Fair Work Bill 2008 – Senate Standing Committee on Education, Employment and Workplace Relations

January 2009

Submission prepared by the Chamber of Commerce and Industry of Western Australia

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About CCI

The Chamber of Commerce and Industry of Western Australia (CCI) is the leading business association in Western Australia (WA).

It is the second largest organisation of its kind in Australia, with a membership of over 5,300 organisations in all sectors including: manufacturing; resources; agriculture; transport; communications; retailing; hospitality; building and construction; community services; and finance.

CCI members are located in all geographical regions of WA.

CCI has extensive involvement on behalf of members in a diversity of workplace relations matters across all these industries.

Most members are private businesses, but CCI also has representation in the not-for-profit sector and the government sector.

CCI members employ a significant number of employees – nearly 73% of members employ up to 9 employees; 21.3% between 20 and 99 employees and 5.89% over 100 employees.

CCI is the direct employer of over 900 apprentices across WA as part of a Group Training Scheme operated by Apprenticeships Western Australia Pty Ltd, a wholly owned subsidiary of CCI. The apprentices are in traditional trades in the resources sector, building and construction, metal and engineering fabrication, ranging through to trainees operating in the aged care sector.

CCI's workplace relations policy promotes flexibility to achieve workplace productivity that will sustain high levels of economic growth.

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Table of Abbreviations

Act	*Workplace Relations Act 1996*
AIRC	Australian Industrial Relations Commission
BOOT	Better off overall test
CCI	Chamber of Commerce and Industry WA
EM	Explanatory Memorandum – *Fair Work Bill 2008*
FWA	Fair Work Australia
FWF Policy	Forward with Fairness Policy – April 2007
FWF – PIP	Forward with Fairness – Policy Implementation Plan – August 2007
FWB 2008	*Fair Work Bill 2008*
GFB	Good faith bargaining
NES	National Employment Standards
Pre-reform Act	The *Workplace Relations Act 1996* prior to the *Workplace Relations Amendment (Work Choices) Act 2005*
ROE	Right of entry
Transitional Bill	*Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009*
UFD	Unfair dismissal
WA	Western Australia
WA IR Act	*Industrial Relations Act 1979 (WA)*

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Executive Summary

Approach by CCI to the submission

CCI commends the Government and the Department of Education, Employment and Workplace Relations on the structure of the Fair Work Bill 2008 ("FWB 2008") and the approach to drafting: overall it is less legalistic than previous industrial relations legislation; uses plain English and therefore is easier for all to read and understand.

Given the importance of workplace relations to the economic and social welfare of Australia and its citizens, the details of the FWB 2008 must be the subject of comprehensive analysis and debate.

Given the tight timelines of the Senate Committee Inquiry process, CCI has concentrated on what it has initially identified as key areas of concern – it is only a preliminary examination – the lack of commentary on other clauses should not be interpreted as either support or opposition.

CCI's examination of the FWB 2008 has revealed unnecessary or unreasonable requirements imposed on employers - impediments to efficiency and productivity improvement that are inconsistent with the Government's stated objectives.

CCI proposed amendments to key clauses of concern

The majority of this submission concentrates on specific clauses of the FWB 2008 – recommendations for change follow a brief commentary and succinct rationale for the proposed changes.

CCI's key concerns with the FWB 2008, include:

- changes to greenfields agreement provisions that have the potential to: delay and increase costs; create disruption in workplaces due to employee organisation demarcation disputes or overlapping coverage; and militate against productivity and flexibility;

- the proposed transfer of business provisions, where an existing business is failing, require the new employer to accept and perpetuate flawed labour cost and operating models – this is illogical and is likely to be counterproductive to the mutual interests of employers and employees alike;

- expansion of the right of entry provisions, especially in light of the Government's commitment that "…*Existing right of entry laws will be retained;*"[1]

- perpetuation of across industry awards is inconsistent with the commitment to a dynamic new system to bring about modernisation and deliver enterprise flexibility and productivity;

- the expanded definition of permitted matters [e.g. as related to employee organisations and employers] is irreconcilable with delivering productivity improvements – a critical objective of agreement bargaining;

- good faith bargaining is promoted as a key provision in the FWB 2008, yet protected industrial action is permitted during GFB negotiations;

- overall the agreement making procedures are more bureaucratic and complicated, and due to the emphasis in the FWB 2008 of facilitating employee organisation involvement, even where historically there has been none, the process will be protracted and involve greater intervention of the Fair Work Australia ("FWA"); and

- the general enhancement of employee organisation rights without added protections for employers, e.g. from abuse of those rights.

Context

CCI believes that, perhaps more so than ever before, industrial relations legislation needs to support workplaces to effectively deal with constantly changing national and global economic circumstances. It needs to allow and facilitate flexibility in employment arrangements whilst safeguarding all participants from unfair or unnecessarily onerous influences.

The Government has correctly identified industrial relations reform as essential in promoting economic prosperity and driving productivity in the private sector.[2] The scope and immediacy of this challenge is heightened by the slowing global economy and the implications of that for the Australian economy.

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[1] *Forward with Fairness – Policy Implementation Plan* (April 2007), page 2.
[2] *Forward with Fairness* (April 2007), page 1– just one of many such references

The OECD Economic Outlook for Australia identified preservation of labour market flexibility as an important component of ongoing industrial relations reform.[3]

Government commitments

CCI doubts the substantive provisions of the FWB 2008 will deliver the changes required to support, rather than hinder, flexibility and international competitiveness.

It calls on the Government to release modelling to the Senate committee showing how the FWB 2008 will affect unemployment and the economy. It is imperative the Government demonstrate how this critical legislative framework will deliver what is says it will in terms of supporting workplace productivity.

CCI expects the provisions of the FWB 2008 to be consistent with the Government's promises and policy pronouncements. There are instances where this is not the case, for example the statement that "…*Existing right of entry laws will be retained;*" is not reflected in the FWB 2008.[4]

The following Government objectives are not given the support they could, and in CCI's view should be given, in new industrial relations legislation[5]:

- *"Productivity- based bargaining and flexibility is at the heart of the new system."*
- *"The new system will allow employers to get on with growing their own business and will allow employees to get on with their jobs."*
- *"The new system will allow Australia to become more competitive and prosperous without taking away rights and guaranteed minimum standards."*

On the contrary, there are aspects of the FWB 2008 that:

- Disturb existing workplace relationships that assist productivity based bargaining;
- Distract employers from their primary task of growing their businesses and employees from getting on with their jobs; and

[3] OECD Economic Outlook, No 84, November 2008.
[4] Above n1, page 2.
[5] Commonwealth Government, *Fact Sheet 1: The new workplace relations system, 2008.*

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- Present serious risks to the competitiveness of Australian businesses.

Employer – employee relations

CCI members and the wider business community of WA require a sustainable industrial relations and economic legislative framework that promotes effective, efficient and productive enterprises and fosters high levels of engagement and mutual responsibility between employers and employees, and their representatives.

By extending bargaining to matters beyond those relating directly to the employer and employee relationship, the Government will put at risk what has already been achieved.

Employee organisation demarcation

The implications of the expanded role and rights for employee organisations, together with a significantly widened involvement in agreement making provided for in the FWB 2008, has the potential to rekindle and exacerbate employee organisation demarcation disputes.

In these cases it is vital the FWA on application will urgently resolve the matter so that productive and harmonious relations are restored.

The Minimum safety net

The new minimum safety net, comprising of the National Employment Standards ("NES") and the relevant modern award will result, especially during the transitional stages, in more complexity and increased costs for employers.

Such outcomes are at odds with the Government's intention that award modernisation is not intended to increase costs for employers.

Transitional arrangements and commencement of legislation

The *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* ("the Transitional Bill") is scheduled for commencement in March 2009 – no details are yet known. Once tabled, CCI will call for the Transitional Bill to be referred to a Senate Inquiry for assessment and review.

CCI is of the view the Government must not introduce the new system before 1 January 2010 – this allows time for businesses to alter systems and policies to facilitate the effective implementation of any changes.

Fair Work Australia 2008

FWA has a central and comprehensive role and will be a key determinant as to the success of the new system.

The Government is required to dedicate significant additional resources to enable the FWA to meet its goals of efficiency and effectiveness. In light of public sector cutbacks, CCI is concerned the Government will not be able to dedicate the required resources.[6]

FWA is vested with considerable power, much of it being exercised informally. Accordingly, transparency, accountability and appeal avenues are essential in the exercise of such powers.

The future

CCI supports the establishment of an industrial relations framework that delivers:

- National and international competitiveness;
- Fairness for employee and employers; and
- Enterprise productivity and flexibility.

CCI, its membership and the wider business community is questioning whether the FWB 2008 can deliver.

It is incumbent on the Government to monitor the impact of its legislation and to commission a review after two years involving comprehensive stakeholder consultation.

