Fair Work Amendment Bill 2013 (Cth):

Submission to the Senate Education, Employment and Workplace Relations Legislation Committee

1396

Chamber of Commerce and Industry of Western Australia (Inc)

TABLE OF CONTENTS

Submission to the Senate Education, Employment and Workplace Relations Legislation Committee regarding the *Fair Work Amendment Bill 2013* (Cth)

1. ABOUT CCIWA

1.1 The Chamber of Commerce and Industry WA (**CCIWA**) is the leading business association in Western Australia, and with over 8,000 members is one of the largest organisations of its kind in Australia.

1.2 CCIWA members operate across most industries including: manufacturing; resources; agriculture; transport; communications; retail trade; hospitality; building and construction; local government; community services; and finance. CCIWA members are located throughout Western Australia.

1.3 Most of CCIWA's members are private businesses, although CCIWA also has a significant proportion of members in the not for-profit sector and the government sector.

1.4 Approximately 70% of CCIWA members are small businesses employing up to 19 employees, with over 20% employing between 20 and 99 employees and over 5% employing more than 100 employees.

2. GENERAL COMMENTS

2.1 The Senate Education, Employment and Workplace Relations Legislation Committee (**Senate Committee**) has invited interested parties to make submissions in relation to the *Fair Work Amendment Bill 2013* (Cth) (**Bill**).

2.2 CCIWA welcomes the opportunity to provide the Senate Committee with submissions regarding the Bill.

2.3 During 2012 the operation of the *Fair Work Act 2009* (Cth) **(FW Act)** was subject to a comprehensive review by an independent panel comprising of Professor Ron McCallum, Hon Michael Moore and Dr John Edwards (**the Expert Panel**). The Expert Panel's Final Report[1] made 53 recommendations to amend the Act, of which only 18 have so far been adopted through the *Fair Work Amendment Act 2012* (Cth).

[1] R. McCallum, M. Moore & J. Edwards: *Towards more Productive and Equitable Workplaces: an evaluation of the Fair Work legislation* (2012).

2.4 This Bill seeks to implement only one further recommendation of the Expert Panel.[2] Two other recommendations of the Expert Panel are relied upon for the purpose of the proposed amendments to requests for flexible work arrangements and disputes concerning frequency of right of entry visits.[3] However in both cases the proposed amendments are only loosely based on the recommendations contained in the Expert Panel's Final Report and will fail to achieve intention of the recommendations.

2.5 CCIWA is of the view that there is no legitimate basis for the amendments being proposed by the Bill and that these changes goes against the Government's previously expressed view that the FW Act is working well.[4]

2.6 Furthermore the Government has failed to consult with employers with respect to these changes and continues to ignore many of the Expert Panels recommendations that address some of the concerns raised by employers or would otherwise add certainty to the operation of the FW Act.

2.7 Through this Bill the Government is clearly going beyond the scope of reform legitimately provided by the review of the FW Act to create an industrial relations environment that is squarely biased towards the interests of the trade unions.

2.8 With the exception of the proposed amendment prescribed in Schedule 1 Part 1 of the Bill, which has the effect of implementing Recommendation 5 of the Expert Panel's Final Report, CCIWA believes that the proposed amendments will result in:

2.8.1 a significant impost on the Fair Work Commission **(FWC)** through workplace bullying provisions, which will create a complex legislative minefield that will be prone to abuse through "give it a go" type applications, whilst failing to fundamentally tackle the problem of bullying;

2.8.2 the right of workers to enjoy their meal breaks free from unwanted interference being removed under new right of entry provisions that grant unions an automatic right to lunch rooms irrespective as to the appropriateness of the venue;

2.8.3 obligating employers to assist unions in exercising right of entry by providing transport and accommodation in remote environments, which will create an irresistible opportunity for permit holders to breach the FW Act by holding discussions with employees outside of designated meal breaks and give organisers access to residential facilities;

---

[2] Schedule 1 Part 1 of the Bill seeks to implement Recommendation 4 of the Expert Panel's Final Report in relation to a period of special maternity leave not reducing an employee's entitlement to unpaid parental leave.

[3] Recommendation 5 and Recommendation 35 respectively.

[4] Media Statement, Hon Bill Shorten, Fair Work Act Review Announced (20 December 2011).

2.8.4 the ability for modern awards to reflect modern work practices and promote productive performance of work to be quashed by a requirement that they reflect traditional methods of remunerating overtime and weekend work;

2.8.5 further restrictions on the ability of employers to vary rosters to accommodate the needs of the business beyond the significant restrictions already imposed by the modern awards; and

2.8.6 increased red tape for employers in responding to flexible work arrangements in a poor attempt by the Government to tackle significant community issues.

3. MODERN AWARDS OBJECTIVE

3.1 Schedule 2 of the Bill seeks to insert a new award objective which requires the FWC to take into account the need to provide additional remuneration for employees working:

3.1.1 overtime;

3.1.2 unsocial, irregular or unpredictable hours;

3.1.3 on weekends or public holidays; and

3.1.4 shifts.

3.2 CCIWA is of the opinion that the intent of this new objective is to prevent the FWC from considering applications to vary overtime, shift loadings or penalty rates. However it also calls into question many existing award provisions which would need to be removed as part of the 2014 review of the modern awards if this amendment is adopted.

3.3 The proposed amendment makes the assumption that there is only one method of treating hours of work that fall outside of that which is normally deemed "standard" hours and that is by way of additional remuneration.

3.4 Most modern awards establish clear definitions of what constitutes ordinary hours and provide clear additional compensation for overtime, shift, weekend or public holiday work.

3.5 However there are a number of awards that take a different approach to the treatment of "non standard" hours. The *Real Estate Industry Award*[5] and *Professional Employees Award*[6] are two clear examples of this. The *Real Estate Industry Award* is a consent award established by agreement between the relevant unions and employer federations. This novel award recognises the degree of autonomy exercised by many employees in the industry in determining their hours of work and the significant impact that commission payments have in motivating and rewarding employees. This has allowed for an award that focuses on rewarding productivity whilst still providing for an effective safety net for employees.

3.6 Likewise the *Professional Employees Award* has long recognised the professional nature of the employees covered by this award and the flexible nature in which work is performed. Section 18 of this award allows for employees to be compensated for overtime, call backs, evening, and weekend work through a variety of options including additional leave, a special allowance, additional remuneration, or factoring these requirements into an employee's salary.

[5] MA000106.

[6] MA000065.

3.7 Alternative structures such these are clearly at odds with the new award objective proposed by the Bill and if implemented awards of this nature would need to be substantially re-written to incorporate traditional award provisions. This would have significant implications for these industries and occupations which have come to rely on award provisions that reflect modern work practices.

3.8 The newly proposed objective would also require standard award clauses, such as annualised salaried arrangements, to be removed from the modern award as they would no longer meet the modern award objective. Provisions of this nature are common across a range of awards and establish safeguards to ensure that employees are adequately compensated. However, they are unlikely to meet the narrow requirements established by the proposed objective of additional remuneration.

3.9 Alternative remuneration methods, such as those identified above, rely heavily upon the existing modern award objective, in particular objective (d) which provides that modern awards must take into account "*the need to promote flexible modern work practices and the efficient and productive performance of work.*"[7] The objective proposed by the Bill directly contradicts this existing modern award objective.

3.10 The new objective also attempts to lock into place a traditional perspective on how work should be renumerated and not only prevents alternative arrangements from being considered but jeopardises long standing award arrangements that seeks to provide much needed flexibility within the current award structure.

3.11 Of additional concern is the requirement for modern awards to provide remuneration for irregular or unpredictable hours. Most awards do not clearly provide additional remuneration for this factor and the desired intention of this provision is unclear. This will create additional confusion for employers and increased disputation as part of the 2014 modern award review.

