



Queensland  
**Workplace Rights Ombudsman**  
Queensland Government

**QUARTERLY REPORT**

**TO THE**

**MINISTER FOR TRANSPORT, TRADE,  
EMPLOYMENT AND INDUSTRIAL RELATIONS**

**1 JULY TO 30 SEPTEMBER 2008**

**ACTIVITIES CARRIED OUT BY THE  
QUEENSLAND WORKPLACE RIGHTS OFFICE**

The Honourable John Mickel MP  
Minister for Transport, Trade, Employment  
& Industrial Relations  
Level 6B Neville Bonner Building  
75 William Street  
BRISBANE QLD 4000

Dear Minister

### **FIRST 2008-09 QUARTERLY REPORT OVERVIEW**

In accordance with the requirements of s.339Z of the *Industrial Relations Act 1999*, I am honoured to provide to you the quarterly report on the activities of the Queensland Workplace Rights Office (QWRO) for the period 1 July 2008 to 30 September 2008.

During this period the QWRO has continued to provide Queensland employers and employees with information and support pursuant to our legislative functions and notable in this period is an 8% increase in the number of callers to the hotline (5,400 up from 5000) and increased usage of the QWRO website.

The office continued to deal with the usual range of workplace issues which are detailed fully in the body of the report, however of serious concern is the almost epidemic levels of underpayment of wages and occupational superannuation. Additionally, the practice of businesses engaging people on sham sub-contracting arrangements which avoid industrial obligations, when in fact they are employees, remains prominent. Without urgent action to increase the numbers of authorised officers whose job it is to enforce compliance, the situation, given recent adverse economic developments, will only worsen.

Good employers deserve to be protected from unfair competition from their law flaunting competitors as much as workers are entitled to the basic legal minimum entitlements provided for in relevant industrial instruments.

Neither of these outcomes is likely in the short or medium term without the Federal Government restoring the ability of well-trained Queensland Department of Employment & Industrial Relations Inspectors and properly accredited union officials to inspect records and enforce the provisions of industrial instruments applicable to corporations and their employees. I strongly recommend that the officers representing the Queensland Government at national forums focus on this most important of issues.

It follows that recommendations relating to wage recovery and compliance contained in earlier reports remain both relevant and urgent.

Finally, my sincere thanks must again go to the manager and staff of the QWRO for having continued to apply their high standards to the job at hand. Similarly, officers of the Department of Employment and Industrial Relations and the office of the Minister must be thanked for their ongoing support.

Naturally, if requested, I am available to provide clarification of any issue.

Yours sincerely,

**COMMISSIONER DON BROWN**  
Queensland Workplace Rights Ombudsman

## **Executive Summary**

The Queensland Workplace Rights Ombudsman and the Queensland Workplace Rights Office (QWRO) have continued to provide services to assist employers, employees and other interested parties to facilitate and encourage fair industrial relations and work practices in Queensland and to rectify unlawful, unfair or inappropriate industrial relations and other work-related matters.

The level of demand and delivery of services continues to exceed the plans developed and expectations held at the commencement of the operations of the Ombudsman and Office on 1 July 2007.

During the quarter ended 30 September 2008 the QWRO has:

- received a total of 5477 (5013 for the quarter ended 30/6/08) calls on the Queensland Workplace Rights Hotline from employers and employees. These callers have been provided with information and advice about industrial relations and work-related matters. From commencement in July 2007 to 30 September 2008, the QWRO has received a total of 24 736 calls, far exceeding the expected demand of 6000 calls per year;
- had 10 528 visits (8554 for the quarter ended 30/6/08) to the QWRO website from 9248 unique visitors (7531 for the quarter ended 30/6/08). From commencement in July 2007 to 30 September 2008, the QWRO website has received a total of 36 794 visits from 31 296 unique visitors;
- completed 125 individual case investigations (135 for the quarter ended 30/6/08). From commencement in July 2007 to 30 September 2008, the QWRO has completed 768 individual case investigations.
- delivered more than 50 per cent (>50 per cent for the quarter ended 30/6/08) of the QWRO services to regional Queenslanders, consistent with the year ending 30 June 2008;
- continued to refer matters of possible unlawful industrial relations and work-related matters to other appropriate authorities or agencies; and
- continued to consult widely with employer and employee organisations.

The services of the Queensland Workplace Rights Ombudsman and Office continue to be of significant assistance to Queensland workers and employers in understanding their rights and obligations in industrial relations and work-related matters.

### **Consultation with persons affected by Industrial Relations and other work-related matters [s339D(1)(a)]**

The Queensland Workplace Rights Ombudsman, both directly and through staff of the QWRO, continued to consult with persons and stakeholders affected by industrial relations and work-related matters. Besides organisations such as the Queensland Council of Unions, the Australian Workers' Union, Commerce Queensland and regional chambers of commerce and AGFORCE, other representative organisations such as local industry groups have been consulted and have provided pertinent information to the QWRO, in their own right and as representatives of individual employers.

When visiting regional Queensland areas the Queensland Workplace Rights Ombudsman continued, where requested, to meet with regional chambers of commerce or labour councils and persons generally with an interest in industrial relations and work-related matters.

### **Information, education and promotion of informed decision making by persons affected by Industrial Relations and work-related matters [s339D(1)(b)]**

#### **Queensland Workplace Rights Hotline**

The Queensland Workplace Rights Hotline contact number is **1300 737 841** and can be called from anywhere within Queensland for the cost of a local call.

The QWRO estimated and planned for a performance target of 3000 calls received during each quarter of operation for 2008/2009. For the quarter ended 30 September 2008 the hotline:

- received a total of 5477 calls (5013 quarter ended 31/3/08, 24 736 since 1/7/07)
- had just under 80 per cent of calls from employees and just over 20 per cent from employers; (employer calls were just under 25 per cent for the year ended 30/6/08)
- had 54 per cent of calls from regional areas; (an increase from 48 per cent for the quarter ended 30/6/08)
- had just under 25 per cent of calls from young employees under 25 years of age; (>25 per cent for the quarter ended 30/6/08), and
- calls were split between 53 per cent of female and 47 percent of male callers (almost evenly split for quarter ended 30/6/08).

