QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 288 – statement of policy

Queensland Council of Unions AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others (No. B209 of 2002)

AND

The Australian Workers' Union of Employees, Queensland AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others (No. B308 of 2002)

VICE PRESIDENT LINNANE
DEPUTY PRESIDENT BLOOMFIELD
COMMISSIONER BLADES

15 October 2003

DECISION

[1] On 15 August, 2003 we released a decision in this matter: see *Queensland Councils of Unions v Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others* (2003) 171 QGIG 1417. That decision dealt with the major issues raised by the various parties during the course of the proceedings before us. At paragraph [120] of that decision we stated:

> "There were other matters raised in the QCU and AWU claim. We indicated during the course of the hearing that we would determine the major matters in the first instance and then proceed to deal with other aspects of the claim. Matters such as replacement of the terms "definite decision" and "discuss/discussion" with the terms "decide/s" and "consult/consultation" are in this category. If these matters are unable to be conciliated in the process suggested later in this decision then we will determine those matters prior to the operative date.".

[2] Further at paragraphs [122] and [123] we further stated that:

> "We are in receipt of correspondence from the QCCI dated 24 December 2003 wherein they advise of 'significant developments in the ACTU Federal Redundancy Test case.'. We are further advised that as a result of the conciliation process in the Australian Industrial Relations Commission (AIRC) agreement had been reached 'between the ACTU, ACCI and AIG on certain limited matters.'.

and

> "Prior to the release of any formal Statement of Policy containing specific provisions, we will provide all parties with an opportunity to address us on any agreement that has been reached in the AIRC proceedings. We will also provide parties with the opportunity to address us on the 'other matters' raised in the applications. For the purposes of finalising a form of order we will organise for conferences of the parties to see if any of those matters can be resolved by consent. Conferences will be convened by Commissioner Asbury on 12 September, 2003 and 22 September, 2003 commencing at 9.00 a.m. on each day. In the event that all outstanding matters are unable to be resolved we will list the matters for mention on Tuesday 30 September, 2003 at 9.00 a.m.".

[3] When the matter was before us on 30 September, 2003 a number of the outstanding matters had been resolved during the conferences with the assistance of Commissioner Asbury and the goodwill of the respective parties.

[4] In the course of this decision it should be noted that the Queensland Cane Growers' Association Union of Employers (QCGA) and The Restaurant and Caterers Employers Association of Queensland Industrial Organisation of Employers (RCEA) supported the position adopted by the Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers (QCCI) on each of the issues which remain for determination by this Full Bench. Further, The Australian Workers' Union of Employees, Queensland (AWU) supported and adopted the submission of the Queensland Council of Unions (QCU) on all such issues.

[5] The following issues remain to be determined by this Full Bench:

(i) The replacement of "definite decision" and "major change" with "decision" and "change"

In paragraph (1)(a) of the current TCR Statement of Policy, under the heading **"Introduction of Changes",** the QCU and the AWU propose the following clause:

> "Where an employer decides to introduce changes in production, program, organisation, structure or technology including for an economic reason, that are likely to have significant effects on employees, the employer shall notify the employees who may be affected by the proposed changes and their union or unions.".

[6] The existing clause in the Statement of Policy provides as follows:

> "Where an employer has made a definite decision to introduce major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer shall notify the employees who may be affected by the proposed changes and their union or unions.".

[7] The QCU claim is that the term "definite decision" should be replaced with the word "decides", the term "major" should be removed and the words "including for an economic reason" should be included. In fact, the claim is that wherever the term "definite decision" is used in the TCR Statement of Policy it should be replaced by the word "decides". This claim is supported by the Queensland Government. It is opposed by various employers including the QCCI, the Retailers' Association of Queensland Limited, Union of Employers (RAQ), the QCGA and Employer Services on behalf of those it represents.

[8] The QCU submit that there should be consistency with the general thrust of certain provisions of the *Industrial Relations Act 1990* and in particular ss. 90 and 90A of the Act which refer to "decision" and not "definite decision". Section 90 deals with the giving of notice of a proposed dismissal where an employer decides to dismiss 15 or more employees for an economic, technological or structural reason, and s. 90A requires an employer in the same circumstances to consult with an employee's industrial organisation about any such dismissal. The QCU also argue that there should be consistency within the TCR Statement of Policy itself with various clauses referring to "decision" rather than "definite decision": see clauses relating to Time off During Notice Period and Notice to Centrelink.