3.12 The amendment demonstrates a significant distrust by the Government in the ability of the FWC to carry out its function to establish appropriate minimum terms and conditions of employment.

3.13 Throughout the 2012 review of the modern awards, the FWC has shown a reluctance to grant applications to vary existing award provisions. The recent Penalty Rates decision[8] demonstrates the reluctance of the FWC to deviate from the traditional means of renumerating based on traditional working hours to accommodate the concerns of employers within the retail and hospitality industries.

3.14 Given the highly conservative approach generally adopted by the FWC in establishing terms and conditions of employment, the proposed amendment is

[7] s134(1)(d) of the FW Act.

[8] [2013] FWCFB 1635.

clearly unnecessary and will jeopardise those rare occurrences where the tribunal has recognised the need for flexibility.

4. ANTI-BULLYING MEASURES

4.1 CCIWA has serious concerns with the proposed anti-bullying measures set out in the Bill and therefore strongly opposes the implementation of the anti-bullying measures in their entirety.

4.2 For the reasons set out below, CCIWA believes that the changes proposed in the Bill and the associated ramifications of these changes have not been properly considered.

4.3 Further, in the event that the Senate Committee decides to implement some or all of the proposed anti-bullying measures set out in the Bill, CCIWA has made some suggestions about how some of the proposed provisions should at the very least be amended to avoid for example, floodgates of bullying claims or blatant unfairness for employers.

Changes not recommended by Expert Panel

4.4 CCIWA notes that the Expert Panel did not make any recommendations with respect to implementing anti-bullying measures in the FW Act.

4.5 On this basis, CCIWA submits that the implementation of the anti-bullying measures into the FW Act is both unnecessary and unwarranted.

Ability to make an application

4.6 The Bill provides that a worker who reasonably believes that they have been bullied at work may apply to the FWC for an order to stop bullying.

4.7 Section 789FD of the Bill sets out the following test to determine whether a worker has been bullied at work:

> *(1) A worker is **bullied at work** if:*
> *(a) while the worker is at work in a constitutionally-covered business:*
> *(i) an individual; or*
> *(ii) a group of individuals;*
> *repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and*
> *(b) that behaviour creates a risk to health and safety.*
>
> *(2) To avoid doubt, subsection (1) does not apply to reasonable management action carried out in a reasonable manner.*

4.8 The Explanatory Memorandum to the Bill[9] explains that this definition of bullying reflects the definition that was proposed in the House of Representatives Standing Committee on Education and Employment Inquiry Report "*Workplace Bullying – We just want it to stop*" (**the Committee Report**). The Explanatory Memorandum also explains that the Committee noted that "repeated behaviour" refers to:

[9] See [109] of Explanatory Memorandum

…the persistent nature of the behaviour and can refer to a range of behaviours over time and that 'unreasonable behaviour' is behaviour that a reasonable person, having regard to the circumstances may see as unreasonable (in other words it is an objective test). This would include (but is not limited to) behaviour that is victimising, humiliating, intimidating or threatening.

4.9 CCIWA has a number of concerns with the proposed test for assessing the existence of workplace bullying. In particular, CCIWA has concerns with the following:

4.9.1 **the definition of a "worker**" – the Bill seeks to adopt a very broad definition of a worker from the *Work Health and Safety Act 2011* (Cth) (**WHS Act**) which includes an individual who performs work in any capacity, including as an employee, contractor, subcontractor, outworker, apprentice, trainee, student gaining work experience or volunteer. Aside from some exceptions, the FW Act governs the employment relationship between employees and employers. However, the proposed definition of a worker will essentially mean that many persons who fall outside the traditional employer and employee relationship will be able to rely on the FW Act and make bullying related claims. Therefore, CCIWA submits that it is inappropriate to adopt an Work Health and Safety (**WHS**) related definition of worker in the FW Act.

4.9.2 **the definition of bullying** – the Bill seeks to include a very broad definition of workplace bullying under section 789FD of the Bill. In particular, CCIWA has concerns with the proposed wording of "repeatedly behaves unreasonably towards the worker" and "creates a risk to health and safety".

Even if an objective test is used, which the Explanatory Memorandum appears to suggest will be the case, the proposed wording of "repeatedly behaves unreasonably towards the worker" would essentially capture any kind of behaviour imaginable (i.e. repeated unfriendly facial expressions towards a worker which could likely be the consequence of a number of underlying reasons, other than bullying).

CCIWA also has serious concerns about the wording "creates a risk to health and safety". Arguably, there are many things within the workplace, including issues other than bullying, which create a risk to health and safety. The proposed wording means that bullying does not need to have any actual, quantifiable effect on an individual's health and safety but rather there only needs to be a *perceived risk* to health and safety. Further, as the FWC essentially make the final assessment about whether there is a risk to health and safety, CCIWA has serious concerns about whether the FWC possesses the requisite WHS related skills to make such an assessment.

Based on the existing definition of workplace bullying, it would appear that even the most unmeritorious bullying claims would still fall within the definition of bullying and therefore an application could at the very least be made. As a consequence, the time and resources of both employers and

the FWC will be wasted in determining/defending such claims. On this basis, CCIWA submits that the definition of bullying needs to be reconsidered and revised appropriately. In particular, CCIWA submits that a much higher threshold test should be imposed (i.e. "serious and imminent risk to health and safety" etc);

4.9.3 **absence of pre-conditions for bringing a claim** – the Bill does not stipulate any pre-conditions before an individual makes an application to the FWC to stop bullying. For example, there is no requirement for an individual to try to resolve the matter internally, or even make their employer aware of the bullying issue, prior to making an application to the FWC. Therefore, CCIWA submits that these provisions appear to encourage individuals to circumvent engaging in any internal processes as a preliminary measure to address bullying. Further, the Bill appears to encourage the unnecessary incurrence of expense and resources by directly proceeding to the FWC to address bullying issues.

CCIWA also submits that the lack of internal process proposed in the Bill is contrary to the *Occupational Safety and Health Act 1984* (WA) (**OSH Act**) and the WHS legislation already enacted in other States. Under these provisions an employee has a duty of care to report a hazard (i.e. bullying) to their employer and the employer must then address the issue, which will likely involve an internal dispute resolution process.[10] As a consequence, CCIWA submits that the procedural inconsistencies between the Bill and OSH Act are likely to cause confusion.

Based on the above, CCIWA submits that it should be a pre-condition to making an application that an individual must have at the very least made their employer aware of the alleged bullying;

4.9.4 **the unhelpful performance management exemption** – whilst the Bill clarifies that reasonable management action carried out in a reasonable manner is not considered bullying at work, CCIWA notes that this exemption will not prevent frivolous claims being made in the first instance. As a consequence, the time and resources of both employers and the FWC will be wasted in determining/defending bullying claims which may have actually arisen out of reasonable performance management processes;

4.9.5 **individual no worse off** – alike unfair dismissal applications, workers will be no worse off for making an application to stop bullying (i.e. it is likely that any application fees will be refunded or waived). On this basis and for a number of the reasons we have identified above, CCIWA has serious concerns that the proposed bullying provision are vulnerable to being abused and as a consequence, will result in an influx of "give it a go" type claims where workers will essentially try to obtain "go away money".

[10] See ss 20 and 23K of OSH Act.

Further, CCIWA also has concerns that employers will have a propensity to pay "go away money" to avoid a presumably publicly available FWC order being made against them and to avoid the civil penalties/representative costs associated with a breach of a FWC order.

4.10 For the reasons outlined above, CCIWA strongly opposes the Bill which seemingly allows anyone performing work in an employer's workplace to make what would appear to be unmeritorious bullying claims without consequence.