The most significant recurrent issues raised in telephone calls were:

- wages and other conditions of employment including occupational superannuation
- termination of employment
- workplace harassment, including bullying, and other workplace health and safety issues
- state or federal jurisdiction and industrial instrument coverage confusion
- disciplinary procedures such as warnings
- workers compensation and work injury matters

- employment contract and sub-contractual arrangement confusion or coercion
- apprenticeship and traineeship matters.

All telephone calls to the hotline are managed on an individual basis with personal information and advice provided relevant to the circumstances of each caller. Callers were assisted with information directly relevant to their enquiry, contact details for other relevant agencies or organisations which may be able to assist further and where appropriate, recording and registration of matters for investigation by the Queensland Workplace Rights Ombudsman. A summary of the information given in response to the recurrent issues is, but not limited to, as follows:

### **Wages and conditions of employment**

- Wage rates and conditions of employment from industrial instruments and legislation where they could be readily identified and searched by hotline operators
- referrals to or contact details for Wageline for state jurisdiction enquiries or the Workplace Infoline for federal jurisdiction enquiries
- **issues continue to emerge in the use of employment contracts to shift costs such as recruitment, training, vehicle accident excesses etc to employees.**

### **Occupational superannuation**

- Explanation of obligations under the *Industrial Relations Act 1999 (Qld)* and *Superannuation Guarantee (Administration) Act 1992 (Cwth)*
- information and advice to employers and employees about obligations and rights for occupational superannuation contributions
- referrals to the Australian Taxation Office (ATO) Superannuation hotline ph 13 10 20 and the ATO Superannuation complaints system.

### **Termination of employment**

Information from either the *Industrial Relations Act 1999 (Qld)* or the *Workplace Relations Act 1996 (Cwth)* about obligations prior to termination:

- exclusions from remedies to unfair termination of employment under the *Workplace Relations Act 1996 (Cwth)*
- referrals to relevant agencies or organisations, for both employers and employees, for assistance
- referrals of callers to the Queensland Workplace Rights Ombudsman's Code of Practice for the Fair Treatment of Employees on Termination of Employment
- information and advice to employers re fair termination procedures
- assistance with understanding and lodging relevant termination of employment documents with either the Queensland Industrial Relations Commission or Australian Industrial Relations Commission; and
- referrals to the Queensland Ant-Discrimination Commission where appropriate.

### **Workplace harassment and bullying and other workplace health and safety issues**

- Information to assist parties to resolve workplace issues between themselves or in accordance with industrial instrument grievance or dispute resolution provisions
- referrals to Workplace Health and Safety Queensland, Department of Employment and Industrial Relations
- referrals to relevant agencies or organisations, for both employers and employees, for assistance
- referrals to the Queensland Ant-Discrimination Commission where appropriate.

#### **State or federal jurisdiction and industrial instrument coverage confusion**

- Explanations of the operation of the federal Work Choices legislation from 27 March 2006 and its impact on the state jurisdiction
- explanations of the operation of state awards and agreements as preserved agreements or notional agreements preserving state awards; and
- explanations that matters such as long service leave, child labour, OH&S etc are still State regulated.

#### **Disciplinary procedures such as warnings**

- Information to assist parties to resolve workplace issues between themselves or in accordance with industrial instrument grievance or dispute resolution provisions;
- referral of callers to the Queensland Workplace Rights Ombudsman's Code of Practice for the Fair Treatment of Employees on Termination of Employment which contains information for the fair management of disciplinary procedures and warnings
- referrals to relevant agencies or organisations, for both employers and employees, for assistance.

#### **Workers compensation and work injury matters**

- Explanation of obligations and rights of employers and employees under the *Workers' Compensation and Rehabilitation Act 2003 (Qld)*
- referrals of matters to WorkCover Qld
- explanations of obligations and rights of employers and employees under the *Workplace Health and Safety Act 1995 (Qld)*
- referrals to Workplace Health and Safety Queensland, Department of Employment and Industrial Relations
- referrals to relevant agencies or organisations, for both employers and employees, for assistance.

#### **Employment and sub-contractual arrangement confusion or coercion**

- Explanations of definitions of employees and employers under the *Industrial Relations Act 1999 (Qld)* or the *Workplace Relations Act 1996 (Cwth)*
- information and advice to assist parties to establish or renegotiate their work arrangements to meet legislative obligations and their needs and preferences

- referrals of matters to the state Department of Employment and Industrial Relations or federal Workplace Ombudsman for investigation where it appears sham arrangements exist
- **issues continue to emerge where sham contract arrangements strip usual work entitlements such as superannuation, overtime, penalties etc and shift costs such as recruitment, training, vehicle accident excesses and insurances etc to workers.**

### **Apprenticeship and traineeship matters**

- Explanations of obligations and rights of parties under training contracts and the *Vocational Education, Training and Employment Act 2000 (Qld)*
- referrals to Training Queensland, Department of Education, Training and the Arts
- referrals to the Queensland Training Ombudsman.

### **Queensland Workplace Rights Office website**

The QWRO website at [www.workplacerights.qld.gov.au](http://www.workplacerights.qld.gov.au) has provided significant information to assist workers and employers understand and make informed decisions about industrial relations and work-related matters. Use of the QWRO web site by clients is continuing to increase.

For the quarter ended 30 September 2008, the QWRO website has had:

- 10 528 visits (8554 visits quarter ended 30/6/08) from
- 9428 unique visitors (in excess of 1000 repeat visitors); (7531 unique visitors quarter ended 30/6/08), and
- those visitors undertook 35 838 page views (29 003 page views quarter ended 30/6/08).

Most visitors arrived at the QWRO website through Google searches, links from the Wageline website and the Department of Employment and Industrial Relations website searches respectively.

The top two pages viewed, other than the QWRO home page, were both Workers pages – “*Your rights and obligations as an employee*” and “*State or Federal system – which are you?*”. Various Employers pages were the next most utilised.