[9] On the issue of the deletion of the word "major", the QCU referred to the definition of "significant effects" in the clause dealing with the Employer's Duty to Notify and submit that this definition captures the term "major changes" within it. The QCU therefore submit that there is no need to replicate the same terminology.

[10] The Queensland Government supports the removal of the word "definite" arguing that it does not add anything to the meaning of the noun "decision" and that by its nature any decision is definite. If that submission is not accepted, the Queensland Government's position is that the use of the term "decision" would encourage or require employers to err on the side of notifying employees earlier, rather than later, and suggest that this should be encouraged as any discussion/consultation at an earlier stage would more likely provide a meaningful opportunity to minimise or avoid the adverse effects on employees. The Queensland Government contend that the word "decides" in no way imposes any obligation on the employer to discuss or notify the employees at any stage prior to a decision being made.

[11] The Queensland Government supports the removal of the term "major" contending that it is only changes that "are likely to have significant effects" that need to be notified and the word "major" is thus superfluous. As for the addition of the words "including for an economic reason" the Queensland Government does not oppose their inclusion but does question whether they add any additional meaning to the clause.

[12] The QCCI position is that to vary the wording would weaken managerial prerogative. They contend that employers may make "many decisions regarding the economic sustainability of their business, often arriving at the final or "definite" decision after much consideration", and that employers will "often amend decisions or proposed strategies when introducing change". The QCCI contend that it would be "unwieldy" to expect an employer to notify employees when they have made any decision to introduce change. According to the QCCI, an employer should only be "obliged to notify employees once the decision has become definite and clear in the mind of the employer". The QCCI submit that to delete the word "definite" would strip the employer of the ability to consider and reconsider any decision to introduce change prior to the notification being given to staff.

[13] On the issue of the deletion of the word "major", the QCCI argue that this would also weaken managerial prerogative. The QCCI submit that the word "major" provides clear guidance as to the type of change that requires an employer to notify employees. The QCCI gives the "removal of plant" as an example of "major" change caught by the TCR provisions.

[14] AIG also oppose this claim arguing that the proposal does not attempt to improve poor drafting but rather raises questions as to the point in time when a decision is made. According to their submission, the proposal fails to recognise and accommodate the fact that, in many instances, there are stages to decision making. It is further submitted that the proposal fails to recognise or understand that decisions regarding introduction of workplace change may not always be planned and in many instances they are a function of unforeseen circumstances. AIG further submit that the term "major" should continue to be included in the clause as the existing provision provides an appropriate balance between an employer's right to manage operational requirements and an employee's right to be provided with as much notice of termination of employment as possible.

[15] The Queensland Hotels Association Union of Employers (QHA) argue that any deletion of the word "major" would mean that the intention of the TCR provision would be altered and this has the potential to create additional obligations on employers to notify for relatively minor changes.

[16] However, it is the QCU proposal that **any** change must be discussed with employees. Rather, it is changes in production, program, organisation, structure or technology including for an economic reason that are likely to have significant effects on employees.

[17] It seems appropriate to us that any change in production, program, organisation, structure or technology that is likely to have significant effects on employees should be notified to employees. If it is likely to have a significant effect on an employee it is only reasonable that the employee be entitled to be notified of the change. In our view, the position of the employer is protected by the words "likely to have significant effects on employees" and the definition of "significant effects" in the current TCR Statement of Policy.

[18] As for the inclusion of the words "including for an economic reason", this does not seem to us to add anything to the provision. Regardless of the reasons for the employer deciding to introduce a change in production, program, organisation, structure or technology the employer is required to notify the employees if it is likely to have a significant effect on those employees. Whether the introduction of change is for efficiency reasons, economic reasons or any other reason, the obligation to notify is placed on the employer. It seems to us to be superfluous to add the additional words sought to the provision.