WA Economic Overview

General

WA continues to benefit from a golden age of economic prosperity, unlike any other in the state's short history.

WA's economy is now almost twice the size it was at the start of the decade, with Gross State Product totalling $146.4 billion in 2007-08.

[6] The Australian, 'Razor gang to fund rescue', 22 December 2008.

WA continues to increase its contribution to the national economy, accounting for up to: one fifth of growth in the domestic economy; one quarter of total business investment; and one third of Australia's exports.

The mining and resources sectors are the key drivers of WA's unprecedented economic growth and accounts for around 30 per cent of the WA economy.

WA's economic success is not limited to the resources sector and promotes growth into all other sectors. The construction sector, for example, has become a key driver of the WA economy, and contributes to the growth in other sectors such as mining, manufacturing and service related industries.

In recent years, the construction sector in WA recorded exceptional growth - an annual average of nearly 13 per cent – and is the fourth largest industry sector in WA. Other sectors of the economy have also benefited from WA's economic boom - property and business services sector has average annual growth of 12.5 per cent (worth $16.4 billion) and transport and storage has an annual growth of 10 per cent (output totalling $17.7 billion in 2007-08).

Similarly, WA is also home to a thriving manufacturing industry, with output totalling $11.3 billion in 2007-08, and accounting for eight per cent of economic activity.

While the WA economy has recorded remarkable growth in recent years, the weakening international economic conditions has meant the short term economic outlook for the state has deteriorated.

Economic prosperity and industrial relations

Industrial relations regulation has significant implications on business operations: their productivity; sustainability; and growth. Although the extent to which various legislative approaches influence business efficiency and effectiveness, it remains indisputable that industrial relations and economic reform are inextricably linked.

It follows, therefore, that WA's economic growth and resulting prosperity has to a significant extent been facilitated by the current industrial relations legislative framework.

The FWB 2008 proposes significant changes to what currently exists and the nature of these changes, CCI maintains, will introduce uncertainty and unnecessary impediments on business. The drivers to enterprise productivity and flexibility are threatened by the FWB 2008 in its current form.

Productivity, flexibility and innovation

In an increasingly globalised marketplace, WA and Australian businesses compete with businesses in other jurisdictions and other nations. In this intensely

competitive market, flexible, innovative and productive enterprises/businesses are the keys to sustainable growth.

Given the Government's commitment to productivity, CCI calls on the Government as part of its modelling on the economic effects of the FWB 2008, to undertake a cost benefit analysis to fully consider the possible implications on productivity.

Labour market flexibility

The World Economic Forum (WEF) assesses the relative economic performance of countries ranking them according to 12 indices, or "*pillars of competitiveness*" aggregated and termed the Global Competitiveness Index. Labour market efficiency is one of the pillars. As part of its assessment the WEF identified restrictive labour practices as the ***most*** problematic for doing business in Australia.[7]

[7] The Global Competitiveness Report 2008-2009

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Recommendations

The following is a chronological list of recommendations made by CCI with the objective of amending the FWB 2008 to:

- remove unnecessary or unreasonable requirements imposed on employers that are impediments to efficiency and productivity improvement; and are inconsistent with the government's stated objectives;
- ensure clarity and remove ambiguity; and
- promote consistent application.

1. **Clause 3 - Object of this Act.** The proposed Clause 3 (a) of the FWB 2008 to be amended as follows:

   Insert after "*economic prosperity*" the following: "*international competitiveness,..*".

2. **Clause 54 - When an enterprise agreement is in operation.** Provide that an agreement commences operation on the day it is approved by FWA or such later date specified in the agreement.

3. **Clause 19.2 - What industrial action excludes.** Retain the existing provision to ensure the burden of proof remains on the person claiming "*reasonable concern by that employee about an imminent risk to his/her health or safety person"*.

4. **Clause 172 - Making an enterprise agreement.** Failing confining permitted matters to those pertaining only to the employer – employee relationship - and these matters are the only ones the subject of protected industrial action - the scope of permitted matters pertaining to an employer – union 'relationship' needs to be explicitly linked to the delivery of productivity benefits at the enterprise level as provided for in clause 171(a) – Object of Part 2-4.

5. **Clause 174 – Notice of employee representational rights.** An employee organisation should not be the automatic bargaining representative.

6. **Clause 175 - Relevant employee organisations to be given notice of employer's intention to make greenfields agreements etc.** Remove the requirement for an employer to notify every relevant employee organisation covering a specific group of employees, stipulating instead that at least only one of those relevant employee organisations covering a specific group of employees must to be notified.

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7. **Clause 176 - Bargaining representatives for proposed enterprise agreements that are not greenfields agreements.** Clause 176 is varied to include a provision the employer can require an employee organisation purporting to be a bargaining representative to provide proof (i.e. it is entitled to represent the interests of employees as provided for in clause 176(3) and there is at least one member who is an employee) to satisfy a reasonable person they are a bargaining representative.

   Amend clause 176(1) to clarify its application.

   Also amend the FWB 2008 requiring the employer to recognise and bargain in good faith only with a bargaining representative who has advised the employer:

   - within 14 days of the notice being provided to employees, or
   - where the employee appoints someone in writing within 7 days of that authorisation being given.

8. **Clause 179 - Employer etc. must not refuse to recognise or bargain with other bargaining representatives.** Refer to proposed changes to clause 176. Similar to the commentary about greenfields agreements negotiations are likely to become more complicated in enterprises where there remain overlapping union coverage and resultant demarcation disputes.

9. **Clause 182(3) - When a greenfields agreement is made.** Relax the requirement for a greenfields agreement to be signed by every relevant employee organisation, in circumstances where there is overlapping coverage and/or established industry arrangements.

   Preferred Option 1 - Amend to allow the employer to give notice only to the sufficient number employee organisation(s) necessary to cover all employees who will be the subject of the agreement. This facilitates continuation of traditional coverage and supports established employer-employee organisation relationships without adding to complexity or causing inefficiency

   Option 2 - Amend to allow the employer to notify the employee organisations able to cover some of the work, with the aim of making an agreement that can be varied to progressively include other employee organisations able to cover the remainder of the work. This enables work to proceed even though future work has not yet been addressed in the agreement but with a process to enable that to happen

   Option 3 - Amend to enable separate agreements to be progressively made with individual employee organisations covering different aspects of the work

undertaken by the enterprise. This has the same benefit as Option 2 but is likely to lead to a less tidy outcome than might be possible under Option 2.

Option 4 - An amendment to clarify that not every (or all) employee organisations are required to sign a greenfields agreement – just those relevant employee organisations that together cover all employees proposed to be the subject of the greenfields agreement.

10. **Clause 186(6) – When FWA must approve an enterprise agreement—general requirements – Requirement for a term about settling disputes.** The model term about dealing with disputes about enterprise agreements as foreshadowed in clause 737 should allow an independent party to assist in resolving disputes in accordance with the provisions of the dispute settling clause but not prescribe arbitration unless all parties to the 'dispute' agree.

    Clause 186(6) notes dispute settling clause cannot be used for the purposes of the settling disputes over reasonable business grounds for clauses 739 and 740 - this should be a subclause not a note.

    The requirement for a 'dispute settlement procedure' should be Division 5 – Mandatory Terms of Enterprise Agreements – otherwise too easily missed.

11. **Clause 188 - When employees have genuinely agreed to an enterprise agreement.** Amendments incorporating the following should be considered:

    Delegation of Voting Rights

    Insertion of a specific provision into clause 181 of the FWB 2008 to enable a delegated authority of voting rights to a parent or guardian of a disabled employee employed in a supported employment service who has a diminished capacity to comprehend the agreement making process, as follows:

    "*Diminished Capacity – Employees with an intellectual disability*

    (4)A parent or guardian of an employee with an intellectual disability employed in a supported employment service who has a diminished capacity to express informed consent, have delegated voting rights with respect of this section to vote on behalf of that employee."

    Additional example of the kinds of employees under clause 180(6)

    Insertion of the following additional example under clause 180(6) as follows:

    "*(d) Employees with an intellectual disability*".

12. **Clause 193 - Passing the better off overall test ("BOOT").** Amend the FWB 2008 so that the BOOT test is designed to assess whether on balance the

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agreement is better off for all employees rather than prescribe that it must be better off for each individual and therefore require a resource and time hungry testing process.

13. **Clause 202 - Enterprise agreements to include a flexibility term etc.** The model flexibility term should stipulate notification of termination of the individual flexibility arrangement is by agreement – in writing and at any time – otherwise the default position is a minimum of 28 days notice by either the employee or employer.

14. **Clause 203 - Requirements to be met by a flexibility term.** Amend the clause to reflect termination by agreement only and the 28 days is the default position only.

15. **Clause 207 - Variation of an enterprise agreement may be made by employers and employees.** Allow for enterprise agreements to be varied without requiring the approval of existing employees who will not be affected by the variation.