### **Facilitate and encourage fair Industrial Relations and work practices in Queensland, including by developing Codes of Practice [s339D(1)(c)]**

Callers to the Workplace Rights Hotline service come with varied concerns. Assistance and advice varies with each call, contingent on the situations as described to the QWRO. Advice is offered in order to prevent reoccurrence of past incidences of perceived unfairness matters and poor work practices, to facilitate resolution of a current matter in a workplace or to assist callers to avoid actions which might in the future constitute unfair, inappropriate or unlawful situations.

Examples of this are:

- encouragement to communicate
- encouragement for open processes
- explaining natural justice and avoiding hasty decisions
- encouragement for employers to clarify gap between a worker's actual and desired performance
- to consider level of training provided
- to consider others perspectives, and
- to consider consequences of one's actions.

The Queensland Workplace Rights Office and hotline continue to refer customers to and provide advice from the codes of practice developed by the Queensland Workplace Rights Ombudsman for the fair treatment of employees in:

- the contract cleaning industry
- retail industry
- aged and community care services
- hospitality industry
- employment generally and
- relevant to termination of employment.

These codes are published on the Queensland Workplace Rights Ombudsman website. Employers are encouraged to consider the contents of these publications to facilitate a more harmonious and productive workplace.

**Investigate and publicise unlawful, unfair or otherwise inappropriate Industrial Relations or work-related matters in Queensland [s339D(1)(d)]**

**Investigations**

The QWRO estimated and planned for a performance target of 125 formal cases of unlawful, unfair or otherwise inappropriate industrial relations or work related matters to be received and investigated during each quarter of operation for 2008/2009. For the quarter ended 30 September 2008 the QWRO:

- received a total number of 132 cases for investigation; (147 quarter ended 30/6/08, 819 since 1/7/07)
- completed investigations for 125 cases; (135 quarter ended 30/6/08, 768 since 1/7/07)
- completed almost 65 per cent of the investigations within one month; (65 per cent within one month quarter ended 30/6/08)
- took an average of 32 days to complete investigations; (36 days quarter ended 30/6/08)
- undertook almost 70 per cent of the investigations for matters arising in regional areas; (56 per cent year ended 30/6/08).

Of the 125 cases investigated 85 had elements of unfairness (68 per cent), whilst in 40 cases unfairness was not substantiated (32 per cent).

Of the 125 cases investigated, in 37 cases unfairness was rectified by the employer, 40 matters were referred to another appropriate agency or authority for enforcement or compliance action and information and education was provided to the parties in all cases including the remaining 48 completed.

The individual cases investigated were spread across industry sectors. The industries in which the highest proportion of case investigations occurred were hospitality /restaurants, engineering (electrical, mechanical), retail sales, transport and cleaning contracting (for the quarter ended 30/6/08 retail sales, clerical/administration, fast food industry, transport, hospitality/restaurants).

All facets of the hospitality industry combined constituted by far the highest number of cases.

Almost 30 per cent of the cases of unfair, unlawful or otherwise inappropriate industrial relations or work related matters involved termination of employment (<30 per cent quarter ended 30/6/08). In these matters by far the most prevalent issue was alleged unfair dismissal from an employing company where the workers are still excluded from any recourse under the federal workplace relations legislation.

Other statistical data of note for the cases investigated (as distinct from hotline calls cited earlier) are as follows:

- 53 per cent of cases investigated were for female workers; (49 per cent male quarter ended 30/6/08)
- 60 per cent of the cases related to full-time workers, approximately 20 per cent to casual workers, about 10 per cent to part-time workers and the remainder either in other alternative work arrangements (e.g. sub-contract) or not able to be identified; (44 per cent full-time, 20 per cent casual, 4 per cent part-time quarter ended 30/6/08)
- the age group which attracted the highest proportion of cases investigated was 41 to 55 years (18 to 25 year age bracket for the quarter ended 30/6/08)
- the most prevalent issue for investigation was wages, including superannuation, and conditions of employment. Other prevalent issues arising in cases for investigation behind wages and conditions were dismissal from employment and bullying, harassment and other discrimination in the workplace.

It is neither possible, nor appropriate, to report on all matters investigated or publicised by the Queensland Workplace Rights Ombudsman and office. A summary of examples of matters investigated and completed during the quarter ended 30 September 2008 can be found at Appendix 1. It is the practice of the QWRO to maintain confidentiality where such is requested by those using the services of the QWRO.

**Refer instances of possible unlawful Industrial Relations and work-related matters to appropriate authorities or services [s339D(1)(e)]**

**Referrals generally**

Operational referrals in the September 2008 quarter continued unchanged. As reported previously, the following is a summary of operational procedure.

The QWRO has Information Officers operating the Queensland Workplace Rights hotline and Senior Investigations Officers who assist the Ombudsman in his legislative functions. These functions include referral of instances coming to the attention of the Ombudsman to appropriate authorities or services.

Most referrals from the QWRO arise from calls to the hotline. Due to the large number of callers to the hotline, Information Officers utilise their discretion in redirecting callers as is appropriate to other agencies or organisations who may be able to assist with their circumstances.

Where callers have the capacity and resources to take their matter up directly with other agencies or services, the Information Officers assist callers to the extent necessary for them to successfully progress their matter. In instances where callers do not have the capacity or resources to progress their matter or in matters already being investigated, the Ombudsman, Information Officers and Senior Investigations Officers will facilitate referrals to relevant agencies and organisations once satisfied of the veracity of a claim.

The Ombudsman, in accordance with s339G(1) of the *Industrial Relations Act 1999 (Qld)*, does not represent or otherwise act as an agent for any person in matters referred to other authorities or services. The referrals ensure that persons can seek redress in relation to possible unlawful matters either directly through the appropriate authority or with assistance from a service relevant to their circumstances.

Callers are provided with information and contact details for relevant registered employer and employee organisations, where appropriate.