(ii) Replacement of the word "Discuss" with "Consult"

[19] In paragraph (2) of the TCR Statement of Policy, under the heading **Introduction of Changes,** the QCU and AWU propose the removal of the terms "discuss" and "discussion" and their replacement with the words "consult" and "consultation". The proposed clause is as follows:

> "(a)The employer shall consult the employees affected and their union or unions about the introduction of the changes, the effects the changes are likely to have on employees (including the number and categories of employees likely to be dismissed, and the time when, or the period over which, the employer intends to carry out the dismissals), ways to avoid or minimise the effects of the changes for example by finding alternate employment.
>
> (b) The consultation must occur as soon as practicable after making the decision referred to in the Employers Duty to Notify.
>
> (c) For the purpose of such consultation the employer shall provide in writing to the employees concerned and their union or unions, all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees, and any other matters likely to affect employees:
>
> Provided that any employer shall not be required to disclose confidential information, the disclosure of which would be adverse to the employer's interests.".

[20] The claim in this regard is supported by the Queensland Government. It is opposed by those organisations representing employers.

[21] The current TCR Statement of Policy provision is as follows:

> "(a)The employer shall discuss with the employees' affected and their union or unions *inter alia* the introduction of the changes referred to, the effects the changes are likely to have on employees, ways to avoid or minimise and measures to avert or mitigate the adverse effects of such changes on employees.

(b) The discussions shall commence as early as practicable after a definite decision has been made by the employer to make the changes referred to in subclause 1 hereof.

(c) For the purpose of such discussion, the employer shall provide in writing to the employees concerned and their union or unions, all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees, and any other matters likely to affect employees:

Provided that any employer shall not be required to disclose confidential information, the disclosure of which would be inimical to his/her interests.".

[22] The QCU argue that the change in terminology proposed reflects the verbiage found in various sections of the Act e.g. ss. 89, 90 and 90A of the Act. The inclusion of the words "the number and categories of employees likely to be dismissed and the time when, or period over which, the employer intends to carry out the dismissals" are, according to the QCU, words used both in the Act and in the current TCR Statement of Policy: see the clause relating to Notice to Centrelink.

[23] The QCU further contend that the issue of consultation at the workplace level is not a new phenomenon, with both the 1991 National Wage Case decision and the 1991 Queensland State Wage Case decision bringing about the inclusion of consultative mechanisms in awards pursuant to the Structural Efficiency Principle. In Queensland a Practice Note was issued which provided for a model award clause dealing with the establishment of a consultative mechanism whereby employers, employees and unions could raise matters for consideration: see (1991) 137 QGIG 475.

[24] Further, the QCU point to s. 127 of the Act and the need for a dispute settling mechanism to be inserted into awards and to the fact that such mechanism must include a procedure for consultation at the workplace. In addition, s. 130 of the Act made it mandatory in the award review exercise for the inclusion of a dispute resolution procedure in awards, including a procedure for consultation at the workplace and a procedure for the involvement of relevant organisations.

[25] The Queensland Government submit that the changes sought by the QCU and AWU are matters which are vitally important to the process of encouraging the parties to work together with a view to minimising or avoiding the adverse effects of workplace changes, and preventing or minimising redundancies wherever possible. In the Queensland Government's view, the term "consult" reflects the spirit and intent of the TCR standard by encouraging a two way process that enables both parties, employers and employees, to work through the issues of workplace change together. According to the Queensland Government submission, the word "consult" does not impose any obligation on an employer to accept and implement the views or suggestions that they receive from employees through the process of consultation.

[26] The Queensland Government also supports the inclusion of the words "the number and categories of employees likely to be dismissed, and the time when, or the period over which, the employer intends to carry out the dismissals". In so doing, the Government submits that the terminology reflects that of s. 90(2) of the Act and is again consistent with the spirit and intent of the TCR standard.

[27] The QCCI acknowledge that the 1991 Practice Note dealing with model clauses arising from the Structural Efficiency Adjustment has given rise to more consultative workplaces but contend that consultation in the case of the introduction of change is vastly different to consultation about a wage classification. The QCCI submit that

> "… in the case of change an employer has little opportunity to reverse the decision and the employer is left with the task of discussing how the change will be enacted. It is not open for the employer to consult with employees about how the change could be minimised or eradicated. The decision to enact a change is closely tied to financial resources and as such there is little scope for an employer to consider other strategies.".

and further that:

> "An employer should not be compelled to ask the advice of employees in relation to redundancy. Whilst this may currently occur at workplaces it should not be a mandatory provision … How an employer derived at that decision is a financial and commercial issue and we would submit inappropriate to be opened up for consultation. To consult implies a level of understanding of why an employer has chosen a certain path. QCCI believes that this is the auspice of the employer not employees and their union(s).".