    Amend the FWB 2008 to allow variations to Enterprise Agreements to be approved:

    - where only a portion of the existing workforce will be affected by the variation, by a majority of those employees who will be affected, or

    - where none of the existing workforce is affected by the variation, by a process similar to that recommended by CCI for the making of greenfields agreements.

16. **Clause 228 - Bargaining representatives must meet the good faith bargaining requirements.** Amend the FWB 2008 to require, where a bargaining representative seeks to commence bargaining for an enterprise agreement, an initiation of bargaining notice similar to that provided for in Section 42 of the *Industrial Relations Act 1979(WA).*

17. **Clause 228 - Bargaining representatives must meet the good faith bargaining requirements.** Amend the FWB 2008 to clarify that the requirements of GFB also apply to members of the employee organisation or other bargaining representatives as relevant.

18. **Clause 228(1)(c) and (d) – giving and responding to proposals.** Amend the FWB 2008 to reflect the requirement that the proposals of bargaining representatives are to explicitly take into consideration the overarching Object of the FWB 2008 and particularly clause 171 Objects of Part 2-4.

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19. **Clause 228(1)(e) - refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining.** The following options are presented in order of preference:

    That 228(1)(e) be deleted, amended or qualified so as to reduce the potential for parties to be unnecessarily constrained in how they conduct negotiations.

    Preferred Option - Delete 228(1)(e). There will be little lost in doing this and it will remove a cause of litigation.

    Option 2 - Add a further subclause 228 (3) in terms such as:

    To avoid doubt, the following conduct is not 'capricious' or 'unfair':

    (a) Changing or proposing to change one's negotiating position in response to a change or perceived change in the bargaining position of another party or in response to lack of progress in the bargaining process.

    (b) Withdrawing a proposal that has been presented on a 'without prejudice' basis and which has not been accepted in its entirety, or withdrawing any part of such a proposal.

    (c) Refusing to be bound to a suggestion or proposal presented in a genuine attempt to find common ground between negotiating parties.

    This reduces the potential for parties to be unnecessarily constrained in how they conduct negotiations.

    Option 3 - Delete the words '*capricious or unfair'* from 228 (1)(e). That would mean that any 'conduct that undermines freedom of association or collective bargaining' would be prohibited. Removes potential for litigation over application of the words 'capricious' and unfair'. Little if anything would be lost by doing this.

20. **Clause 236 - Majority support determinations.** Vary clause 236 to prevent majority support applications and determination in relation to an enterprise that is to be covered by a multi-employer enterprise agreement and where the employers have initiated or agreed to bargain for an agreement covering the employees for whom the order is being sought.

21. **Clause 238 - Scope orders.** Vary clause 238 to prevent the application and making of scope orders in relation to an enterprise that is to be covered by a multi-employer enterprise agreement and where the employers have initiated or agreed to bargain for an agreement covering the employees for whom the order is being sought.

22. **Clause 243 - When FWA must make a low-paid authorisation.** Vary clause 243 to provide that FWA must not make an authorisation including any employer that has previously had a history of enterprise bargaining.

    Vary 263 to provide that enterprise agreement includes a collective agreement made under previous provisions and collective agreements made under state industrial relations law.

    Amend clause 263 of the FWB 2008 to establish a requirement that FWA must consider the needs of the individual employer. In line with this FWA should be able to/required to make single enterprise low paid workplace determinations

23. **Clause 243(2) and (3) - When FWA must make a low-paid authorisation - people with a disability working in a supported employment service**.

    Insert a specific exemption provision for employers who engage disabled employees in supported employment services to clarify that FWA does not have the authority to approve a low-paid authorisation for this sector. The proposed wording should be inserted under clause 243 as follows:

    "Exemptions

    (6)Employers engaged in supported employment services for people with disabilities are exempt from the application of this section."

24. **Clause 261 - When FWA must make a consent low-paid workplace determination.** To prevent any doubt, it is suggested that clause 261 specifies that a low paid determination only binds those employers who have consented to it being made.

25. **Clause 262 – When FWA must make a special low-paid workplace determination—general requirements.** Only provide for consent low paid determinations (as specified in clause 261); or in order for a determination to be made:

    - the initiating bargaining representative must have made attempts to genuinely negotiate a single enterprise agreement; and
    - before a determination is made, FWA must exhaust all opportunities to assist the parties to reach agreement; and
    - determination can only be made in relation to a single enterprise, taking into account the circumstances of that employer (including capacity to pay, etc).

26. **Clause 266 - When FWA must make an industrial action related workplace determination.** Remove the ability of FWA to determine the substantive matters at issue after terminating industrial action other than to make any appropriate GFB orders.

27. **Clause 270 - Terms etc. of a bargaining related workplace determination**. Remove FWA's power of compulsory arbitration or determination.

28. **Part 2-8—Transfer of business - Division 2—Transfer of instruments**.

    Preferred option – The FWB 2008 is amended to reflect a narrower definition of "transfer" than currently proposed that defines "Transmission of business" as construed by the High Court in the *Gribbles decision*; and

    A transferring employee and new employer may agree before or after the transfer date to terminate the transferring instrument and for the employee to be covered by the new employer's industrial instrument.

    Option 2 - allow a transferring employee and the new employer to make an agreement, before or after the transfer date, to terminate the transferring instrument and revert to the new employer industrial instrument.

    Option 3 – clarify the FWB 2008 so that any new collective agreement established by the new employer with its workforce will override any transferring industrial instrument.

    Option 4 - In order to provide new employers with an ability to offer staff common terms and conditions, the current provisions of the Workplace Relations Act 1996 ("the Act") prescribe a transmission period of 12 months for the transmitted/ transferred instrument be retained.

29. **Clause 351 - Discrimination.** Remove clause 351 on the basis it duplicates current federal and state discrimination laws.

30. **Clause 386 - Meaning of dismissed.** Amend the FWB 2008 [including clause 396 – Initial matters to be considered before the merits] to exclude applications by resigned employees citing conduct by the employer involving the instigation or management of unsatisfactory performance or disciplinary process unless adequate verification and substantiation that the performance or disciplinary matters were contrived and without any foundation.

31. **Clause 386(2) - Meaning of dismissed.** CCI also seek to retain the following exclusions from the definition of "dismissed":

    - trainees;

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- short term casual employees, who are by their very nature hired and fired at short notice – conventionally "one hour";
- all terminations not at the initiative of the employer;
- out of time applications are not considered and therefore the capacity to litigate is forfeited; and
- all high income employees whether covered by minimum conditions, awards or agreements.

32. **Clause 386(3) - Meaning of dismissed.** Remove clause 386(3).

33. **Clause 396 - Initial matters to be considered before merits.** See recommendation re 386(1)(b)

34. **Clause 397 - Matters involving contested facts, clause 398 - Conferences and clause 399 – Hearings. FWA ensure**:

- senior independent commissioners (or such status) within FWA deal with unfair dismissal ("UFD") matters;
- employers are able to elect to have UFD matters dealt with in a more formal fact-finding process (i.e. formal arbitration vs "coffee table" arbitration);
- UFD processes are transparent and open;
- UFD process generate written decisions;
- appropriate filing fees are imposed on employees, and these fees are sufficient to discourage speculative claims;
- other procedural/substantive provisions are retained, including:
  - automatic discontinuation of a matter where the applicant does not attend;
  - employees cannot lodge multiple claims (e.g. with anti-discrimination tribunals);
  - employees cannot lodge frivolous, vexatious applications or those lacking in substance;
  - costs to be awarded against a party who acts unreasonably and allows costs to be incurred on the other side.

35. **Clause 400 - Appeal rights.** The public interest test remains an unqualified ground for appeal from FWA decisions in the first instance similar to the current provision i.e. section 120(2) – application of such a clause is to necessarily include: grounds for appeal of law, fact and denial of due process/natural justice. Where an error of fact is claimed, the necessity for it to be of significance is not opposed.

36. **Clause 409 - Employee claim action (Industrial action**). Restrict protected industrial action to clause 172(1)(a) matters only.

37. **Clause 409(1) – "..or are reasonably believed to be about, permitted matters.."**. Delete "..or are reasonably believed to be about, permitted matters.." from clause 409(1)(a).

38. **Clause 423(2) and (3) - FWA may suspend or terminate protected industrial action—significant economic harm etc.** While GFB is in place and the requirements are being met, there should be a prohibition on any industrial action, threatened or otherwise.

    Alternatively, amend clauses 423(2) and (3) to ensure there is a balanced consideration of both employer and employee interests by FWA – in particular, any action taken by employees/employee organisation that is causing significant economic harm to the employer is sufficient grounds for the termination of industrial action.

    Or delete clauses 423(2) and (3), noting that in order to exercise the power to terminate a bargaining period, FWA still needs to be satisfied the industrial action has been engaged in for a protracted period and the dispute cannot be resolved in the reasonably foreseeable future [clause 423(6)].