Procedural issues

4.11 Section 789FE of the Bill provides that:

> *The FWC must start to deal with an application under section 789FC within 14 days after the application is made.*
>
> *Note: For example, the FWC may start to inform itself of the matter under section 590, it may decide to conduct a conference under section 592, or it may decide to hold a hearing under section 593.*

4.12 The Explanatory Memorandum to the Bill also provides that in the course of dealing with a matter the FWC may make a recommendation to the parties or express an opinion, or refer a matter to a WHS regulator or another regulatory body.[11]

4.13 CCIWA has the following concerns with the proposed procedure for determining workplace bullying applications:

4.13.1 the resources of the FWC are already stretched. In fact, the FWC only recently introduced its "Future Directions" which included timeliness benchmarks for a number of the FWC's functions. Therefore, CCIWA has concerns about whether the FWC will have the capacity to promptly determine the likely influx of bullying applications in conjunction with their existing tasks. Our concerns are exacerbated by the fact that the FWC is not experienced in dealing with bullying matters and the Bill proposes that the bullying provisions will come into effect at the very latest only 6 months after receiving Royal Assent of the Bill; and

4.13.2 internal investigations of workplace bullying can take a number of weeks or months depending on the circumstances. This is due to the fact that procedural fairness will often require that a number of persons within the workplace are interviewed and witness statements are prepared etc. Whilst, CCIWA acknowledges that the Bill only requires that the FWC *start to deal* with the matter within 14 days, CCIWA has concerns that the push to have bullying matters dealt with speedily will result in:

4.13.2.1. the employer's internal staff not having the opportunity to investigate bullying complaints as thoroughly as they would normally do so, due to

[11] See [116] and [117] of the Explanatory Memorandum.

the what may be the surprise nature of the application and the time constraints in determining the matter; or

4.13.2.2. employers engaging lawyers to assist with the investigation process and defend the application which will result in an increased presence of lawyers within the FWC and increased costs.

4.14 As set out at paragraphs 4.9 to 4.10 above, CCIWA also has concerns that the Bill facilitates workers bringing unmeritorious claims without consequence. CCIWA's concerns are exacerbated by the fact that whilst as a matter of process the FWC may express an opinion or make a recommendation, the FWC has not been given the power to dismiss unmeritorious applications or order any costs against parties for making unmeritorious applications.

4.15 CCIWA also has concerns that the ability of the FWC to refer matters to a WHS regulator or another regulatory body will cause confusion as to which authority has jurisdiction to deal with the matter.

4.16 For the reasons set out above, CCIWA submits that the proposed procedures for making bullying applications, and the associated ramifications, have not been appropriately considered.

<u>Orders</u>

4.17 Section 789FF of the Bill provides that:

> *(1) If:*
>
> *(a) a worker has made an application under section 789FC; and*
>
> *(b) the FWC is satisfied that:*
>
> *(i) the worker has been bullied at work by an individual or a group of individuals; and*
>
> *(ii) there is a risk that the worker will continue to be bullied at work by the individual or group;*
>
> *then the FWC may make any order it considers appropriate (other than an order requiring payment of a pecuniary amount) to prevent the worker from being bullied at work by the individual or group.*

4.18 The Explanatory Memorandum to the Bill[12] provides the following guidance with respect to the orders that may be granted by the FWC:

> *The power of the FWC to grant an order is limited to preventing the worker from being bullied at work, and the focus is on resolving the matter and enabling the normal working relationships to resume…Examples of the orders that the FWC may make include an order requiring:*
>
> - *the individual or group of individuals to stop the specified behaviour;*
> - *regular monitoring of behaviours by an employer;*
> - *compliance with an employer's workplace bullying policy;*
> - *the provision of information and additional support and training to workers;*

[12] See [119] of the Explanatory Memorandum.

- *review of the employer's workplace bullying policy.*

4.19 The Explanatory Memorandum to the Bill[13] also clarifies the intended scope of the orders as follows:

> *Orders will not necessarily be limited or apply only to the employer of the worker who is bullied, but could also apply to others, such as co-workers and visitors to the workplace.*

4.20 Section 789FG of the Bill also provides that:

> *A person to whom an order under section 789FF applies must not contravene a term of the order.*
>
> *Note: This section is a civil remedy provision (see Part 4-1).*

4.21 CCIWA has the following concerns with the proposed orders provisions:

4.21.1 **ability to make orders** – under the Bill, the FWC may grant an order to stop bullying if it is satisfied that an applicant meets the test set out in section 789FF of the Bill (see above). With respect to the proposed test, CCIWA has concerns with the wording "bullied at work" and "there is a risk that the worker will be continued to be bullied at work".

As mentioned at paragraphs 4.9 and 4.10 above, CCIWA has a number of concerns with the proposed definition of being "bullied at work". As a result, CCIWA strongly opposes the FWC making an order to stop bullying on the basis of an applicant satisfying such a flawed definition of bullying.

The additional component of the test requires the FWC to be satisfied that "there is a risk that the worker will be continued to be bullied at work". As set out at paragraph 4.9.1 above, CCIWA believes that the term "risk" sets a far too low threshold.

Based on the above, CCIWA submits that the test which allows the FWC to make such orders should be considered and revised (i.e. there must be a "serious and imminent risk that the worker will be continued to be bullied at work" etc);

4.21.2 **scope of orders/policing of orders** – the Explanatory Memorandum to the Bill clearly identifies that orders to stop bullying may be imposed on a wide scope of persons including employers, individual employees, visitors etc.

CCIWA submits that the wide scope of persons who may be subjected to orders is a serious concern from a policing perspective, particularly if the orders made by the FWC are vague. As a result, even if an employer uses its best endeavours to police for bullying, if a FWC order to stop bullying is contravened, employers are likely to incur considerable costs in fines (i.e. up to $51,000) and representational costs in defending Court proceedings. Employers are also likely to suffer reputational damage as presumably the FWC orders will be publicly available. CCIWA also discusses below at

[13] See [118] of the Explanatory Memorandum.

paragraphs 4.29 to 4.31 below that such orders may also be used against an employer in a number of other claims.

Based on the above, CCIWA submits that the imposition of some orders may place unachievable policing roles on employers which in-turn may lead to serious financial and reputational consequences for employers;

4.21.3 **appropriateness of orders/likely impact of orders** – the Explanatory Memorandum to the Bill explains that the focus of the FWC orders is to resolve the bullying matter and enable normal working relationships to resume. The Explanatory Memorandum also sets out some examples of orders which may be made by the FWC (see above).

CCIWA has serious concerns that the FWC orders will not achieve the objective of resolving bullying matters and/or enabling normal working relationships to resume. For example, whilst a FWC order to stop bullying or comply with an employer's workplace bullying policy might give some individuals incentive to change some of their behaviours, the order will not address the underlying systemic problems which lead to, and perpetuate, bullying in the workplace. CCIWA further submits that the fear of an order being imposed and/or the imposition of civil penalties for breaches of such orders are not conductive to facilitating normal working relationships within the workplace. In addition, given the underlying psychological nature and nuisances of bullying, CCIWA questions whether the FWC possesses the requisite skills to make an order which will appropriately address bullying in the workplace.

4.22 Based on the above, CCIWA strongly opposes the proposed provisions in the Bill which enable the FWC to make orders which will likely fail to address the underlying systemic issues that contribute to, and perpetuate, workplace bullying.

<u>Overlap of claims</u>

4.23 Proposed section 789FH of the Bill provides the following:

> *Section 115 of the Work Health and Safety Act 2011 and corresponding provisions of corresponding WHS laws (within the meaning of that Act) do not apply in relation to an application under section 789FC.*
>
> *Note: Ordinarily, if a worker makes an application under section 789FC for an FWC order to stop the worker from being bullied at work, then section 115 of the Work Health and Safety Act 2011 and corresponding provisions of corresponding WHS laws would prohibit a proceeding from being commenced, or an application from being made or continued, under those laws in relation to the bullying. This section removes that prohibition.*

4.24 The Explanatory Memorandum to the Bill[14] also explains that:

> *…if a worker suffers discrimination, adverse action or dismissal as a result of raising a bullying matter, they will continue to be entitled to pursue remedies under the FW Act or WHS Act.*

[14] See [127] of the Explanatory Memorandum.