[28] The RAQ and QRTSA oppose the proposal to "consult" arguing that it would unduly interfere with the employer's right to manage their business and introduce change.

[29] The RCEA also oppose this change contending that the employer has the right to determine the size of their workforce and that union involvement in this area of day to day operations is not appropriate.

[30] The QHA contend that to delete "discuss" and replace it with "consult" would mean that employers would be required "to seek advice from" employees and unions rather than "to speak about together and exchange opinions". This, according to the QHA, places a greater obligation on an employer. The QHA sees the current obligation as obliging an employer to speak with an employee and union about the issue of change or redundancy in order to obtain their point of view. If the employer was required to "consult", the QHA is of the view that the employer would be required to seek advice from the employee and union and may ultimately have to reflect this advice in the ultimate decision. The QHA also objects to the addition of the words "including the number and categories of employees likely to be dismissed, and the time when, or the period over which, the employer intends to carry out the dismissals" contending that the words are superfluous and may place additional obligations on the employer.

[31] We agree that since the formulation of the *Termination Change and Redundancy Statement of Policy* in 1986 much progress has been made to encourage consultation at the workplace. We have not been provided with any good reason why employees and their unions should not be consulted on TCR matters. We are therefore of the view that the term "discuss" should be replaced with the term "consult".

[32] We are of the view that the inclusion of the words "including the number and categories of employees likely to be dismissed, and the time when, or the period over which, the employer intends to carry out the dismissals" is appropriate. It is this type of information that must be provided by an employer if the employer is to meaningfully discuss or consult with the employee and/or union about the effect the changes are likely to have on an employee.

(iii) The replacement of "definite decision" with "decision" and the replacement of "discuss" with "consult" in the Redundancy section

[33] The same issues of "definite decision" as opposed to "decide" and "discuss" as opposed to "consult" are also found in clause (1) under the heading **Redundancy.** The position of the parties in this regard is the same as referred to earlier in this decision.

We refer to our determinations in respect of (i) and (ii) above. The same position is adopted in respect of this clause.

(iv) Definition of Business

[34] Subclause (3)(b) in the **Transmission of Business** section under the **Redundancy** heading contains a definition of "business". The QCU and AWU propose an alteration to the definition of "business" to include the words "or subsidiary (which means a corporation that would be taken to be a subsidiary under the Corporations Law, whether or not the Corporations Law applies in the particular case)".

[35] According to a document tendered during proceedings on 30 September, 2003 this proposed amendment is supported by all parties other than the QCCI and the RAQ. During the course of the proceeding on 30 September 2003 the RAQ did indicate that "depending on further consultation between the parties there may be a need for further submissions on the transmission of business issue … but we'd be more clear on our position by the end of the week …". Neither the QCCI nor the RAQ dealt with this issue in their further written submissions.

In those circumstances we are prepared to include the words referred to above in the definition of "business".

(v) Commission Payments

[36] The QCU and AWU propose the inclusion of the following at the end of subclause (6) in the **Severance Pay** section under the heading **Redundancy**:

> "(*In the instance where commission payments in whole or in part, are a feature of the award, then reference to s. 7 of the *Industrial Relations Regulations 2000* offers assistance in the method of calculation to be adopted.)".

The following alternate provision has been proposed by the RAQ:

> "(*In the instance where an award provides for commission payments in whole or in part, then reference to s. 7 of the *Industrial Relations Regulations 2000* offers assistance in the method of calculation to be adopted.).".

[37] The alternate position is supported by the QCCI, the QCGA, RCEA and Employer Services.

[38] The Queensland Government supports the QCU and AWU proposal but has indicated in its written submission that either of the alternatives are acceptable.

[39] The QCCI contend that the Full Bench did not make a determination nor direct the parties to consider any provision in this regard. We do note that the Full Bench, in paragraph [82] of its decision, stated that:

> "There may be a need to make special provision for those employees receiving commission. … It would appear to be somewhat incongruous to base severance payments upon commissions not earned but some method of calculation has to be adopted. In these unusual circumstances, it may be appropriate to adopt the method used under s. 7 of the Regulation.".