Referrals have been made to other agencies, organisations and tribunals including, but not limited to:

- Queensland Industrial Relations Commission
- Australian Industrial Relations Commission
- Wageline
- Department of Employment and Industrial Relations
- Workplace Health and Safety Queensland
- Queensland Anti-Discrimination Commission
- Queensland Working Women's Service
- Youth Workers Advisory Service
- Apprenticeship and Traineeship Ombudsman
- Department of Education, Training and the Arts
- Queensland Police Service
- WorkCover Queensland

- Q-Comp, the Queensland Workers Compensation Authority
- Legal Aid Queensland
- Q-Leave, the Portable Long Service Leave Authority
- the federal Workplace Authority
- the federal Workplace Ombudsman
- the federal Department of Immigration and Citizenship
- the Human Rights and Equal Opportunity Commission
- Australian Taxation Office
- Superannuation Guarantee Hotline
- Employee and employer representative bodies\*

\* Callers are referred to representative organisations in general, without favour, where it is seen that they would benefit from the services offered by such organisation. Examples of such situations include employees wanting to act as a group and needing representation in respect of bargaining with the employer and employers seeking assistance to ensure compliance with legislation or contents of proposed agreements.

### **Referrals to the federal Workplace Ombudsman**

The QWRO has continued the practice adopted in previous quarters, namely, wherever a formal written referral of any matter has been made to the federal Workplace Ombudsman, a request has always been made that the federal Workplace Ombudsman inform the Queensland Workplace Rights Ombudsman on the outcomes.

The QWRO has both a general interest in ensuring possible unlawful matters are addressed and often a specific interest in investigating other allegations of unfair or inappropriate matters for the same worker and employer.

Section 166U(4) of the *Workplace Relations Act 1996 (Cwth)* provides *inter alia*:

*‘A member of the Office of the Workplace Ombudsman may disclose information to an officer of a State who has powers, duties or functions that relate to the administration of a workplace relations or other system relating to terms and conditions, or incidents, of employment, if the member considers on reasonable grounds that the disclosure of the information is likely to assist the officer in the administration of that system.’*

### **Make representations to an appropriate person or body about Industrial Relations or work-related matters [s339D(1)(f)]**

Representations have been made, mostly through referrals of specific possible unlawful matters to the appropriate authorities or services for their investigations. Most case referrals arising from investigations in the September 2008 quarter have been referred to the:

- federal Workplace Ombudsman (17); and
- Anti-Discrimination Commission of Queensland (6).

**Monitor and report to the Minister on Industrial Relations and work-related matters in Queensland [s339D(1)(g)]**

Changes were made earlier this year to the federal WorkChoices legislation by the federal *Transition to Forward with Fairness* amendment. A significant part of this amendment was the removal of Australian Workplace Agreements as an industrial instrument option and the reinstatement of a significant no-disadvantage test for all other formal workplace agreements.

There is a significant continuing emergence of trends noted from calls to the Queensland Workplace Rights hotline and cases received for investigation. It appears that some employers are reverting to sham sub-contractual arrangements to reduce or eliminate conditions such as overtime, penalty rates, leave entitlements etc.

Many examples have been brought to the attention of the Queensland Workplace Rights Office where work is offered on the basis of accepting a sub-contractual status. There are also examples of where work is offered on the condition that the worker obtain an Australian Business Number (ABN) and invoice the employer for work performed.

Many of these examples, on even a simple review, do not stand up to scrutiny and are resolved by the QWRO or referred on to the appropriate authorities including the state Department of Employment and Industrial Relations, federal Workplace Ombudsman and Australian Taxation Office.

It is also apparent that employers are utilising the same sham contracting arrangements or conditions in employment contracts to shift costs to workers or have them authorise deductions for charges such as recruitment costs, training charges, excesses on vehicle accident insurance and miscellaneous other business related costs associated with the engagement of workers and normally borne by employers. These costs are historically and sensibly part of the usual costs of doing business. However, the Queensland Workplace Rights Office is seeing many examples of where workers are being offered work, conditional upon the worker either accepting to meet some of the costs of their employment or authorising later deduction from their wages or contract payments for these costs.

An additional associated matter with both work and employment contracts are conditions seeking to bond workers to an employer for a minimum period of time. These operate on the basis that if the worker does not remain with the employer for a stated minimum period of time, the worker either must meet stipulated costs or pay a penalty, including an authorisation for the employer to withhold the costs or penalty from any monies owed to the worker at termination of their employment or contract.

Another associated matter is the use of work or employment contracts to seek to restrict or restrain workers options for alternative work or employment in the same area and industry for varying periods of time after the termination of work. These restrictions are alleged to be used by businesses to protect their commercial interests, but in some instances they also unfairly bond the worker to the employer or seek to unfairly limit their future employment opportunities.

While many of the issues referred to in this section were included in contracts reduced to writing and signed by both the employer and employee, it should be borne in mind that the employment or work being offered was conditional upon the signing of the contract, i.e. no signature, no job.

The balance of power at the bargaining table in these circumstances is palpably with the employing party.

Employers and employees alike should be under no illusions. A dispute regarding the nature of a working relationship between two parties will be determined by an examination of the factual circumstances.

Employers' obligations cannot be avoided by simply labelling an employment relationship as that of contractor and sub-contractor, those who do so place their business at serious risk of being ordered to pay hefty amounts of back pay, bearing in mind such claims can be made up to six years after the money became payable.

The operation of the federal social security legislation and arrangements make it difficult for workers to reject or refuse offers of work with unfair conditions attached. Under their social security obligations, workers can be penalised a number of weeks of social security payments if they fail to accept work considered suitable under the guidelines and regulations administered by Centrelink.

These are matters which may require consideration and discussion in development of new legislative arrangements for the proposed national workplace relations system.

**Investigate and report to the Minister on the impact of any aspect of Industrial Relations and work-related matters affecting Queenslanders [s339D(1)(h)]**

**Wages**

Little has changed in the period under review compared to previous quarters regarding underpayment of wages. Enquiries to the QWRO, investigations conducted by the QWRO and information gathered by way of direct meetings between the Ombudsman, employees and employers throughout the State, continue to point squarely to a problem of extremely serious proportions in this area.