4.25 The Explanatory Memorandum to the Bill further provides that the provisions in the Bill which enable an individual to make various bullying related claims are consistent with the Committee Report. In particular, the Explanatory Memorandum to the Bill[15] provides that the ability for an individual to pursue multiple remedies :

> *… is consistent with the Committee's recommendation that all workers who have been bullied should have access to a quick and cost-effective individual remedy.*

4.26 From a practical perspective, CCIWA submits that the Bill will enable an individual to make a number of bullying related claims which arise out the same or similar facts including:

4.26.1 an application to the FWC to stop bullying;

4.26.2 where appropriate, an adverse action/general protections claim in the FWC or Federal Court/Federal Magistrates Court;

4.26.3 where appropriate, a discrimination claim in the Australian Human Rights Commission or Federal Court/Federal Magistrates Court;

4.26.4 in the event of a dismissal, potentially an application to the FWC or Federal Court/Federal Magistrates Court; and

4.26.5 where appropriate, a workers compensation (i.e. stress related) claim in accordance with the relevant State and Territory requirements.

4.27 As set out at paragraph 4.25 above, the Explanatory Memorandum to the Bill suggests that the provisions in the Bill which enable an individual to pursue multiple claims for bullying related matters align with the Committee's recommendations. However, CCIWA disagrees that these provisions align with the Committee's recommendations.

4.28 CCIWA submits that providing individuals with the ability to pursue multiple claims/remedies does not give individuals access to a <u>quick</u> and cost-effective individual remedy. Rather, the Bill seeks to not only perpetuate the Industrial Relations/WHS hybrid nature of bullying claims but makes the existing system even more complicated by providing for an additional remedy. As a consequence, individuals will still likely need to consult with both an Industrial Relations and WHS specialist to assess their options with respect to bullying in the workplace. Further as set out in paragraph 4.13 above, CCIWA has concerns about the consequences of the FWC being required to promptly assess bullying applications.

4.29 CCIWA also has serious concerns that the ability for an individual to pursue multiple remedies for bullying related matters will essentially mean that an employer may be sanctioned in various ways for a bullying incident.

4.30 For example, if the FWC makes an order against an employer to stop bullying, the order in itself provides substantiated evidence of bullying. As a consequence, the

[15] See [128] of the Explanatory Memorandum.

order may be relied upon by Worksafe to prosecute the employer for an unsafe or hazardous workplace or to issue the employer with an improvement notice. The order may also be relied upon for the purposes of workers' compensation claims or other legal claims. The Explanatory Memorandum to the Bill also clarifies that this is the intention of the legislation by expressly stating that the anti-bullying measures "*are not intended to preclude investigation and prosecutions under WHS and criminal law*". [16]

4.31 The incessant punitive action which can arise from a bullying incident grossly conflicts with the well understood common law concept of double jeopardy and/or the concept of double dipping.

4.32 CCIWA also submits that the ability of individuals to pursue a number of bullying related claims stifles the productivity of both employers and employees in the workplace.

4.33 CCIWA has further concerns that if these provisions are implemented, there will be 2 regulators (namely, the Fair Work Ombudsman and the WHS Inspectors) which essentially police bullying in the workplace. CCIWA submits that this may result in the unnecessary duplication of some of the duties of regulators and in some circumstances, the role of the respective regulators may become unclear.

4.34 CCIWA also has concerns that the boundaries and distinction between the role of the FWC and WHS regulators will be further blurred by the ability of the FWC to refer a matter to a WHS regulator or another regulatory body.[17] In addition, CCIWA further submits that the ability of the FWC to refer matters does not appear to align with the Committee's recommendation to have an individual remedy for bullying as set out at paragraph 4.25 above.

4.35 For the reasons outlined above, CCIWA strongly opposes the provisions in the Bill which will enable an employee to pursue a FWC order to stop bullying in conjunction with other claims.

Draft Bullying Code of Practice

4.36 It is our understanding that the revised WHS Draft Bullying Code of Practice (**Code**) is due to be released in the near future.

4.37 CCIWA has concerns that there will be inconsistencies between the provisions of the Code and the Bill and that employers will be confused about which process to follow.

Conclusions regarding anti-bullying measures

[16] See [92] of Explanatory Memorandum

[17] See [91] and [117] of the Explanatory Memorandum

4.38 For all of the reasons identified above, CCIWA strongly opposes the implementation of all of the anti-bullying measures in the Bill.

4.39 However, in the event the Senate Committee decides to adopt some or all of these provisions, CCIWA urges the Senate Committee to consider revising some of provisions in accordance with our suggestions set out above.

5. RIGHT OF ENTRY

5.1 CCIWA has serious concerns with the proposed right of entry provisions set out in the Bill and therefore strongly opposes the implementation of these provisions in their entirety.

Labor Government's failure to honour promise

5.2 The Labor Government made a pre-election promise that it would not change the right of entry laws with the introduction of the FW Act. In addition, one of the Labor Government's Forward with Fairness priorities was for the right of entry rules to remain unchanged.

5.3 In fact, on 8 November 2007, the Deputy Opposition Leader at the time, Julia Gillard, made the following press statement:[18]

> *I'm happy to do whatever you would like. If you'd like me to pledge to resign, sign a contract in blood, take a polygraph, bet my house on it, give you my mother as a hostage, whatever you'd like ... we will be delivering our policy as we have outlined it.*

5.4 Contrary to the promises made by the Labor Government, the FW Act has actually made significant changes to the right of entry laws.

5.5 CCIWA submits that the right of entry changes proposed in the Bill constitute a further failure of the Labor Government to honour its promise to not change the right of entry laws.

Location of interviews and discussions

5.6 Section 492 of the Bill provides that:

> *(1) The permit holder must conduct interviews or hold discussions in the rooms or areas of the premises agreed with the occupier of the premises.*
>
> *(2) Subsection (3) applies if the permit holder and the occupier cannot agree on the room or area of the premises in which the permit holder is to conduct an interview or hold discussions.*
>
> *(3) The permit holder may conduct the interview or hold the discussions in any room or area:*
> *(a) in which one or more of the persons who may be interviewed or participate in the discussions ordinarily take meal or other breaks; and*
> *(b) that is provided by the occupier for the purpose of taking meal or other breaks.*
>
> *Note 1: The permit holder may be subject to an order by the FWC under section 508 if rights under this section are misused…*

5.7 These proposed amendments seek to remove the right of employers/occupiers to determine the location of interviews or discussions by making lunch rooms the default location for such discussions/interviews, irrespective of whether that location is reasonable or not.

[18] See National Press Club Debate.

5.8 To facilitate these amendments, the Bill seeks to amend the FW Act to remove all existing provisions which require an assessment of whether a proposed location for conducting interviews or holding discussions is reasonable. For example, the Bill proposes to amend the FW Act so that:

5.8.1 the FWC no longer deals with a dispute about whether the request to conduct interviews or hold discussions in a particular room or area is reasonable. CCIWA notes that recommendation 36 of the Expert Panel's Final Report sought to amend the FW Act to provide the FWC with greater power to resolve disputes about the location for interviews and discussions. Whilst CCIWA does not necessarily agree with this recommendation made by the Expert Panel, it is clear that the proposed amendments in the Bill are contrary to the Expert's Panel recommendation;

5.8.2 there are no longer provisions which provide that a request is not unreasonable only because the room or area is not that which the permit holder would have chosen;

5.8.3 there are no longer provisions which set out when a request is unreasonable (i.e. the room is not fit for purpose, the request is made with the intention of intimidating persons etc); and

5.8.4 there are no longer provisions which provide that the regulations may prescribe circumstances in which a request for a room or area is reasonable/unreasonable in the circumstances.