[40] The RAQ is strongly opposed to the inclusion of overaward commission payments being taken into account in any way for the purposes of calculating severance payments. The payments that the RAQ seem to refer to are incentive payments or bonuses given to employees which are designed to generate greater profit for the employer. The RAQ is concerned that the QCU proposal has the potential to include overaward payments paid directly in proportion to results attained that are not provided for in an award. The RAQ accepts that this may not be the QCU's intention but submit that the proposed clause may give rise to substantial ambiguity.

[41] We have a preference for the QCU proposal as some awards do not actually provide for "commission payments in whole or in part" but clearly commission payments are "a feature of the award". In this regard we cite the *Property Sales Award Queensland – State*. Any bonus payment or incentive payment, no matter what term is used to describe the payment, is not to be included in the ordinary time rate of pay for the calculation of severance pay pursuant to the TCR Statement of Policy unless it is provided for in an award. Where commission payments are however a feature of an award e.g. *Property Sales Award Queensland – State*, it is appropriate that those amounts feature in the calculation of the ordinary time rate of pay, and for that purpose, assistance can be gained from a reference to s. 7 of the *Industrial Relations Regulations 2000*.

(vi) Superannuation

[42] There are two alternate proposals for the **Superannuation** subclause under the heading **Redundancy**. These are:

> "An employer may make an application to the Queensland Industrial Relations Commission (QIRC) for relief against severance payments where they have a superannuation scheme that provides particular benefits in a redundancy situation over and above any benefit arising from the applicability of the federal Superannuation Guarantee levy or award based superannuation.".

This proposal is supported by the QCU, the AWU, the Crown and the RCEA.

[43] The alternate is as follows:

> "An employer may apply to the Commission for an order allowing the off-setting of all or part of an employee's entitlement to severance payment on the basis that payment or part of it is already provided for or included in the contributions which the employer has made over and above those required by law to a superannuation scheme and which are paid or payable to the employee on redundancy occurring.".

[44] This alternate position is supported by the QCCI, the RAQ, the QCGA and Employer Services.

[45] The Queensland Government submit that there is no substantive difference between the two alternatives but prefers the first of the alternatives.

[46] Having considered the submissions of all parties we are of the view that the following provision is appropriate:

"An employer may make an application to the Queensland Industrial Relations Commission (QIRC) for relief from the obligation to make severance payments in circumstances where:

- the employer has contributed to a superannuation scheme which provides a particular benefit to an employee in a redundancy situation; and
- the particular benefit to the employee is over and above any benefit the employee might obtain from any legislative scheme providing for superannuation benefits (currently the federal Superannuation Guarantee levy) or any award based superannuation scheme.".

QCCI correspondence of 24 December 2002

[47] In correspondence dated 24 December, 2002 the QCCI advised the Full Bench of certain developments in the Federal Redundancy Test case and of agreements reached between various parties to that proceeding. We are mindful of the fact that the AIRC has not, as yet, formed any view on the matter before it having not completed the hearings in the matter. We have already indicated to the parties that they will be given an opportunity to be further heard once the decision of the AIRC is released. It is our considered view that the appropriate time to deal with any matters in the AIRC decision, whether they be by determination of the AIRC or by agreement between the parties, is once that decision is released.

Statement of Policy

[48] We would ask the QCU and AWU to forward to other parties and the Full Bench a draft Statement of Policy encompassing our determinations both in the decision released on 15 August 2003 and in this decision by close of business on Monday 20 October 2003. We will then give those other parties until close of business on Friday 24 October 2003 to respond to the draft. The Full Bench will then be in a position to release the Statement of Policy prior to the end of October 2003.

D.M. LINNANE, Vice President.

A.L. BLOOMFIELD, Deputy President.

B.J. BLADES, Commissioner.

Hearing Details:
2002 30 September
3 and 7 October – Written Submissions

Released: 15 October 2003

Appearances:
Ms D. Ralston for the Queensland Council of Unions.
Ms Y. D'ath for The Australian Workers' Union of Employees, Queensland.
Mr T. Shipstone for the State of Queensland.
Ms S. Lindsay for the Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers.
Mr M. Belfield for the Australian Industry Group, Industrial Organisation of Employers (Queensland).
Mr M. Guymer for the Retailers' Association of Queensland Limited, Union of Employers.
Mr G. Trost for the Queensland Cane Growers' Association Union of Employers.
Mr P. Warren for the Australian Sugar Milling Association, Queensland, Union of Employers.