    Corresponding amendments to clause 423(4) will then be required to reflect the changes to clauses 423(2) and (3).

39. **Clause 423(4) - FWA may suspend or terminate protected industrial action—significant economic harm etc.** Delete clause 423(4)(e).

40. **Clause 431 - Ministerial declaration terminating industrial action**. Remove clauses 431 to 434 - There is no necessity for this provision. FWA should be properly equipped to deal with this matter.

    In the alternate require Minister to provide written reasons for decision only after having given all affected parties an opportunity to be heard, with ability for the determination to be appealed.

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41. **Chapter 3, Part 3-3, Division 9—Payments relating to periods of industrial action.** Amend FWB 2008 to retain the blanket prohibition on any payments to employees whilst there is protected industrial action.

42. **Clause 481 - Entry to investigate suspected contravention (ROE).** Clause 481(3) must also explicitly require the permit holder to provide verifiable evidence that there is a member of the permit holder's organisation in the workplace.

43. **Clause 482 - Rights that may be exercised while on premises.** The FWB 2008 requires amendment to prohibit the inspection and copying of the records of any non member of the permit holder's organisation.

44. **Clause 482(1)(c) - Rights that may be exercised while on premises.** Clause 482(1)(c) is amended to ensure the affected employer or occupier is protected from allegations of a contravention where the permit holder fails to meet the burden of proof either about the suspected contravention or the existence of a member of the permit holder's organisation in the workplace.

    Clause 482(1)(c) also requires amendment that the purposes of inspection/copying is for verification only not for fishing expeditions and the similar vexatious activities.

45. **Clause 483 - Later access to record or document.** The FWB 2008 requires amendment to prohibit the inspection and copying of the records of any non member of the permit holder's organisation as a result of "later access".

46. **Clause 484 - Entry to hold discussions.** An employer has the right to apply to FWA for determination that the employee organisation party to the agreement has the right to conduct meetings during meals breaks to the exclusion of all other employee organisations.

47. **Clause 593 – Hearings.** Amend clause 593 to require adherence to the principles of natural justice and due process.

48. **Clause 598 - Decisions of FWA.** To ensure clarity and unambiguous application it is suggested the term "determination", which prima facie should come within a definition of "decision", is expressly included in the definition of "decision" in the FWB 2008.

WA Economic Overview

Western Australia continues to benefit from a golden age of economic prosperity, unlike any other in the state's short history.

This economic prosperity has its roots in the state's rich abundance of natural resources, and skill and expertise in the extraction and processing of minerals. This has provided the basis for WA to benefit from the rapid expansion of the Chinese economy that is in transition to industrialisation and is therefore requiring significant mineral and energy supplies.

WA's economy is now almost twice the size it was at the start of the decade, with Gross State Product totalling $146.4 billion in 2007-08 – see Chart 1.

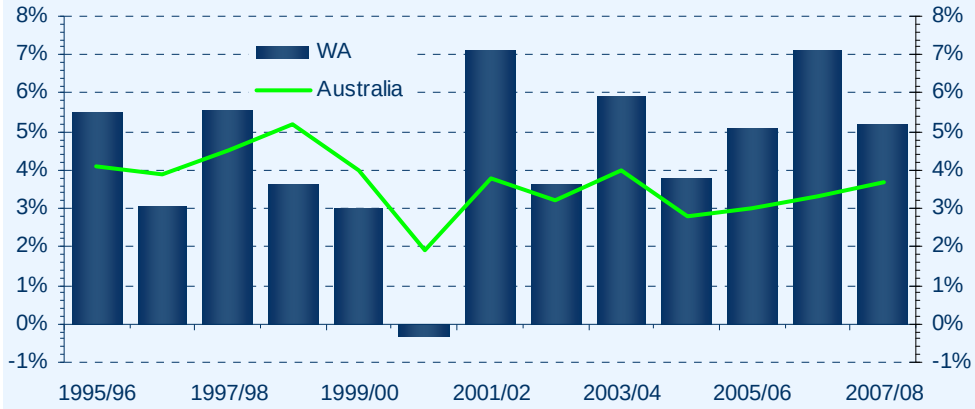
This period of exceptional growth has meant that WA is also making an increasing contribution to the national economy.

WA continues to be the powerhouse of the nation, accounting for up to:

- one fifth of growth in the domestic economy;
- one quarter of total business investment; and
- one third of Australia's exports.

The high level of activity in global mineral and energy markets has meant the mining and resources sectors are the key drivers of WA's outstanding economic growth.

Chart 1
Economic Growth, WA vs Australia
Yearly % Change



Source: ABS Cat.5220.37

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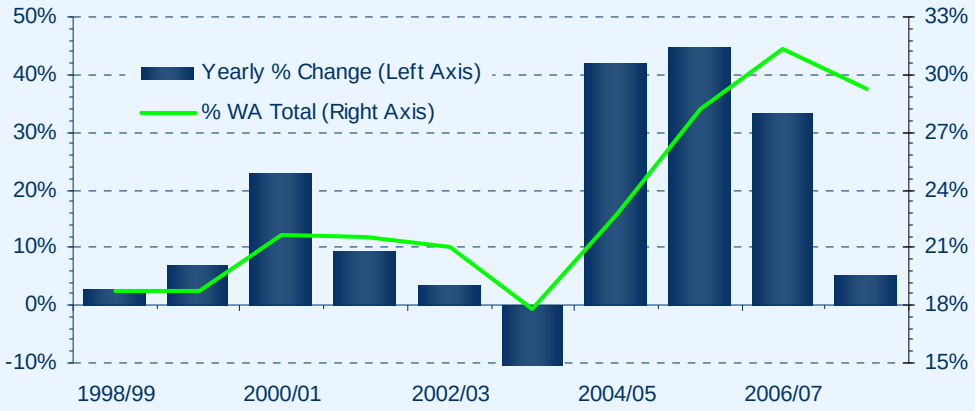
Chart 2
Mining Sector Output, WA
Yearly % Change & % WA Total



Source: ABS Cat.5220.37

Since the beginning of the decade, the mining sector in WA has grown by 18.8 per cent per annum, to be worth $42.5 billion in 2007-08. As a result, the mining sector now accounts for around 30 per cent of the WA economy – see Chart 2.

WA's economic success is not limited to the resources sector. The benefits of WA's once in a lifetime economic boom have spilled over into all other sectors.

The construction sector has been a primary beneficiary of the boom in global mineral and energy markets, and is a key driver of the WA economy. Not only does the sector make a valuable contribution to the state in terms of output and employment, but it also plays a critical role in increasing the productive capacity of other sectors such as mining, manufacturing and service related industries.

In recent years, the construction sector in WA recorded an exceptional performance. Since the beginning of the decade, output from the construction sector has grown on average by nearly 13 per cent per annum. As a result, construction is now the fourth largest industry sector in WA, with output totalling almost $10 billion in 2007-08, and accounting for 10 per cent of the state's economy.

Other sectors of the economy have also benefited from WA's once in a lifetime economic boom. Since the beginning of the decade, the property and business services sector has grown on average by 12.5 per cent per annum, to be worth $16.4 billion. Similarly, transport and storage has risen by 10 per cent per annum on average over this period, with output totalling $17.7 billion in 2007-08.

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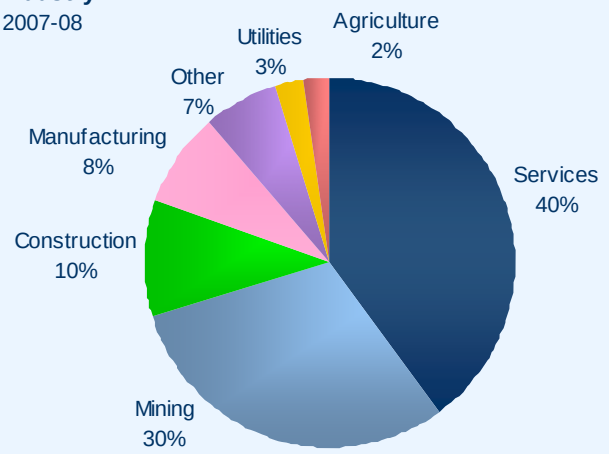
Chart 3
WA Economy by Industry
% of Total Activity, 2007-08



Source: ABS Cat.87520. and 8762.0

While WA has leveraged its comparative advantage in resource extraction and processing to attain a high level of growth and development, the need for a diversified economy is recognised. WA is home to a range of thriving industries that all make valuable contributions to the economy.

While mining is often considered to be the state's largest industry, collectively, the services sector is the largest contributor to the WA economy, accounting for 40 per cent or $56 billion of the state's total output in 2007-08 – see Chart 3. The services sector includes industries such as: retail trade, hospitality, health, education and culture and recreation.

Similarly, WA is also home to a thriving manufacturing industry, with output totalling $11.3 billion in 2007-08, and accounting for eight per cent of economic activity.