Hospitality, Tourism, Retail, Transport and the contract services sectors of Cleaning, Security and Traffic Control whilst by no means an exhaustive list continue to figure prominently in this regard.

Additionally, sham sub-contracting continues to be a prominent vehicle for the avoidance of payment of entitlements to employees.

Previous comments regarding the large and difficult task of enforcing compliance remain relevant and previous recommendations regarding the re-establishment of arrangements which allow Qld State Industrial inspectors and properly accredited union officials to inspect wage records and initiate recovery action against corporations also remain extremely relevant.

By far the most common occurrence when employers are found to have underpaid employees is that they simply make good the deficiency. Rarely is an employer subjected to the deterrent penalty available under both the State and Federal Acts. With few exceptions this has been the case for many years.

Compare a very recent case of an employee of a major retailer in Maryborough who was convicted in the Magistrates Court for having taken from her employer without payment, a tube of lip gloss valued at \$2.98.

1. She suffered the shame of a conviction.
2. She was fined \$250.00.
3. She had her employment spanning 7 years terminated and consequently lost the 7 years continuity of employment towards long service. This represented a loss to the employee of some thousands of dollars apart from any impact on her ability to earn a living in future.

There can be no argument that trust in an employment relationship is vital, especially where it involves the handling of money. The deterrent for employees inherent in the possibility of being dismissed, prosecuted and fined is reasonable. My concern is that employers who keep money rightfully the property of their employees have rarely been subjected to the same treatment. The deterrent factor has been eroded to the point of irrelevance.

This must be addressed.

Industrial Court of Queensland President D.R. Hall made the point with great clarity in case no. C14 of 2005 when he said:

*“... The system of wage fixation established by the Industrial Relations Act 1999 will be set at nought if industrial instruments are ignored. The provision of the civil remedy by s. 278 is not in itself sufficient. That remedy can only lead to a recalcitrant employer paying the sum which should have been paid in the first place. The purpose of the offence created by s. 666 of the Act is to encourage payment of wages by attaching financial penalties to the failure to do so”.*

Comments by Mr Phillip Burchardt (Federal Magistrate) contained in his judgment in the matter of *Byrne v KNL Group Pty Ltd Trading as Donut King & Anor* [2008] FMCA 144 are also well worthy of note on the questions of both the propensity of employers to underpay employees and on the issue of penalty.

He stated:

*“Finally, and this applies in relation to all the contraventions, the state of the authorities involving the retail industry is now such that it is proper to take judicial notice of the fact that contraventions of industrial law appear to be regrettably rife in the retail industry in which the Respondents operate. Leaving aside even decisions of other judicial officers, my own case load has involved a regrettably numerous series of examples of retail industry infractions”.*

He also stated:

*“... It is important that people in low-paid jobs with only basic conditions of employment get at the very least the minimum entitlements that the relevant legislation and industrial instruments provide”.*

*“Next, and by extension to the former principle, general deterrence is necessary to ensure that these conditions are indeed provided”.*

While the Federal Magistrate’s comments in this matter related to the retail industry, it is my experience that the problem is far more widespread.

Full and urgent attention to these issues is vital not just to ensure proper remuneration of employees but also to protect good employers meeting all of their statutory obligations, from the unfair competition of employers who flaunt industrial and other laws.

Recommendations in this regard follow at the report for s339D(1)(j) below.

### **Superannuation**

The number of issues with superannuation continue to be of concern, not least of all the simple non-compliance through failure to pay contributions by employers. It would appear, from all of the information available, that this failure to pay is only addressed on the complaint of a disaffected employee to the Australian Taxation Office (ATO) Superannuation Guarantee section. The most recent information available is that the ATO has an 18 month backlog of complaints for investigation in relation to unpaid superannuation.

Most employees only become aware superannuation contributions are not paid when they either make their own check on their funds, or their fund notifies them that contributions are no longer being made to their fund. Examples have been brought to the attention of QWRO of where funds have advised employees, despite their current and continued employment, that contributions are no longer being made on their behalf and the employer has advised the fund that the employees have ceased employment.

Many examples have been brought to the attention of QWRO where pay slips show contributions being made on a regular basis but upon checking with their funds employees discover none of the recorded contributions have actually been paid to their funds.

Other examples have been brought to the attention of QWRO where employees have elected, either by salary sacrifice or additional payments, to make voluntary contributions to their fund over and above the 9 per cent employer contributions and employees have discovered that not only had the employer not paid the required contribution but had also not paid the salary sacrificed or voluntary contributions. In these instances the employees have been advised to refer the matter to the Queensland Police Service as this raises serious, potential criminal offences in relation to the employee’s own money.

In all of these instances employees are only able to seek remedy through the ATO, meaning a long wait and possible loss of contributions if the employer is subsequently bankrupt or a company in liquidation.

The federal Superannuation Guarantee legislation requires employers to make the compulsory superannuation contributions on behalf of all eligible employees by the 28<sup>th</sup> day of the month following the end of each quarter of the financial year. Many industrial instruments, both federal and state actually require the contributions to be made more regularly on a monthly basis. However, it would appear that there may be no proactive mechanism within the ATO Superannuation Guarantee system to address non-compliance.

In the state industrial relations jurisdiction for sole traders, partners and non-constitutional corporate bodies Inspectors under the *Industrial Relations Act 1999 (Qld)* may seek recovery of superannuation contributions and both the Queensland Industrial Relations Commission (s278) and the Industrial Magistrates Court (s406 and s408) have power to make orders for payment by an employer of unpaid contributions.

In the federal industrial relations system for constitutional corporations Workplace Inspectors under the *Workplace Relations Act 1996 (Cwth)* may seek recovery of superannuation contributions and the Federal Court or Federal Magistrates Court (s719 and s720) have power to make orders for payment by an employer of unpaid contributions.