5.9 CCIWA submits that there has not been any cogent evidence provided which suggests that it is necessary to depart from the existing provisions in the FW Act.

5.10 CCIWA also submits that the proposed amendments in the Bill will overturn significant case law which has determined that for a variety of reasons, a lunch room is not an appropriate venue for holding discussions or conducting interviews.

5.11 For example, in the Full Bench Fair Work Australia decision of *Sommerville Retail Services Pty Ltd v Australasian Meat Industry Employees' Union* [2011] FWAFB 120, the majority of the Full Bench found that it was reasonable for an employer to request the union to hold discussions with employees in a training room as opposed to a meal room. In making this determination, the Full Bench concluded that it was appropriate to give consideration to employees who may not wish to participate in discussions and that such employees may be inconvenienced if discussions were to take place in a meal room.[19]

5.12 Whilst note 1 under section 492 of the Bill indicates that permit holders will be reprimanded for misusing their rights, ironically, the Explanatory Memorandum to the Bill[20] provides that:

[19] See [54]

[20] See [142] of the Explanatory Memorandum.

*An example of a misuse of rights under section 508 in these circumstances may be where a permit holder **repeatedly** seeks to have discussions with a person in a lunch room to encourage that person to become a member of an organisation when the person has made it clear to the permit holder that they do not wish to participate in such discussions.*

5.13 Therefore, the Explanatory Memorandum suggests that a permit holder will not be reprimanded for their failure to respect the wishes of employees until they have **repeatedly** engaged in such behaviour and a person has made it clear that they do not wish to be a member.

5.14 CCIWA submits that these proposed amendments are an abomination as they discard all concepts of reasonableness and create a gross imbalance of power. In addition, the amendments violate non-members right to privacy (i.e. to enjoy their lunch breaks without being harassed by union organisers).

5.15 CCIWA also has concerns that the proposed amendments may:

5.15.1 contravene the freedom of association provisions in the FW Act, as there will likely be forced interactions between union organisers and non-members; and

5.15.2 create disputation within the workplace due to forced interactions between union organisers, members and non-members. In addition, there is also potential for an increased quantity of bullying and harassment claims on this basis.

5.16 Based on the above comments, CCIWA strongly opposes the proposed amendments to the provisions dealing with the location of interviews and discussions in the context of right of entry.

Disputes regarding frequency of entry to hold discussions

5.17 Section 505A of the Bill provides that:

5.17.1 the FWC may deal with a dispute about the frequency with which a permit holder(s) enter premises for the purposes of holding discussions with employees or TCF outworkers if an employer or occupier disputes the frequency of entry ; and

5.17.2 in dealing with such a dispute, the FWC may only make an order if it is satisfied that the frequency of entry by the permit holder(s) would require an **unreasonable diversion of the occupier's critical resources**.

5.18 The Explanatory Memorandum to the Bill[21] provides the following guidance with respect to the FWC's ability to make orders:

…This is intended to be an appropriately high threshold since disputes under new section 505A have the potential to displace a permit holder's legitimate right to enter premises for authorised purposes, in the absence of any intentional misbehaviour or wrongdoing by the permit holder. What will amount to an

[21] See [154] of Explanatory Memorandum.

unreasonable diversion of an occupier's critical resources will be for the FWC to determine on the particular circumstances before it…

5.19 There are many recent examples of excessive right of entry requests being made to businesses or sites. This issue was clearly identified in the Expert Panel's Final Report[22] which made reference to one site experiencing over 700 right of entry visits over the course of a year, being an average of 56 per month.

5.20 The supervision of right of entry requests currently imposes a significant cost on employers as costs are associated with the management and supervision of right of entry which are also exacerbated by excessive visits.

5.21 As set out above, the Bill and Explanatory Memorandum to the Bill, have provided little guidance about what will constitute an "*unreasonable diversion of the occupier's critical resources*". However, the term "critical" in itself essentially suggests that an order could only be made if an occupier's most crucial or essential resources were unreasonably diverted.

5.22 On this basis, CCIWA submits that the proposed amendments in the Bill will do little, if anything, to alleviate the burden and costs associated with excessive right of entry. This is due to the fact that the proposed test of an "*unreasonable diversion of the occupier's critical resources*" is remarkably high and will likely be unattainable for many employers/occupiers. CCIWA further questions the value of amending the FW Act to incorporate such a test if in practicality employers/occupiers will rarely, if ever, be able to rely upon it.

5.23 CCIWA also notes that recommendation 35 of the Expert Panel's Final Report provided that:

The Panel recommends that s. 505 be amended to provide FWA with greater power to resolve disputes about the frequency of visits to a workplace by a permit holder in a manner that balances the right of unions to represent their members in a workplace and the right of occupiers and employers to go about their business without ***undue inconvenience****.*

5.24 CCIWA submits that the proposed amendments in the Bill set a significantly higher threshold for curtailing incessant union entry than the "undue inconvenience" threshold test recommended by the Expert Panel.

5.25 Based on CCIWA's comments above, it is CCIWA's view that the threshold for obtaining orders should be brought into line with the recommendation of the Expert Panel's Final Report to allow the FWC to make orders when the frequency of entry causes "undue inconvenience" to the employer/occupier.

Accommodation/transport arrangements in remote areas

Scope of arrangements

5.26 Sections 521C and 521D of the Bill require occupiers to enter into:

[22] R. McCallum, M. Moore & J. Edwards: Towards more Productive and Equitable Workplaces: an evaluation of the Fair Work Legislation (2012), p193.

5.26.1 accommodation arrangements with permit holders/organisations when accommodation is not reasonably available in a remote area unless the occupier provides the accommodation, or causes it to be provided; and

5.26.2 transport arrangements with permit holders/organisations when permit holders are seeking to exercise right of entry in a remote place that is not reasonably accessible unless the occupier provides the transport, or causes it to be provided.

5.27 The Explanatory Memorandum to the Bill[23] provides the following guidance with respect to assessing whether a location is in a "remote area":

> *…What is a remote area will depend on the particular circumstances but is limited to circumstances where the only realistic means for the permit holder to access the premises is by transport provided by the occupier or where the only accommodation at the location, if it is required, is that provided by the occupier…*

5.28 It is CCIWA's view that the proposed transport/accommodation arrangements will have a significant impact in Western Australia as many employers/occupiers perform work in the North West or offshore which would appear to fall within the proposed meaning of "remote area".

Challenging entrance into such arrangements

5.29 Under the Bill, occupiers must enter into accommodation/transport arrangements if:

5.29.1 providing accommodation/transport, or causing it to be provided, would not cause the occupier undue inconvenience;

5.29.2 the permit holder/organisation requests the occupier to provide accommodation/transport, or cause it to be provided;

5.29.3 the request is made within a reasonable period before the transport/accommodation is required; and

5.29.4 the permit holder/organisation have been unable to enter into a transport/accommodation arrangement with the occupier by consent.

5.30 The Bill also provides that the FWC may deal with a dispute about whether the premises/accommodation are reasonably accessible/available, whether providing accommodation/transport would cause the occupier undue inconvenience and whether a request to provide transport/accommodation is made within a reasonable period.

5.31 Ironically, the Explanatory Memorandum to the Bill[24] provides that:

[23] See [159] of Explanatory Memorandum.

[24] See p 7 of Explanatory Memorandum.

> *… the Bill also provides the FWC with the ability to deal with disputes about aspects of accommodation and transport arrangements, such as whether to provide accommodation or transport would cause the occupier undue inconvenience. This will ensure that occupiers of premises are not required to go to unreasonable lengths to facilitate right of entry.*

5.32 It is CCIWA's view that the above provisions essentially allow permit holders/organisations to challenge occupiers on virtually every angle (as set out at paragraph 5.30 above) should an occupier not be willing to enter into an accommodation/transport arrangement.