WA's strong economic growth has resulted in an extremely tight labour market. Since the current phase of economic expansion started six years ago, almost 200,000 jobs have been created in the WA economy, while, the unemployment rate dropped to historically low levels, and has been hovering around three per cent for around two years now – see Chart 4.

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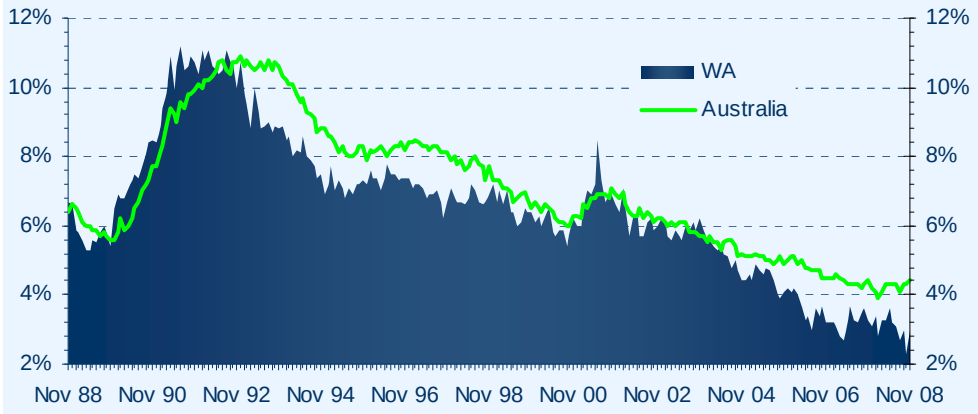
Chart 4
Unemployment Rate
WA and Australia, Seasonally Adjusted



Source: Productivity Commission

With job prospects so positive, this is attracting record numbers of people to WA to share in the benefits of such favourable economic conditions.

The record number of people attracted to WA is not sufficient to meet demand, with labour shortages becoming a key limiting factor to additional growth in this State. Labour shortages and associated wage pressures were identified as the single largest concern for businesses in 2008 by nearly 70 per cent of WA businesses. Despite easing somewhat in recent times, labour shortages remain a critical issue for WA businesses, with over 40 per cent describing labour as scarce.

While the WA economy has recorded remarkable growth in recent years, the weakening international economic conditions has meant that the short term economic outlook for the state has deteriorated. With the major advanced economies slipping into recession, and China's growth starting to slow, the prospects for the WA economy in the short term have weakened. Given the short term weaknesses in the Australian and WA economy it is vital the FWB 2008 provides the necessary legislative platform to encourage growth and drive enterprise productivity and flexibility.

CCI remains confident the WA economy is one of the best placed in the industrialised world to cope with the uncertainty. Given the underlying strengths of WA economy, it will remain the economic engine room for the Nation. It is anticipated WA will be one of the world's first economies to emerge strongly from the slowdown.

The softening conditions are expected to be only a temporary interruption to WA's economic growth. CCI believes that WA has the potential to continue on its current high growth trajectory in the longer term, leveraging off the continued

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stimulus created by China's rapid growth and development. With over $160 billion worth of investment projects either under construction or in the pipeline, the longer term growth profile for the state remains positive.

In order to ensure WA is able to meet its long term growth potential, it is imperative that State and Federal Governments ensure the appropriate policies and strategies are put in place to encourage growth and development, and to address the key challenges facing the WA and national economies. This will ensure that the WA and the nation are well positioned to sustain and leverage off current and future economic opportunities.

While it is difficult to establish a direct correlation between industrial relations policy and economic performance, in its most recent Economic Outlook, the OECD stated that it was "important for the ongoing reform of industrial relations to preserve labour-market flexibility."[8]

Productivity, flexibility and innovation

In an increasingly globalised marketplace, WA and Australian businesses compete with businesses in other jurisdictions and other nations. In this intensely competitive market, flexible, innovative and productive enterprises/businesses are the keys to sustainable growth.

It is essential that governments do not introduce measures that adversely affect enterprise productivity, flexibility and innovation that can damage Australia's competitive advantage and act as a disincentive to investment.

Growth in productivity in Australia has eased in recent times and is lagging behind a number of other developed nations - there is no state based measure of productivity. Since the beginning of the decade, Australia's labour productivity has improved by 1.3 per cent per annum – down from 2.4 per cent per annum in the previous decade. This rate of growth was below that of the United Kingdom (2.2 per cent per annum), the United States (2.1 per cent), and the OECD more generally (two per cent per annum).

By industry, communication services have recorded the strongest growth in labour productivity since the beginning of the decade, recording annual average growth of 4.6 per cent. This was followed by agriculture, forestry and fishing, and wholesale trade, up 2.9 per cent per annum on average respectively. By contrast, labour

[8] Above n3.

productivity in the mining and utilities sectors deteriorated over this period, falling on average by 4.3 per cent and four per cent per annum respectively.

Given the Government's commitment to productivity, CCI calls on the Government to undertake a cost benefit analysis of the FWB 2008 to properly consider the possible implications it might have on productivity.

Labour market flexibility

The efficiency and flexibility of the labour market are critical for ensuring workers take up the most relevant/appropriate jobs and are provided with incentives so they give their best in those jobs.

Labour market flexibility is important as a determinant of national competitiveness and is one of the '12 pillars' of competitiveness against which the Global Competitiveness Index (GCI) assesses national economic performance. The GCI is constructed by the World Economic Forum.[9]

The other pillars are: the institutional environment; infrastructure; health and primary education; macroeconomic stability; higher education and training; goods and market efficiency; financial market sophistication; technological readiness; market size; business sophistication; and innovation.

Australia was ranked 19 in 2007- 2008 in the GCI moving to 18th in 2008 -2009 out of 134 countries.

Although Australia's ranking for labour market efficiency (7th pillar) has improved from 13th in 2007-2008 to 9th 2008-2009, restrictive labour practices are identified as the ***most*** problematic for doing business in Australia.[10]

Economic prosperity and industrial relations

Industrial relations regulation has significant implications on business operations: their productivity; sustainability; and growth. Although the extent to which various legislative approaches influence business efficiency and effectiveness, it remains indisputable that industrial relations and economic reform are inextricably linked.

It follows, therefore, that WA's economic growth and resulting prosperity has to a significant extent been facilitated by the current industrial relations legislative framework.

[9] Above n7.
[10] Above n7.

The FWB 2008 proposes significant changes to what currently exists and the nature of these changes, CCI maintains, will introduce uncertainty and unnecessary impediments on business. The drivers to enterprise productivity and flexibility are threatened by the FWB 2008 in its current form.

General submission

Approach by CCI to the submission

The FWB 2008 is a comprehensive piece of proposed legislation. CCI commends the Government and the Department of Education, Employment and Workplace Relations on the Bill's structure and the approach to drafting: it is overall considerably less legalistic than previous industrial relations legislation; the use of plain English makes the FWB 2008 easier for all to read and understand; and it is considerably less bulky than the legislation it is intended to replace.

Given the importance of workplace relations to the economic and social welfare of Australia and its citizens, this proposed legislation should be the subject of a comprehensive analysis and debate. The consultative process that preceded the drafting of the FWB 2008 does not obviate the need to fully analyse it and the implications for employees, employers and their representative organisations and for economic and social growth.

As a consequence of the tight timelines of the Senate Committee Inquiry process, CCI has concentrated on what it has initially identified as key areas of concern. This submission should be viewed only as a preliminary examination - the lack of commentary on other clauses should not be interpreted as either support or opposition.

Where changes are suggested, we have endeavoured to support those suggestions with practical examples of the difficulties anticipated if the FWB 2008 is passed in its present form. Generally these difficulties are described as unnecessary or unreasonable requirements imposed on: employers; impediments to efficiency and productivity improvement – these are inconsistencies between the Government's stated objectives and what is written in the FWB 2008.

Some provisions of the FWB 2008, although not necessarily controversial, are unclear or ambiguous and so require amendment. If this is not done, the Government's intention to promote a simpler, and less formal and legalistic set of processes will be compromised. There is also the potential for unnecessary and costly litigation.

Context

CCI believes that, perhaps more so than ever before, industrial relations legislation needs to support workplaces to effectively deal with constantly changing national and global economic circumstances. It needs to allow and facilitate flexibility in employment arrangements whilst safeguarding all participants from unfair or unnecessarily onerous influences. Fair treatment and productivity improvement

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should not be viewed as incompatible aims: on the one hand there is little point in having everyone treated fairly if the workplace is uncompetitive; on the other hand optimum productivity will only be achieved in the long term if all players believe they have received fair treatment.

The Government has correctly identified industrial relations reform as essential in promoting economic prosperity and driving productivity in the private sector.[11] The scope and immediacy of this challenge is heightened by the slowing global economy and the implications of that for the Australian economy.