However, the federal Superannuation Guarantee virtually renders both the state and federal provisions and powers to be of little consequence, because beyond the 28<sup>th</sup> day of the month following the end of each quarter of the financial year unpaid superannuation contributions become a charge payable to the ATO. Payments made by any employer as required by orders of the courts or tribunals mentioned above are not recognised as meeting any part of the charge payable to the ATO.

It is clear that it would be in the interests of improving compliance with superannuation contribution requirements that the ATO have some proactive mechanism to address employers who fail to make contributions and consideration be given to amending the Superannuation Guarantee legislation to recognise payments made in restitution arising from court and tribunal orders.

Recommendations in this regard follow at the report for s339D(1)(j) below.

A further matter arising in relation to superannuation contributions is for aged workers 70 years or over. The Superannuation Guarantee does not require contributions to be made for employees upon attaining 70 years of age. Additionally it would appear that workers 70 years of age or over are also prevented from making their own additional superannuation contributions.

There are now many workers remaining in the workforce beyond the traditional retirement at 65 years of age. Whilst there is currently an economic downturn and potential impact on the labour market Queensland and Australia has an increasingly ageing population and it will be continually necessary into the future to encourage older workers to remain in or return to the workforce to maintain the necessary labour supply.

In fact the Queensland Government currently has an employment program operating within the Department of Employment and Industrial Relations promoting an *Experience Pays* awareness strategy to promote, highlight the benefits, improve attitudes about and encourage the employment of and participation in the workforce of older workers.

It would seem unnecessarily unfair and discriminatory for older workers to not have the same entitlements for superannuation contributions required on their behalf as other employees or for them to be excluded from making further contributions to their own retirement savings.

Including workers over 70 years of age for operation of the Superannuation Guarantee would be of no additional cost to employers over any other employee. Enabling workers over 70 years of age to make additional contributions to their superannuation fund would seem beneficial to them and the broader community given the increasing public liability for an aging population.

Recommendations in this regard follow at the report for s339D(1)(j) below.

### **Resolution of Workplace Issues**

I regard it as commonplace for an employee to be reluctant to be seen to challenge their employer by raising issues the employee believes to be wrong or desirous of correction.

Unfortunately, many of the 24,736 callers to the hotline have expressed reservations and even outright fear of the consequences should their employer find out they had raised an issue with the QWRO.

It is trite to say that workplace issues are best resolved at the workplace. Whatever the issue, if it can be resolved between those directly involved it is palpably (1) faster and (2) cheaper.

In short it is in the public interest that the finances and resources of an enterprise not be diverted to addressing matters in tribunals that can be resolved on the job quickly and gratis.

Anyone with even a passing interest in workplace relations would acknowledge the truth of this statement.

Whether or not an employee's fear of reprisal is real or imagined it is nonetheless present and if not the main impediment, it is a serious impediment to the desirable process of self-resolution of workplace problems.

Such impediment could, in my view, be largely removed by legislative amendment making it illegal for an employer to engage in such action.

It would be naïve to think that such a move would automatically eliminate the problem completely but in my estimation it would go a long way to giving an employee the confidence to raise issues whilst at the same time providing a deterrent for employers tempted to react inappropriately.

Recommendations in this regard follow at the report for s. 339D(1)(J) below.

**Advise the Minister on the operation of Chapter 8A of the *Industrial Relations Act 1999* and generally about Industrial Relations and work-related matters**  
**[s339D(1)(i)]**

The QWRO plans and performance targets were increased considerably for 2008-2009 over those for the preceding year, as a consequence of the continuing high demand for QWRO services. The revised performance targets were exceeded or met in relation to both information services and investigations for the quarter ended 30 September 2008:

- 5477 calls (5013 quarter ended 30 June 2008, 24 736 since 1 July 2007) to the Queensland Workplace Rights hotline against an increased planned quarterly service of 3000 calls;
- 125 completed cases (135 quarter ended 30 June 2008, 768 since 1 July 2007) managed by the QWRO against an increased planned quarterly service of 125 cases.

The continued and increasing demand for services, particularly telephone and web based information is a reflection of the demand from industrial relations stakeholders, employers and workers and the general public about industrial relations and work-related matters. There have been many differing issues raised with the QWRO across a large spectrum of industrial relations and work-related matters.

In so far as the operation of the legislation is concerned, the Ombudsman and the QWRO have demonstrated that there is much scope for resolution of specific individual matters. Additionally, the Ombudsman and QWRO continue to be well placed through their activities and experience to offer advice or report broadly on industrial relations, work-related or labour market matters.

The activities undertaken in the performance of the legislative functions has seen the Ombudsman and QWRO provide information and resolve matters as provided for in existing legislation.

There has also been capacity to pick up matters in legislative gaps where individuals may not otherwise have had any avenue, providing additional scope for resolution. The Ombudsman and QWRO have also demonstrated capacity to facilitate resolutions where unfairness has arisen as a consequence of the operation of federal WorkChoices legislation.

The functions of the Ombudsman and QWRO providing for direct action by way of investigation, consultation or alternatively referral, gives a very broad opportunity to assist in most industrial relations and work-related matters. There is significant demand for the services provided, the services have been delivered to meet demand and the levels of demand and service delivery have been sustained since the commencement of operation on 1 July 2007.

**Inform the Minister about strategies to mitigate the negative effects of legislation, improve protection for vulnerable workers and promote fair and equitable industrial relations and work practices in Queensland [s339D(1)(j)]**

The strategies recommended under this sub-section in previous quarterly reports are still valid for improving the protection of vulnerable Queensland workers and promoting fair and equitable industrial relations and work practices for Queenslanders.

Additionally, it would be necessary to manage the emerging concerns reported in s339D(1)(g) above through appropriate provisions preventing or limiting these practices in the substantive *Forward with Fairness* federal workplace relations legislation and in any review or amendment of the existing *Independent Contractors Act 2006 (Cwth)*.

These may be matters which may be addressed by the Minister through the Workplace Relations Ministers Council and/or by officials of the Department of Employment and Industrial Relations who I understand are discussing and negotiating arrangements in the Commonwealth – State Higher Level Officers Group for the proposed national industrial relations system.