5.33 It is a gross misstatement in the Explanatory Memorandum to suggest that the ability of the FWC to deal with disputes about transport/accommodation arrangements means that occupiers will not be required to go to unreasonable lengths to facilitate right of entry.

5.34 CCIWA submits that the above provisions will require occupiers to incur considerable costs, and waste valuable time and resources in the FWC if they refuse to enter into such arrangements with permit holders/organisations. Further, given the likely technical nature of such disputes (i.e. whether the arrangement will cause undue inconvenience etc), it is likely that lawyers will be engaged to represent occupiers in such disputes which will result in further cost to occupiers.

5.35 These proposed provisions also overlook the fact that in this modern day and age there are multiple ways in which unions can meet with their members without having to actually attend sites. For example, unions could arrange teleconferences, video links etc.

5.36 Alternatively, in some circumstances it would not be necessary for a union to physically attend a site. For example, union organisers could simply meet with members or potential members at the relevant airport.

Costs of arrangements

5.37 Under the Bill, civil remedies apply (i.e. fines of up to $51,000) if the occupier charges a permit holder/organisation a fee for transport/accommodation that is more than is necessary to cover the cost to the occupier of providing the transport/accommodation. In addition, it is not intended that unions will incur incidental costs, such as insurance premiums or electricity.

5.38 CCIWA strongly opposes these provisions.

5.39 It is simply absurd that an occupier is required to provide accommodation and transport to a permit holder at a premium rate which is exclusive of incidental costs.[25] This is particularly the case given that significant incidental costs may be incurred by occupiers in facilitating such arrangements. For example:

[25] See [167] and [173] of Explanatory Memorandum

5.39.1 insurance premiums may need to be increased to actually have adequate insurance coverage for permit holders to use the occupier's transportation; or

5.39.2 occupiers may incur costs for permit holders to undertake requisite safety inductions before being permitted to travel on the occupier's transportation (i.e. choppers).

5.40 Occupiers should not be required to fund any union activities.

5.41 On this basis, CCIWA submits that permit holders/organisations should be required to pay all actual costs incurred by the occupier in facilitating transport/accommodation arrangements. Whilst such costs may be prohibitive, permit holders have many other options for communicating with their members as discussed above.

Conduct of permit holder

5.42 The Bill also proposes that whilst the permit holder is in transit or accommodation, the FWC may treat the conduct of the permit holder as conduct engaged in as part of the exercise of their rights.

5.43 Whilst this provision attempts to prevent permit holders from misusing their rights by holding discussions with employees outside designated meal breaks, CCIWA submits that considerable costs will likely be incurred by employers by having an employee supervise the permit holder throughout the duration of their transit to site and/or the duration of their site visit.

5.44 If such supervision arrangements are not put in place, it will be difficult for occupiers to police the behaviour of permit holders whilst they are in transit or on site. This is particularly the case given that permit holders will be given many opportunities to interact with employees (i.e. in the mess, wet mess, on the plane etc).

Violation of privacy

5.45 CCIWA submits that the ability for permit holders to enter into accommodation/transport arrangements will likely result in the privacy of non-members being violated in many instances.

5.46 As set out above, unless the permit holder is supervised at all times, permit holders will have significant opportunities to have unfettered access to employees.

5.47 As a party to the International Covenant on Civil and Political Rights, Australia has undertaken to adopt the necessary legislative measures to "*give effect to the rights of persons not to be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence*".[26] CCIWA submits that these proposed amendments do not comply with this Covenant.

[26] Privacy Act 1988 preamble in reference to Schedule 2 to the Australian Human Rights Commission Act 1986 .

5.48 CCIWA also submits that in some circumstances, accommodation arrangements will likely conflict with section 493 of the FW Act which provides that a permit holder must not enter any part of the premises that are used mainly for residential purposes.

Other challenges

5.49 CCIWA further submits that no cogent evidence has been provided to indicate why these proposed changes are necessary.

5.50 In addition, these proposed amendments were not recommended by the Expert Panel. As such, CCIWA submits that these proposed amendments are both unnecessary and unwarranted.

5.51 In conclusion, for the reasons set out above, CCIWA strongly opposes the implementation of the transportation/accommodation arrangements into the FW Act.

6. FAMILY FRIENDLY MEASURES

6.1 Consultation About Changes to Rosters and Working Hours

6.1.1 Currently, there are not any provisions in the FW Act for consultation for each and every variation of a roster. There are provisions in many modern awards regarding rostering and the obligations required. A sample clause from the Manufacturing and Associated Industries Award 2010 is provided below for demonstration purposes. It can be seen that the below clause clearly provides for a process to be followed for any change and there are limitations about what can be changed. Similar industry specific clauses can be found in many existing modern awards.

36.5 Methods of arranging ordinary working hours

(a) *Subject to the employer's right to fix the daily hours of work for day workers from time to time within the spread of hours referred to in clause 36.2(c) and the employer's right to fix the commencing and finishing time of shifts from time to time, the arrangement of ordinary working hours must be by agreement between the employer and the majority of employees in the enterprise or part of the enterprise concerned. This does not preclude the employer reaching agreement with individual employees about how their working hours are to be arranged.*

(b) *The matters on which agreement may be reached include:*

(i) *how the hours are to be averaged within a work cycle established in accordance with clauses 36.2, 36.3 and 36.4;*

(ii) *the duration of the work cycle for day workers provided that such duration does not exceed three months;*

(iii) *rosters which specify the starting and finishing times of working hours;*

(iv) *a period of notice of a rostered day off which is less than four weeks;*

(v) *substitution of rostered days off;*

(vi) *accumulation of rostered days off;*

(vii) *arrangements which allow for flexibility in relation to the taking of rostered days off; and*

(viii) *any arrangements of ordinary hours which exceed eight hours in any day.*

(c) *By agreement between an employer and the majority of employees in the enterprise or part of the enterprise concerned, 12 hour days or shifts may be introduced subject to:*

(i) *proper health monitoring procedures being introduced;*

(ii) *suitable roster arrangements being made;*

(iii) *proper supervision being provided;*

(iv) *adequate breaks being provided; and*

(v) *a trial or review process being jointly implemented by the employer and the employees or their representatives.*

(d) *Where an employee works on a shift other than a rostered shift, the employee must:*

(i) *if employed on continuous work, be paid at the rate of double time; or*

(ii) *if employed on other shiftwork, be paid at the rate of time and a half for the first three hours and double time thereafter.*

(e) *Clause 36.5(d) does not apply when the time is worked:*

(i) *by arrangement between the employees themselves;*

(ii) *for the purposes of effecting the customary rotation of shifts; or*

(iii) *on a shift to which the employee is transferred on short notice as an alternative to standing the employee off in circumstances which would entitle the employer to deduct payment in accordance with Part 3-5 of the Act.*

6.1.2 The Bill provides that modern awards and enterprise agreements must contain a term about changes to regular rosters or ordinary hours of work. This term would require the employer to consult with an employee about any change to their regular roster or ordinary hours irrespective of how minimal it is and allows for that employee to have representation for that consultation. The term then requires employers to provide information to the employee regarding the change, invites the employee to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities) and the employer must consider the views. "Regular roster" has not been defined in the Bill. However, the Explanatory Memorandum to the Bill explains that where an employee has an understanding of and reliance on the fact that, their working arrangements are regular and systematic, any change that would have an impact on these arrangements will trigger the consultation requirement in a modern award.

6.1.3 The proposed amendments may also create inconsistencies between existing award provisions and those inserted as a requirement of this Bill.