The OECD Economic Outlook for Australia identified the preservation of labour market flexibility as an important component of ongoing industrial relations reform.[12]

The Government is therefore on notice that labour market flexibility, a key factor in Australia's economic performance, is a major issue for consideration.

Government's commitments

Australia's past approach to industrial relations prescription and regulation lacks the flexibility and facilitative features required by modern workplaces competing in a global economy. CCI doubts that the substantive provisions of the FWB 2008 will deliver the changes required to support, rather than hinder, flexibility and international competitiveness.

It calls on the Government to release modelling to the Senate committee showing how the FWB 2008 will affect unemployment and the economy. It is imperative the Government demonstrate how this critical legislative framework will deliver what is says it will in terms of supporting workplace productivity.

The Hon Julia Gillard MP in a speech to the Fair Work Australia Summit emphasised "*…that all public commitments made before the last election will be honoured…*" and "*…pre-election promises will be implemented in full.*" [13]

CCI therefore expects the provisions of the FWB 2008 to be consistent with such promises and policy pronouncements. There are instances where this is not the

[11] Above n 1.
[12] Above n7.
[13] Speech delivered at the Fair Work Australia Summit, 29 April 2008, Sydney.

case. For example the statement that "…*Existing right of entry laws will be retained;*" is not reflected in the FWB 2008.[14]

Other instances include:

- perpetuation of across industry awards is inconsistent with the commitment to a dynamic new system to bring about modernisation and deliver enterprise flexibility and productivity;
- the expanded definition of permitted matters [i.e. as related to unions and employers] is irreconcilable with delivering productivity improvements – a critical objective of agreement bargaining;
- good faith bargaining has been promoted as a key provision in the FWB 2008, yet protected industrial action is permitted during negotiations; and
- the general enhancement of employee organisation rights without added protections for employers, e.g. from abuse of those rights, is a major concern.

These matters are identified and elaborated in the sections of this submission that deal with specific clauses in the FWB 2008.

The following Government objectives are not given the support they could, and in CCI's view should be given, in new industrial relations legislation: [15]

- *"Productivity- based bargaining and flexibility is at the heart of the new system."*
- *"The new system will allow employers to get on with growing their own business and will allow employees to get on with their jobs."*
- *"The new system will allow Australia to become more competitive and prosperous without taking away rights and guaranteed minimum standards."*

On the contrary, there are aspects of the FWB 2008 that:

- Disturb existing workplace relationships that assist productivity based bargaining;

[14] Above n1, page 2.
[15] Above n5.

- Distract employers from their primary task of growing their businesses and employees from getting on with their jobs; and

- Present serious risks to the competitiveness of Australian businesses.

Employer – Employee Relations

CCI members and the wider business community of WA require a sustainable industrial relations and economic legislative framework that promotes effective, efficient and productive enterprises and fosters high levels of engagement and mutual responsibility between employers and employees and their representatives.

Since the introduction of enterprise bargaining in 1993, the relationship between the employer and employee, and the matters that pertain to that relationship, has been a principal object of agreement making. This has resulted in more productive workplaces and more satisfying and rewarding jobs. By extending bargaining to matters beyond those relating directly to the employer and employee relationship, the Government will put at risk what has already been achieved.

The emphasis needs to be on securing operational flexibility, productivity and innovation at the enterprise or workplace level based on open and honest dealings, with the necessary checks and balances, but without unnecessary distractions.

Employee organisation demarcation

The implications of the expanded role and rights for employee organisations, together with a significantly widened involvement in agreement making provided for in the FWB 2008, has the potential to rekindle and exacerbate employee organisation demarcation disputes.

Although there is evidence to suggest in many industries, or on a site by site basis, the practicalities of remaining demarcation disputes are managed responsibly, it is conceivable there may be an enlivened "turf war" in some areas.

One of the underpinning concerns for employers in a practical sense will be the ability to identify with a high degree of accuracy and confidence as to which employee organisations cover their employees. It is not uncommon for employee coverage rules (in regard to industry, classification or region) of employee organisations to be broad, vague and overlap with other employee organisations.

Where two (or more) employee organisations have, or appear to have, legitimate coverage of a group of employees, unnecessary disruption and delays may arise in the workplace. In these cases it is vital that Fair Work Australia ("FWA") on application will urgently resolve the matter so that productive and harmonious relations are restored.

The Minimum Safety Net

The proposed minimum safety net, comprising of the National Employment Standards ("NES") and the relevant modern award, will result, especially during the transitional stages, in more complexity and increased costs for employers.

CCI has serious concerns that WA businesses will incur significant costs especially in industries, such as hospitality, where penalty rates and rates of pay are set to increase as the Australian Industrial Relations Commission ("AIRC") seeks to bring all states into line.

Such outcomes are at odds with the Government's intention that award modernisation is not intended to increase costs for employers.[16]

The Stage 1 – priority industry awards will result in an increase in costs for employers. The hospitality industry award includes substantial increases to wage rates; casual loadings; penalties and allowances. Similar concerns exist in relation to the awards for the clerical occupational, retail and racing industries.

Transitional Arrangements and Commencement of Legislation

The *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* ("the Transitional Bill") is scheduled for commencement in March 2009 even though it is not yet tabled in Parliament and no details have been provided. Employers will need time to budget for increases in labour costs and develop new strategies for agreement making.

Once tabled in Parliament, CCI will be calling for the Transitional Bill to be referred to a Senate Inquiry for assessment and review.

These concerns are exacerbated if the FWB 2008 becomes law and commences on 1 July 2009. CCI is of the view that the Government must not introduce the new system before 1 January 2010 – this allows time for businesses to alter systems and policies to facilitate the effective implementation of any changes.

Fair Work Australia 2008

It is intended that FWA will provide an accessible "one-stop-shop" that is required to ensure fairness and efficiency, and excellent levels of service to all users of the

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[16] *Revised Award Modernisation Request*, 16 June 2008, section 2(d).

system.[17] How FWA performs its role will be a key determinant as to the success of the new system.

The Government is required to dedicate significant additional resources to enable the FWA to meet its goals of efficiency and effectiveness. In light of public sector cutbacks, CCI is concerned the Government will not be able to dedicate the necessary resources.[18]

FWA is vested with considerable power, much of it being exercised informally. There is an underlying concern the exercise of discretionary power and inquisitorial processes have the very real potential for resulting in unfairness, inconsistency or inequity. Accordingly, transparency, accountability and appeal avenues are essential in the exercise of such powers.

The Future

The Government through its FWB 2008 is aiming to establish an industrial relations framework that delivers:

- national and international competitiveness;
- fairness for employee and employers; and
- enterprise productivity and flexibility.

This is fully supported by CCI. The fundamental question from CCI, its membership and the wider business community is whether the FWB 2008 can deliver.

Some of the key future challenges were identified by John Denton when delivering the Foenander Public Lecture in 2008:[19]

- *"Continue to modernise our system of workplace regulation, balancing fairness with the flexibility that our firms need to compete globally….*
- *To develop an agenda for workplace reform that goes beyond statutory regulation – exploring other policy levers that could help drive productivity in Australian businesses.*

[17] Commonwealth Government, *Fact Sheet 2: Fair Work Australia institutions – a one stop shop, 2008.*
[18] Above n6.
[19] Speech delivered at Foenander Lecture at the University of Melbourne, 20 August 2008.

- *To examine how other countries have gone about addressing these issues, learning from their successes and failures – and most importantly coming up with solutions that will work for Australia."*

It is incumbent on the Government to monitor the impact of its legislation and to commission a review after two years. The review process must involve comprehensive stakeholder consultation.

Submission on specific provisions of the *Fair Work Bill 2008*

Clause 3 Object of this Act

The Forward with Fairness Policy (April 2007) ("FWF Policy") and the Forward with Fairness policy implementation plan (August 2007) ("FWF – PIP") released by the Labor party before the 2007 Federal Election outlines the details of the "mandate" of the Federal Government to introduce the changes contained in the FWB 2008.

A key aspect of the promise by the government is the establishment of a new industrial relations system "*based on **driving productivity** in our private sector.*"[20]

Further, the policy stated that "*a Rudd Labor Government will deliver national industrial relations laws which are **fair to working people**, **flexible for business** and which **promote productivity and economic growth** for the future economic prosperity of our nation.*"[21]

The Commonwealth Government's workplace fact sheet one states: "*Productivity based bargaining and flexibility are at the heart of the new system.*"[22]

The Hon Julia Gillard in her speech to the Fair Work Australia Summit on 29 April 2008 stated it was the Government's intention to embed "*….a dynamic new system that can bring about modernisation without constant system-wide upheaval and conflict*".[23]

CCI submits that clause 3 does not sufficiently meet the Government's stated intention to balance fairness and productivity.

While clause 3(a) contemplates principles of fairness, flexibility and productivity, it does not recognise important factors that directly impact productivity and that have been included in the Workplace Relations Act since 1996, such as high employment, improved living standards, low inflation or international competitiveness.