**Recommendations arising from the impact of aspects of Industrial Relations and work-related matters affecting Queenslanders reported above [339D(1)(h)]**

**Wages**

Previous recommendations regarding wage recovery remain relevant. The need for State Industrial Inspectors and properly accredited union officials to supplement the efforts of the Federal Ombudsman with respect to the enforcement of industrial provisions relating to corporations is urgent.

With respect to the issue of deterrent penalties it is recommended that:

- The Department of Employment & Industrial Relations encourages State Industrial Inspectors to, where appropriate, seek penalties against offending employers in the Queensland jurisdiction.
- The State Government urge the Federal Government to also encourage federal enforcement officers to pursue penalties against employers in the federal system.

**Superannuation**

It is also recommended the Minister write to the Honourable Wayne Swan MP, Treasurer in regard to the issues of non-compliance with superannuation contributions and contributions for or by aged workers and recommend that consideration be given by the federal Government for policy and legislative amendment to:

- introduce the necessary mechanisms for the ATO to undertake proactive enforcement of the Superannuation Guarantee legislation by targeted audits and investigations;

- introduce a process requiring superannuation funds to report to the ATO any employer who has made previous fund contributions, but has failed to meet either their regular payments or any Superannuation Guarantee Contribution (SGC) payment dates;
- include workers aged 70 years or over in the operation of the Superannuation Guarantee and enable voluntary contributions to their existing superannuation funds; and
- ensure that amounts ordered by courts and tribunals to be paid by employers to individual employees be recognised as payments which offset the amount owed by the employer to the ATO pursuant to the SGC.

### **Resolution of Workplace Issues**

Recommendation: That the State Government consider creating, by way of amendment to the *Industrial Relations Act 1999 (Qld)*, a provision making it unlawful for an employer to act in any way detrimental to an employee if the action of the employer is in retaliation to a legitimate workplace complaint made to the employer by the employee.

The State Government encourages the Federal Government to include a similar provision in any changes to Federal Industrial legislation.

### **Ask for help from any public entity about work-related matters [s339D(1)(k)]**

The Queensland Workplace Rights Ombudsman acknowledges the efforts of Workplace Health & Safety Queensland in promptly inspecting employment circumstances of traffic controllers connected with the Amberley Air Show and the readily available access to information and support from the Apprentice & Training Ombudsman.

The Queensland Workplace Rights Ombudsman and Office also acknowledge and thank the Department of Employment and Industrial Relations for their continued support and assistance in the performance of the legislative functions.

## **APPENDIX 1**

### **Investigate and publicise unlawful, unfair or otherwise inappropriate Industrial Relations or work-related matters in Queensland [s339D(1)(d)]**

#### **Summary of examples of matters investigated and publicised – September 2008**

##### **Labour hire company develops fair wage deductions for overpayments policy**

A labour hire company incorrectly overpaid a number of workers at one of their supply sites by paying public holiday penalty rates for a period of two ordinary working days immediately after two public holidays. None of the workers actually worked the public holidays, although most worked the two ordinary working days immediately after. The labour hire company detected the overpayment in reviewing wages payments ready for invoicing the site client. The company immediately notified both the site client and their workers of the overpayment. The labour hire company undertook to investigate and explain overpayments to the workers and advised employees that they would be seeking repayment of the amounts overpaid.

The matter was brought to the attention of QWRO because a site supervisor for the labour hire company was allegedly pressuring employees to sign deduction authorities. Employees perceived that if they did not sign deduction authorities their employment may be jeopardised. After intervention by QWRO the labour hire company immediately ceased the recovery process. The labour hire company sought an opportunity to investigate the actions of the site supervisor, who subsequently left the labour hire company.

The QWRO assisted the labour hire company to develop a fair recovery of overpayments policy. The labour hire company treated all of the previous deduction authorities as void and recommenced the explanation and recovery process, implementing fairer procedures.

##### **Employee given different directions about task, dismissed after raising safety issue**

An employee of a cleaning contractor was directed by his manager to get another employee to assist him to complete a task, regularly undertaken by two employees in wet weather for safety reasons. When the employee went to collect the work colleague to complete the task the colleague refused to attend to assist, abused the employee and claimed they were too busy with other duties. The employee contacted their supervisor and explained what had happened and why he required the colleague's assistance to complete the two person task required by the manager. The employee was told his colleague was busy undertaking a task required by the supervisor. Despite his protestations about the safety procedures for two people, the employee was required to undertake the task on his own. The employee subsequently put his concerns in writing to the manager about the safety procedures for the task and what he considered to be abusive treatment by his work colleague and supervisor. The employee was dismissed the next day with the reason for his dismissal given as "Not taking directions from certain Supervisors which puts the contract in jeopardy".

The employee sought assistance from QWRO as he was employed by a company and excluded from making an application for relief from an unfair dismissal by the federal Work Choices legislation. QWRO intervened and informed the employer of the offence against and protections for employees under the *Workplace Health and Safety Act 1995* for making a complaint about or in any other way raising a safety issue in the workplace. The company reinstated the employee and advised that the manager and supervisor would be counselled in relation to their compliance with company safety procedures and management of safety issues raised by employees.

### **Employee not paid for week's work**

A construction employee undertook one week casual work to assist on a project and provided a tax file declaration on his third day. He was advised he would be paid straight after the end of the week. The employee contacted QWRO almost two weeks later when he had still not received payment. After intervention by the QWRO the employer advised that their normal payroll is fortnightly but the employee's payment had somehow been missed in the previous week's payroll run. Payment was made immediately to the employee.

### **Sub-class 457 visa worker entitlements withheld**

A sub-class 457 temporary visa worker at an engineering company contacted the QWRO after being advised his outstanding entitlements at the end of his employment would not be paid out to him. His employer had arranged accommodation for him and other 457 workers of the business and an agreement had been reached for deductions from wages for accommodation expenses at the commencement of employment. There was some confusion and dispute over the scope of the accommodation agreement which resulted in the worker's entitlements being withheld. After some investigation by the QWRO, the company gave an undertaking to ensure that all future agreements are formalised in writing and the worker's entitlements were paid out to him.