6.1.4 The existing clauses were created during the modern award creation process. Each modern award was thoroughly considered and constructed by the panel. These rostering clauses were inserted in the modern awards on an industry required basis, tailored to that specific industry. Inserting a blanket clause would not only create inconsistencies but would also not be practical for every modern award, particularly when most modern awards already contain an industry specific clause relating to rostering and consultation.

6.1.5 Where there is concern about the rostering provisions within a particular modern award, it will be open to the relevant party to seek changes to those requirements as part of the 2014 award review process.

6.1.6 The extent of the consultation provisions in the Bill are likened to that of the current consultation requirements for redundancy, which is a much more serious issue and commands a thorough consultation process. Likening a change of rosters, to a redundancy process, diminishes the serious nature of redundancy and illogically lifts a change of roster to the same level of significance.

6.1.7 There are also provisions in every modern award and enterprise agreement requiring consultation for significant change. If a rostering change is that significant then the employer is already caught by the current significant change provisions and must consult with employees according to the clause.

6.1.8 Given the nature of many industries constant consultation regarding rostering of work would grind the workings of the employer to a standstill. The practicality of consultation for each and every roster change with each and every employee doesn't exist. For small employers, they don't have the capability to deal with such onerous requirements and for large employers, how an employer would consult with hundreds or thousands of employees each week would create an administrative burden we can only begin to imagine.

6.1.9 The productivity of a workplace would instantly decrease with the requirement to consult over each change. People who work in rostered industries are fully aware of the practice behind why and how rosters change, so there isn't a demand from them for these amendments. Often people in these industries are there due to the flexibility of a rostering system. Students, parents, older employees and simply employees who choose these industries do so to fit their lives, to meet the demand for their flexible requirements work in these industries. The proposed onerous process would encourage employers to be less flexible to have set hours without want for flexibility in shifts because the process behind altering would be far too hard. This would squeeze out these employees who are opting for this style of work.

6.1.10 The proposed amendments also require the employer to consult with a union or employee representative if one is appointed. This part of the provision seeks to only embed unions further into the workplace when the current trend of union membership is on the decline. It would also serve as another avenue for unions to push their agenda having the consultation brought to the union itself. Unions would undoubtedly use these consultations as a means to negotiate for any other issue they have. These provisions could also potentially draw negotiations away from Good Faith Bargaining if the employer is engaged in that process. These provisions extend union power well beyond the current union friendly provisions.

6.1.11 CCIWA submits that consideration should be had about the practical effects these amendments would have on employers and their ability to manage their business.

6.1.12 This proposed amendment is not based on the Expert Panel's Final Report. Nor is there any basis or demonstrated need to address this matter. CCIWA submits that the existing award structure already imposes significant obligations on employers in rostering and managing employees' hours of work and that there is no need for additional obligations to be imposed. Rather we submit that the current restriction already hamper workplace productivity.

6.2 Right to Request Flexible Working Arrangements

6.2.1 CCIWA has a number of concerns with the proposed amendments in the Bill which seek to amend the right to request flexible working arrangements under the FW Act.

Expanded group

6.2.2 The Bill seeks to expand the groups of employees entitled to request flexible working arrangements to a broader category of persons, including where the employee:

a) is a parent, or has responsibility for the care, of a child who is of school age or younger;
b) is a carer (within the meaning of the Carer Recognition Act 2010);
c) has a disability;
d) is 55 or older;
e) is experiencing violence from a member of the employee's family;
f) provides care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing violence from the member's family.

6.2.3 The proposed amendments seek to dramatically expand the groups of employees entitled to request flexible working arrangements. CCIWA has a number of concerns with the expanded group as set out below:

6.2.3.1. **Expert Panel recommendations** – the Expert Panel's recommendations focused on extending the right to request flexible working arrangements to a wider range of persons with caring responsibilities. For example, the Expert Panel Report provided that[27]:

> *The Panel has formed the view that, while the introduction of the right to request flexible working arrangements represented an important development in providing additional rights to certain types of working carers, the scope of the caring arrangements under the current provisions should be expanded to reflect a wider range of caring responsibilities.*

Notably, the Bill seeks to expand the group of persons entitled to request flexible working arrangements to persons other than those

[27] See p. 98 of Final Report.

who have caring responsibilities. Therefore, CCIWA submits that some of the proposed amendments in the Bill do not align with the Expert Panel's recommendations;

6.2.3.2. **55 years of age + category** – the Bill proposes that an employee aged 55 years of age or older is permitted to make a request for flexible working arrangements. CCIWA is unaware of the underlying reasoning which led to the conclusion that 55 years of age was an appropriate limit.

Despite this, CCIWA submits that the age limit of 55 years of age is too low. If an age limit was to be adopted by the Senate Committee, CCIWA submits that the age limit should be lifted to at least align with the age limits imposed in other employment related legislation. For example, the *Superannuation Guarantee (Administration) Act 1992* (Cth) currently imposes an upper age limit of 70 years of age for making superannuation contributions, although this will be removed in its entirety come 1 July 2013;

6.2.3.3. **Family violence/carer of victim of family violence categories** – The Bill proposes that victims of family violence and carers of victims of family violence are permitted to make a request for flexible working arrangements. The right to request flexible working arrangements allows employees to request their employer to change their working hours etc on a routine, ongoing basis based on the employee's personal circumstances.

The unfortunate nature of family violence is that the violence in itself and/or the associated ramifications of the violence (i.e. fleeing from partners, attending hearings etc) is often unplanned and sporadic. Although CCIWA can think of some circumstances in which flexible working arrangements might provide some assistance to this category of persons (i.e. to attend counselling etc), based on the unpredictable nature of such incidents, it is CCIWA's view that flexible working arrangements will only be of limited assistance to these groups.

In addition, due to the sensitive nature of family violence, CCIWA also submits that it is likely that many victims of violence, or potentially even their carers, will be unwilling to inform their employer that they require flexible working arrangements due to family violence issues.

CCIWA also submits that family violence is a serious societal issue. Therefore, legislative measures which seek to address such complicated issues by implementing changes to employment related legislation that will likely be of limited assistance and/or not utilised at all, do not provide meaningful assistance. Rather, any proposed legislative measures should provide meaningful assistance to such victims, and their carers, and form part of a broader package;

6.2.3.4. **Lack of evidential requirements** – if the Senate Committee intends to adopt these amendments, CCIWA submits that employers should be permitted to request evidence from employees which demonstrates that he/she falls within one or more of the stipulated categories of persons.

Such evidential requirements would limit the ability of these provisions to be abused by employees. In addition, evidential requirements for some forms of leave (i.e. parental leave) already exists under the FW Act and therefore the concept and underlying reasons for requesting such evidence is well understood;

6.2.3.5. **Overlap with other jurisdictions** – CCIWA submits that the proposed provisions relating to employees with a disability or who request part-time work are practically not that dissimilar from an application in the discrimination jurisdiction. This raises the question as to why these provisions need to be incorporated into the FW Act, which will simply result in increased regulation for businesses;

6.2.3.6. **Increased costs** – CCIWA submits that the expanded group of employees will impose additional costs on employers to accommodate the personal circumstances of its employees. CCIWA further submits that many small businesses will likely not have the capacity to implement such arrangements;

6.2.3.7. **System does not permit flexibility** – CCIWA submits that awards currently do not provide the range of flexibilities necessary to accommodate a broad range of flexible arrangements and therefore modern awards and individual flexibility provisions must be amended to accommodate the proposed increased requirements on employers to provide flexibility;

6.2.3.8. **Alternative arrangements** – CCIWA submits that there is no evidence to suggest that employers do not already accommodate flexible working arrangements based on employees' personal circumstances. Further, CCIWA submits that voluntary arrangements with employers are more likely to be successful than when the employer is compelled to accept such arrangements.

CCIWA finally submits that the general protections provisions in the FW Act already protect persons with carer responsibilities and persons family responsibilities from discrimination.