Australian businesses are subject to international and global market forces – for them to be sustainable and ensure future expansion requires enterprise flexibility,

[20] Above n2, page 2 [emphasis added].
[21] Ibid, page 6 [emphasis added].
[22] Above n5, paragraph 5.
[23] Above n13.

innovation and productivity. Without any explicit recognition and direct accounting of the international nature of businesses in Australia in the FWB 2008, the delivery of the Government's commitments will be jeopardised.

Further, while clause 3(b) seeks to ensure a guaranteed safety net for employees, it does not meet the necessary productivity requirements by ensuring the safety net is economically sustainable - a provision currently contained in the Act.

Recommendation: *The proposed clause 3 (a) of the FWB 2008 to be amended as follows: Insert after "economic prosperity" the following: "international competitiveness,..".*

Clause 19(2) What industrial action excludes

Clause 19(2)(c) will overturn the current section 420(4) that provides the employee has the burden of proving there was a reasonable concern by that employee about an imminent risk to his/her health or safety.

Experience shows employee organisations, in particular in the building and construction industry, use alleged health and safety issues as a cover for what really is industrial action, thereby circumventing the protected action ballot procedures.

Clause 19(2)(c) in effect shifts the burden from the employee to the employer.

Recommendation: *Retain the existing provision to ensure the burden of proof remains on the person claiming reasonable concern by that employee about an imminent risk to his/her health or safety.*

Clause 54 When an enterprise agreement is in operation

The FWB 2008 provides that an agreement commences operation 7 days after the agreement is approved, or such later date specified in the agreement.

This will reflect a change to the agreement process introduced by the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* that amended the *Workplace Relations Act 1996* ("the Act").

This causes problems because employees expect an agreement to commence once it is endorsed by a vote. Whilst this is not appropriate, there is no reason an agreement should not operate from the date approved by FWA. The further delay appears without logic.

Recommendation: *Provide that an agreement commences operation on the day it is approved by FWA or such later date specified in the agreement.*

Clause 172 Making an enterprise agreement

The incorporation of other matters [clause 172(1)(b)] into the definition of "permitted matters", in particular those pertaining to a (purported) relationship between an employer and an employee organisation, secures the potential for argument, disagreement and industrial action over matters that are secondary, and potentially contrary, to the employer and employee relationship.

The application and scope of the matters pertaining to the relationship between the employer and employee organisation is not defined and will inevitably lead to uncertainty and disputation that is unrelated to productive businesses.

These matters are almost without exception matters an employee organisation will propose to advance its' own interests and therefore will be inconsistent with clause 171 Objects of Part 2-4 that states that this Part is to provide *"…for enterprise agreements that deliver productivity benefits"*.

The inclusion of such matters in bargaining is likely to result in the employer being pressured to agree to matters that are unlikely to improve the employee's wages and conditions, and will be inimical to achieving enterprise flexibility and productivity. If agreement is not reached on the employee organisation claims industrial action is likely to result. This is untenable.

The wording of clause 172 also allows for the possibility of the inclusion of other than permitted matters – as provided for in 172(1)(a) to (d) provided they are not unlawful. This introduces doubt and uncertainty as follows:

- arguments may arise about what is a permitted matter or not;
- if any such matter is agreed and incorporated into an agreement, its' incorporation may give an illusion of enforceability and a need to comply, but which at law does not exist;
- matters may be incorporated into agreements that are out of the control of the employer thereby setting up unrealistic expectations and unenforceable "obligations".

CCI's concerns about uncertainty are further highlighted by Ms Parker's comments during the Standing Committee on Education, Employment and Workplace Relations, that non-allowable content is not enforceable *"..and*

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employees cannot take protected industrial action unless it is permitted content or the employees reasonably believed that it is permitted." [emphasis added].[24]

The proposed expanding of the definition of "permitted matters" and therefore the matters subject to bargaining and FWA determination is likely to militate against productivity.

Recommendation: *Failing confining permitted matters to those pertaining only to the employer – employee relationship - and these matters are the only ones the subject of protected industrial action- the scope of permitted matters pertaining to an employer –employee organisation 'relationship' needs to be explicitly linked to the delivery of productivity benefits at the enterprise level as provided for in clause 171(a) – Object of Part 2.4*

Clause 173 Notice of representational rights

Under clause 173(4) of the FWB 2008, the employee's employee organisation is deemed to be a bargaining representative for the entire process of bargaining. Any employee organisation wishing to engage in bargaining – as before or where there has been no historical involvement – and may only have one member is guaranteed a role. Even small minority employee organisation membership should not guarantee automatic bargaining representative rights.

Recommendation: *An employee organisation should not be the automatic bargaining representative.*

Clause 175 Relevant employee organisations to be given notice of employer's intention to make greenfields agreements etc.

An employer who agrees to bargain or initiates bargaining must take all reasonable steps to notify all employee organisations entitled to represent the industrial interests of one or more employees who will be covered by the agreement [clauses 175 & 12 – Definitions].

The following practical issues arise from this requirement:

- there is no certainty about identifying and determining all unions that are "entitled to represent the industrial interests of one or more employees who

[24] Transcript of Proceedings, *Commonwealth Senate Standing Committee on Education, Employment and Workplace Relations*, page 13, Canberra, 11 December 2008.

will be covered by the agreement" – employee organisation rules are not necessarily clear and unequivocal;

- there is considerable overlap in employee organisation rules, which could result in employee organisations that have not traditionally covered particular work or have been active in those workplaces will be required to sign agreements covering that work;

- it will cause delays in agreement making that negatively impact on productivity, particularly where an agreement is needed or desirable in order to get a project or an enterprise up and running;

- what will the test be for all reasonable steps to notify and how will it be assessed?;

- the requirement will highlight the extent of overlapping coverage among unions and the resultant tensions and demarcation disputes; and

- at the time a greenfields agreement is made, the employer has not yet employed any of the persons who will be necessary for the normal conduct of the enterprise [clause 172(2)(b)(ii) and (3)(b)(ii)].

As a result, the employer is required to reach agreement with each employee organisation that has coverage over any employee during the life of the project. In the case of a greenfields construction project an employer will be required to bargain with multiple employee organisations, with potentially divergent interests.

The length of projects is also a potential problem, as an employer will be required to bargain with employee organisations representing employees who are not anticipated to begin work on the project for several years, and therefore whose interests and demands are not clearly identified at an early stage.

Considering the requests of several different employee organisations will no doubt result in a protraction of the bargaining process, as each employee organisation will represent the specific demands of their members.

Employee organisation constitution and coverage rules cover a broad and often overlapping or ambiguous range of industries and classifications, often exhibiting coverage anomalies, particular to a particular region or classification.[25]

Specific employment classifications can also fall under the coverage of several different employee organisations, and a lack of clarity in employee organisation rules exacerbates this overlapping coverage, examples follow.

- A crane driver can potentially be covered by three different employee organisation s: the Australian Workers' Union (AWU), the Construction, Forestry, Mining and Energy Union (CFMEU) and the Transport Workers' Union (TWU).

- An employee in the gas industry can be covered by the AWU, TWU or The Australian Institute of Marine and Power Engineers (AIMPE).

- Employees with a technical or supervisory role can potentially be covered by the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU), Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU), AIMPE or the Association of Professional Engineers, Scientists and Managers Australia (APESMA).

A table listing key employee organisations likely to be involved in mining and resource construction/development projects together with an illustrative list of the types of occupational/classifications each has likely coverage over - see ATTACHMENT A.

Recommendation: *Remove the requirement for an employer to notify every relevant employee organisation covering a specific group of employees, stipulating instead that at least only one of those relevant employee organisations covering a specific group of employees must to be notified.*

[25] For example the Liquor Hospitality and Miscellaneous Employee Union (LHMU) has coverage over all Uranium workers only in the Northern Territory – the AWU would cover such workers in other jurisdictions.

Clause 176 Bargaining representatives for proposed enterprise agreements that are not greenfields agreements

This clause secures a default bargaining representative status for an employee organisation if there is at least one member who is an employee of that employer.

There is no requirement on the employee organisation to provide any proof it is entitled to represent the interests of employees as provided for in clause 176(3) and it has at least one member.

The wording of clause 176(1), in particular the interrelationship between (1)(b) and (c), creates doubt about the possibility of an employee appointing a bargaining representative that is not an employee organisation in circumstances where there may already be an employee organisation as a bargaining representative for a proposed enterprise agreement.

Recommendation: *Clause 176 is varied to include a provision the employer can require an employee organisation purporting to be a bargaining representative to provide proof (i.e. it is entitled to represent the interests of employees as provided for in clause 176(3) and there is at least one member who is an employee) to satisfy a reasonable person they are a bargaining representative.*

Amend clause 176(1) to clarify its application.