### **Two weeks unpaid training for medical receptionist**

A female medical receptionist resigned from her casual position after approximately six months' casual work. She contacted QWRO after being advised that a period of 2 weeks' training she had performed at the commencement of employment would not be paid and that her employer had asked her to sign a contract several months into her employment which required that she give 6 weeks' notice of intent to resign after 6 months of employment. The owner of the practice was contacted and QWRO raised concerns regarding unpaid training and information was also provided about the relevant award provisions for notice. The employer paid out the final termination pay, but disputed the employee's entitlement to be paid for the two weeks' training. The Ombudsman reaffirmed his position in relation to unpaid training and the matter was finally resolved when full payment for the initial training was paid. The employer also gave an undertaking to pay for all training time in the future.

### **IT company overtime arrangements**

Concerns were raised with QWRO about the workplace arrangements in place to record and compensate employees for bulk overtime worked at an IT company. It was established that due to the nature of the business, from time to time when a project deadline is approaching, it may be necessary for salaried employees to work very long overtime hours or weekends. The arrangement in place to compensate employees did not provide an equitable outcome; for example, one employee could receive less than 50% of the time worked given back to them as time off in lieu, while another employee might receive 100% of the excess time back as time off in lieu. Given that the employees' salaries were already structured to compensate them for additional hours, it was recommended that the company consider developing a policy that provided fairness and equitable time off arrangements to all employees. The company undertook to review their arrangements. The new policy provided fairer outcomes for employees and was communicated to all employees through a range of methods including inductions and meetings and implemented in conjunction with improved time keeping arrangements.

### **Casual worker felt threatened for caring responsibilities**

A casual employee in a relatively large service organisation took two days leave to care for her ill child. Subsequently, the worker was rostered on two shifts on days she did not normally work. She was led to believe it was due to her having been absent and that she was required to make up additional shifts. The employee was unable to work these days, again because of her caring responsibilities and the worker advised the pay section. The employee alleged she was threatened with dismissal should she not work. Further, the worker's pay for other days she had worked in the pay period were not deposited in her savings account on the normal pay day.

QWRO contacted the employing company's senior management who exhibited concern and surprise at the allegations and undertook to investigate the allegations. The worker was contacted soon afterwards and everything had been resolved, with payment made and without any requirement to work additional days.

### **Poor communication results in loss**

A worker was provided with incomplete instructions by his manager for repairs required to be undertaken on a company car. The vehicle had sustained damage from more than one incident. The manager had arranged for various repair quotes, but did not instruct the employee that only some of the repairs were to be actioned and not other repairs. With his understanding that all repairs were to be actioned, the worker authorised the panel beating business to action all repairs.

The employer company demanded payment of the balance of repairs it had allegedly not wanted actioned and subsequently withheld wages without authority when the employee resigned. QWRO discussions with the employer were unable to resolve the matter which was subsequently referred to the inspectors of the Workplace Ombudsman for recovery or potential court action.

### **Unfair work practice results in false time records**

An over-efficient pay clerk in a large mixed business was removing the timesheets of casual employees on the last day of each pay period before the close of business to get a head start for undertaking the payroll the next day. This prevented the employees from entering their correct times for ceasing work. Instead, the pay clerk would enter the standard ceasing times for each individual worker. If employees worked longer hours, the practice was to make the adjustments in the following pay period. However, the onus was unfairly placed with the employees to rectify any underpayment, not as it should with the employer who was responsible for the incorrect times being entered in the first place.

This practice had the effect of workers' trust in their employer being reduced and false time records being kept. QWRO informed the employer of the problems associated with this practice. The employer undertook to immediately adjust payments and ensure the practice was no longer carried out with employees entering their correct finishing times on timesheets now collected the following day.

### **Employee successful in job application but job taken away**

An employee applied for a retail job, was subsequently interviewed and was even requested to work some unpaid shifts. The employee was offered and accepted the job and resigned from her previous employment. When the employee was ready to commence her employment proper the job offer was subsequently withdrawn. After investigation by QWRO the employer admitted there was incorrect communication between their Human Resource Manager and the Managing Director which resulted in someone else also being offered the position. The employee was paid for the work shifts performed and compensation was offered and paid to her for loss of the position.

### **Employees unfairly charged for uniforms**

It was brought to the attention of QWRO that a hospitality industry employer was charging the full cost of uniforms to provided to employees, often under 18 years of age, if they left the employment within 3 months. The employer allegedly withheld the last pay of employees if they left within that period and allegedly had in one instance threatened a young worker with civil action for the balance of the costs of her uniforms.

QWRO raised with the employer the concerns about their practice and provided information regarding the uniform clause in the relevant industrial instrument. QWRO considers and most industrial instruments nominate uniforms as a normal business expense that should not be passed on to employees. QWRO also informed the employer that employees have a right to leave employment within the probationary period, giving required amount of notice, without further repercussions. QWRO also advised that making the uniform cost shifting a condition of accepting employment was unfair, particularly where there was an imbalance of bargaining power for young employees. The employer undertook to cease their practice in relation to uniforms immediately and withdrew claims against any employee.

### **Employee dismissed after a temporary absence from work**

After a resort employee sustained an injury away from work and had a short period of time off he received a letter from the employer advising that he is being replaced and that his employer would 'endeavour to assist' him with another placement elsewhere in the company when he is fit for work. The employee also received a separation certificate stating he resigned, causing delay in any access to social security payments. QWRO contacted the employer and was advised that it was not the intention to terminate his employment and that he is guaranteed a like position once he has full medical clearance. The employer stated the letter to the employee was allegedly a confirmation of the conversations they had with the employee, that he was interested in working at another company location, but in the interim needed a separation certificate to seek financial support.

The employer undertook to either talk to Centrelink or to amend the separation certificate to clear up any misunderstanding. The employer also undertook to make their intention clear, in writing, to the employee that he is guaranteed a job and that his employment has not ceased. The employer also provided a copy of their confirmation letter to QWRO.