<u>Reasonable business grounds</u>

6.2.4 The Bill also seeks to set out what are "reasonable business grounds" for refusing flexible working arrangements as follows:

a) that the new working arrangements requested by the employee would be too costly for the employer;

b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;
c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;
d) that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;
e) that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

6.2.5 The Explanatory Memorandum to the Bill[28] also provides that:

> *The list of reasonable business grounds is not exhaustive and such grounds will be determined having regard to the particular circumstances of each workplace and the nature of the request made.*

6.2.6 CCIWA strongly opposes this amendment.

6.2.7 CCIWA has concerns that the proposed list of reasonable business grounds imposes an overly high threshold on employers to justify their refusal (i.e. too costly for the employer, no capacity to change, impractical to change etc).

6.2.8 In addition, whilst the Explanatory Memorandum to the Bill provides that the list of reasonable business grounds is not intended to be exhaustive, CCIWA has concerns that these reasons will nonetheless be rigidly applied in practice.

6.2.9 CCIWA also submits that no evidence has been produced which indicates that there is a problem with having no definition of "reasonable business grounds" in the FW Act (which currently is the case).

6.2.10 CCIWA further submits that the Expert Panel's Final Report indicated that "reasonable business grounds" did not require a definition.[29]

6.2.11 For the reasons outlined above, CCIWA submits that it is unnecessary to introduce a definition of what constitutes "reasonable business grounds". However, if the Senate Committee decides that such a definition is necessary, CCIWA submits that a much lower threshold of what constitutes "reasonable business grounds" should be adopted than has been proposed in the Bill.

6.3 Special Maternity Leave

[28] See [39] of Explanatory Memorandum

[29] See [5.2.4] and [5.2.6] of Report.

6.3.1 CCIWA notes that the Expert Panel did make the recommendation with respect to any special maternity leave taken not reducing an employee's entitlement to 12 months of unpaid parental leave.

6.3.2 Currently, unpaid special maternity leave is available when an employee is pregnant and has a pregnancy related illness or has been pregnant and the pregnancy ended within 28 weeks prior to the expected birth date, other than through the birth of a living child. Further, a female employee's entitlement to 12 months unpaid parental leave associated with the birth of a child is reduced by the amount of any unpaid special maternity leave taken by the employee when she is pregnant.

6.3.3 The Bill proposes that any special maternity leave taken will not reduce an employee's entitlement to 12 months of unpaid parental leave.

6.3.4 CCIWA submits that the proposed changes have the ability for an employee to be absent from the workplace for periods far greater than the maximum under the current provision of 2 years. This ability comes from the employee having the right to access and exhaust any paid personal/carer's leave accrued prior to taking unpaid special maternity leave.

6.3.5 CCIWA submits that the proposed change creates a greater difficulty for the employee to reintegrate into the business as the prospect of the employee being away from work for a greater length of time is highly probable.

6.3.6 While CCIWA recognises the current provision for "keeping in touch days", which has the ability to assist, due to the lengthy period of absence reintegration is still problematic. In reality, the potential of having an employee out of the workplace for a period of greater than 2 years with the current cap of 10 "keeping in touch days" each year doesn't allow for a employee to wholly reintegrate back into the workplace. For example this becomes particularly problematic in professional or specialist occupations were the knowledge or skills are highly diversified and constantly subject to change.

6.3.7 For the reasons outlined above CCIWA submits that if this proposed amendment is implemented a cap on the amount of additional leave should be imposed to ensure than an employee is not absent from the workplace for a period of greater than 2 years.

6.4 Parental Leave

6.4.1 Currently, the FW Act allows for a couple to take 3 weeks unpaid leave concurrently at the time of the birth or placement of a child. Under the legislation this is the maximum amount of concurrent unpaid parental leave available; that is not to say that employees don't have access to any annual or long service leave, and their access to ordinary leave entitlements remain unchanged.

6.4.2 The proposed provisions under the Bill seek to extend the concurrent period of leave from 3 weeks up to 8 weeks. The leave can be taken in blocks of 2 weeks (or less by agreement) during the first 12 months after the child is born or placed. The notice required for the first portion of leave is still 10 weeks prior to the leave commencing (ie from the birth or placement). The additional portions of leave can be taken with 4 weeks notice.

6.4.3 CCIWA submits that breaking the leave into small portions will become problematic in the workplace. There is no mechanism for compromise or refusal on reasonable business grounds, leaving the employer vulnerable to an additional 5 weeks leave for those 12 months after birth or placement.

6.4.4 CCIWA acknowledges that concurrent leave is necessary immediately preceding the birth or placement of a child. However, we submit that the two week portions taken over a 12 month period wouldn't benefit an employee in the same way as the time would immediately after birth.

6.4.5 Furthermore, if the couple comes from the same workplace it will become even harder to accommodate these additional portions of leave.

6.4.6 In practice in the lead up to the birth or placement of a child each partner usually "saves up" their leave until around the time of birth. The existing combination of unpaid parental leave and taking of accrued paid leave entitlements provides employees with substantial levels of flexibility.

6.4.7 Employers also need to be afforded some ability to manage leave entitlements to ensure the productive performance of work. Employers need to be able to refuse leave on reasonable business grounds or have a mechanism for discussion and compromise.

6.4.8 These proposed amendments are also inconsistent with the Expert Panel recommendations. The Expert Panel made a recommendation that where an employer has refused a request for additional unpaid parental leave then a requirement would be for the employer and employee to have a meeting to discuss the request. CCI submits that the mechanism for the conversation regarding the additional unpaid parental leave be adhered to and that these additional portions of leave need to be with the agreement or approval of the employer.

6.5 Transfer to a Safe Job

6.5.1 Currently, the transfer to a safe job provisions are only applicable, as with all of the pregnancy related provisions under the FW Act, after 12 months of service with the employer. Employees can apply to be transferred to a safe job if the current role is deemed by a medical professional to be unsafe to the health of the mother and/or baby. If there is no appropriate "safe" job, then the employee is entitled to paid no safe job leave, which means the employee is paid to remain away from the workplace until the period of risk ends (ie usually until the birth).

6.5.2 The Bill seeks to extend the existing entitlement to transfer to a safe job to a pregnant employee regardless of whether she has, or will have, an entitlement to other pregnancy related provisions such as unpaid parental leave. When transfer to a safe job is not possible, the employee then becomes eligible for unpaid no safe job leave and the employer will be obligated to hold open the job for the period of risk for an employee who is otherwise ineligible for other pregnancy and birth related provisions of the FW Act.

6.5.3 CCIWA is concerned about the implications of extending the provisions beyond when a pregnant employee is otherwise eligible for transfer to a safe job and also no safe job leave. It appears bizarre to require an employer to transfer an employee to a safe job or to provide the employee with unpaid special maternity leave where there is no obligation on the employer to maintain the position upon the birth of the child. In CCIWA's experience where it is deemed unsafe for an employee to continue to perform their job, this opinion is unlikely to be reconsidered as the pregnancy progresses.

6.5.4 It should be noted that there is nothing preventing employers from holding a job open or having the employee return to work after the birth of their irrespective of the employee not having a formal entitlement to parental leave or unpaid special maternity leave. It is not unusual for employers to enter into such arrangement in order to preserve the training and development provided to employees.

6.5.5 It is important to recognise that the existing parental leave provisions are already complex and confusing for most businesses and that these amendments will simply add to the existing levels of confusion.

6.5.6 CCI also queries the origins of the proposed amendments and we submit that these proposed amendments were not part of the Expert Panel's recommendations. The proposed provisions are also inconsistent with the recommendations made by the Expert Panel and seek to extend pregnancy and parental leave provisions to employees who otherwise have no entitlement to it.

Submitted on behalf of the

Chamber of Commerce and Industry of Western Australia (Inc)

Paul Moss

Manager – Employee Relations

15 April 2013