modern awards may be varied in certain circumstances.

Modern awards are intended to replace all federal awards and NAPSAs. However there may be some employees who are currently covered by NAPSAs who will not be covered by any modern award. For these employees the NAPSAs will continue to operate until 1 January 2014.

The draft modern awards generally do not deal with parental leave. In cases where these awards deal with parental leave, such as the *Higher Education Industry - Academic Staff - Award 2010* and *Higher Education Industry - General Staff - Award 2010*, they mainly provide for paid leave. For unpaid leave provisions state: “the entitlement to parental leave is set out in the NES”.

The right to request flexible work arrangements is not outlined in any of the draft modern awards.

The NES provide for the right to request flexible work practices as well as extensions to parental leave. Section 66 of the *Fair Work Act* makes clear that State law with respect to request for flexible work practices by national system employees is not ousted where it is more beneficial to the employees. Part 6-3 of the *Fair Work Act* extends unpaid parental leave and related entitlements to employees who are not national system employees (by relying on the Commonwealth’s constitutional head of power to make treaties). Section 747 makes clear that Part 6-3 does not exclude State law for non-national system employees where the State law is more beneficial to employees.

Table 2 (Appendix 5) compares the relevant NES provisions with those in the IR Act.

A key difference is that the NES do not provide criteria for reasonable decision making which are found in s. 29D of the IR Act. Further, under the IR Act an aggrieved employee may give notice of an industrial dispute and seek the assistance of the Commission if their request for flexible work practices or extension of leave has been refused. The assistance of the AIRC (and from 1 January 2010, Fair Work Australia) can only be sought if the NES is a term of the relevant award or agreement (and then the normal dispute provisions apply) or if an agreement (including a contract) allows the FWA to settle these right to request disputes.

13. Scope of the *Fair Work Act*

Like Work Choices, the *Fair Work Act* will apply exclusively to national system employers based on its constitutional heads of power: constitutional corporations (foreign, trading or financial corporations); the Commonwealth authorities; employers in the Territories; and employers in relation to international and interstate trade and commerce.

Entities that are not currently national system employers are:

- unincorporated private sector businesses, such as sole traders, some partnerships and some trusts;
- State public servants;
- unincorporated statutory bodies;
- incorporated statutory bodies which are not trading or financial corporations eg. regulatory bodies such as Q-Comp;
- local governments, other than the Brisbane City Council; and
- non-Government Organisations (NGOs) which are not constitutional corporations;
- some NGOs are not incorporated and some that are incorporated have minimal or varying levels of trading.

The best estimate of the breakdown of the Queensland labour force (1,950,000 employees) is:

- Queensland Public Sector (including statutory bodies which are trading corporations in the federal system) – 249,600 employees or 12.8% of the labour force;

- Queensland Government Owned Corporations (GOCs) – 64,300 employees or 3.3% of the labour force;
- Queensland Local Government – 44,800 employees or 2.3% of the labour force;
- Unincorporated businesses – 532,300 employees or 27.3% of the labour force; and
- NGOs (including trading corporations in the federal system) - 27,900 employees in community service industries (excluding public sector, aged care and child care) or 1.4% of the labour force;

The aim of the current federal Government is to have a single national system for the whole private sector. It cannot do this without the co-operations of the States, for example, by States referring their legislative powers with respect to those parts of the private sector which are not constitutional corporations. Queensland is still in discussions with the Commonwealth about whether it will participate in the new national system.

14. Questions to assist submissions

1. What is the level of knowledge about the provisions amongst employers, unions and employees?
2. Do the relevant stakeholders know that they exist?
3. Do the relevant stakeholders know how to apply or implement them?
4. What has worked and what has not worked when implementing the s. 29A-D provisions?
5. What issues have employees, employers and union encountered in the application of the provisions?
6. How can arrangements for the s. 29A-D provisions be made to work?
7. What resources do employers and unions use to support implementation?
8. What resources do employers and unions need to support implementation?

15. Relationship with anti-discrimination legislation

In its submission to the 2007 Pay Equity Inquiry, the Anti-Discrimination Commission Queensland pointed out that refusal on the part of an employer to reasonably consider a request for flexible work arrangements could be the subject of a complaint by an employee under the *Anti-Discrimination Act (1991) (ADA)*. It was pointed out that while such a complaint could be made under that Act as it stands, there would be an advantage to amending the ADA to provide for a right to request flexible work arrangements, by virtue of the fact that employee and employer rights and obligations would be articulated and easier to protect.

Further, such provisions in the ADA could be accessed by employees of constitutional corporations because the ADA is not a law that applies to employment generally and the subject matter is properly characterised as discrimination, rather than conditions of employment.

In the Report entitled “Pay Equity Time To Act” issued in September 2007, the QIRC made the following Recommendation:

“RECOMMENDATION 5

That the Queensland Government amend the Anti-Discrimination Act 1991 (Qld) to provide employees with carer responsibilities the right to make a reasonable request for flexible work practices including part-time work, altered start and finish times, and telecommuting. Carer responsibilities should not be limited to care of children but should include care of other family members. The amendments should also provide:

- appropriate notice procedures;
- an employer obligation for reasonable decision-making;

- matters which must be considered by the employer;
- a requirement that the employer provide written reason for a refusal; and
- The capacity to have the Anti-Discrimination Commission Queensland or the Anti-Discrimination Tribunal determine complaints and consider whether the employer's response is reasonable or not.”.

IMPORTANT DATES

Friday 31 July 2009	Closing date for written submissions.
Wednesday 12 August 2009	Expressions of interest in making submissions to be notified in writing. Evidence to be called, from whom and a short summary of evidence to be notified in writing.
Monday 17 August 2009	Preliminary hearing to program oral submissions and evidence.
Week Beginning 31 August 2009	Public hearing and oral submissions.