Also amend the FWB 2008 requiring the employer to recognise and bargain in good faith only with a bargaining representative who has advised the employer:

- *within 14days of the notice being provided to employees, or*
- *where the employee appoints someone in writing within 7 days of that authorisation being given.*

Clause 182 When an enterprise agreement is made

Clause 182(3) – Greenfields agreement

The necessity for greenfields agreements follows considerable financial and resource commitments subject to specified timelines for phases of development.

The requirement that a greenfields agreement is made only when it is signed by each employer and each employee organisation entitled to represent the industrial interests of one or more of the employees who will be covered by the agreement significantly increase the potential for costly delays by the addition of additional players. Some of these additional players are likely to be more committed to increasing union membership and influence rather than the success of the project.

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It appears that clause 182(3) means employers won't be able to make greenfields agreements unless every relevant employee organisation that will be covered by the agreement signs.

Such a process and resulting agreement significantly raises the potential for union demarcation disputes that will jeopardise the successful completion of the projects. It is essential for the sustainability of any project to secure certainty and stability of labour costs within acceptable parameters

Alternatively, clause 182 could be applied in such a way that only the number of employee organisations sufficient to cover all employees the subject of the agreement may satisfy clause 182. It is, however, not clear. If an employer were to proceed on this basis, there is a risk that another relevant employee organisation applies for a scope order – at any time up to FWA approval of the agreement – and seeks to prevent approval of the agreement alleging it is inconsistent with or undermines GFB [see 187(2)].

Recommendation: *The FWB 2008 requires amendment as follows:*

Relax the requirement for a greenfields agreement to be signed by every relevant employee organisation, in circumstances where there is overlapping coverage and/or established industry arrangements.

Preferred Option 1

Amend to allow the employer to give notice only to the sufficient number employee organisation(s) necessary to cover all employees who will be the subject of the agreement. This facilitates continuation of traditional coverage and supports established employer-employee organisation relationships without adding to complexity or causing inefficiency.

Option 2

Amend to allow the employer to notify the employee organisations able to cover some of the work, with the aim of making an agreement that can be varied to progressively include other employee organisations able to cover the remainder of the work. This enables work to proceed even though future work has not yet been addressed in the agreement but with a process to enable that to happen

Option 3

Amend to enable separate agreements to be progressively made with individual employee organisations covering different aspects of the work undertaken by the enterprise. This has the same benefit as Option 2 but is likely to lead to a less tidy outcome than might be possible under Option 2.

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Option 4

An amendment to clarify that not every (or all) employee organisations are required to sign a greenfields agreement – just those relevant employee organisations that together cover all employees proposed to be the subject of the greenfields agreement.

Clause 186 When FWA must approve an enterprise agreement—general requirements

Clause 186(3) – Requirement that the group of employees covered by the agreement is fairly chosen

There is a potential that unions will seek to use this provision to challenge agreements employees have approved despite a union campaign to oppose the agreement.

Clause 186(6) – Requirement for a term about settling disputes

The settling of disputes term must require/allow for an independent person to "settle disputes" (i.e. FWA or another person).

"Settle" is not defined, although reference to clauses 737 – 740 suggests it is up to the parties to determine whether settling explicitly includes "arbitration' or not.

Recommendation: *The model term about dealing with disputes about enterprise agreements as foreshadowed in clause 737 should allow an independent party to assist in resolving disputes in accordance with the provisions of the dispute settling clause but not prescribe arbitration unless all parties to the 'dispute' agree.*

Clause 186(6) notes dispute settling clause cannot be used for the purposes of the settling disputes over reasonable business grounds for clauses 739 and 740 - this should be a sub clause not a note.

The requirement for DSP should be Division 5 – Mandatory Terms of Enterprise Agreements – otherwise too easily missed.

Clause 188 When employees have genuinely agreed to an enterprise agreement

Clause 180(5) imposes a general requirement on employers to take account of the individual circumstances and needs etc, and specifically to the identified groups in clause 180(6).

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People with a disability working in a supported employment service have varying levels of capacity to comprehend the agreement making process – in particular those people with a diminished intellectual capacity.

There are special requirements for employers of employees with an intellectual disability to educate and train these employees to ensure they understand the: process of agreement making; and its contents.

In order to acknowledge this group's special needs, the additional example of "employees with an intellectual disability" will highlight for all employers the requirement to provide special attention to this group when explaining the terms of the agreement to them.

Under the FWB 2008, as was the case under the Pre-reform Act, there is no provision for the delegation of the power to vote on an agreement, in particular, for a severely intellectually disabled person to a duly recognised person i.e. a parent or guardian.

Where a majority of the employees in a supported employment services have diminished capacity to comprehend the agreement making process and thereby unable to express informed consent, then the agreement will not meet the legislative requirement for approval and therefore will not be deemed valid unless an alternative is provided for.

Delegation of Voting Rights

The issue of informed consent and genuine agreement to approve an enterprise agreement is not a new issue for industrial relations in Australia. The Pre-reform Act imposed similar conditions (see section 170LT(5), (6) and (7)) on the AIRC when certifying an agreement as those now proposed under the FWB 2008 (see clause 188).

Applications for certification of agreements for supported employment services under the Pre-reform Act met with mixed success.[26] The FWB 2008 should enable the ability to delegate voting rights for agreement making purposes from the employee to a parent or guardian in circumstances where a disabled employee in a supported employment service has a diminished capacity to comprehend the agreement making process.

[26] see Coffs Harbour Challenge Inc. – PR900645 [2001] AIRC 140 which was rejected, Challenge Armidale (Business Services) Workplace Agreement 2004 – PR963708 which was approved and Challenge Disability Services Workplace Agreement 2005 – PR959917 which was approved.

Recommendation: *Amendments incorporating the following should be considered:*

Delegation of Voting Rights

Insertion of a specific provision into clause 181 of the FWB 2008 to enable delegated authority of voting rights to a parent or guardian of a disabled employee employed in a supported employment service who has a diminished capacity to comprehend the agreement making process, as follows:

"Diminished Capacity – Employees with an intellectual disability

(4) A parent or guardian of an employee with an intellectual disability employed in a supported employment service who has a diminished capacity to express informed consent, have delegated voting rights with respect of this section to vote on behalf of that employee."

Additional example of the kinds of employees under clause 180(6)

Insertion of the following additional example under clause 180(6) as follows

"(d) Employees with an intellectual disability"

Clause 193 Passing the better off overall test

The Government's intention to apply the "Better Off Overall Test" ("BOOT") to each award covered employee that will be covered by the agreement will result in a significant change to the process in place for the approval of agreements.

Since 1993, a collective agreement was passed or certified if the relevant body was satisfied that the agreement did not result, on balance, in a reduction in the overall terms and conditions of employment of the employees whose employment is subject to the agreement.

The requirements contained in the FWB 2008 in relation to the assessment by the FWA of enterprise agreements, in particular the application of the "BOOT" test, will necessitate considerable resources, efficiency and procedural efficacy.

Comments in the EM[27] that it is intended the FWA will generally be able to apply the better off overall test to classes of employees.." only goes some way to assuage CCI's concerns. Even if this became FWA's demonstrated approach and practice,

[27] Explanatory Memorandum, *Fair Work Bill 2008*, paragraph 818.

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it is inevitable the application of the test can be challenged based on assertions that at least one employee is not better off overall. There is always scope for argument that, for example, given a particular roster configuration, an employee may not be better off as provided for in the FWB 2008, regardless of the employee's acceptance of the situation.

Given the experiences of CCI and its membership in relation to the time delays associated with agreement approval now, CCI is concerned that under the new legislation there will be greater delay and resulting frustration from not being able to implement agreements as intended.

Consistent with the historical practice in assessing "no disadvantage", the BOOT should be confined to an assessment of whether employees are better off overall instead of the individual circumstances of each and every employee. If individual employee BOOT assessment is retained, agreement approval will require substantial administrative resources or alternatively will be significantly protracted.

Recommendation: *Amend the FWB 2008 so that the "BOOT" test is designed to assess whether on balance the agreement is better off for all employees rather than prescribe that it must be better off for each individual and therefore require a resource and time hungry testing process.*

Clause 202 Enterprise agreements to include a flexibility term etc.

The model flexibility term, as a default position, should stipulate a minimum notice of 28 days to terminate the arrangement by either the employer or employee, thereby giving a reasonable period for alternative arrangement being put in place. A lesser period will create unnecessary resource and logistical problems.

Recommendation: *202(4) – Model Flexibility term*

The model flexibility term should stipulate notification of termination of the individual flexibility arrangement is by agreement – in writing and at any time – otherwise the default position is a minimum of 28 days notice by either the employee or employer.

Clause 203 Requirements to be met by a flexibility term

Proposed clause 203(6) provides the individual flexibility arrangement can be terminated by either the employer or employee giving written notice of not more

than 28 days, or alternatively by agreement between the employer and employee in writing at any time.

In many industries, especially the building and construction industry, individual flexibility arrangements are likely to be used for particular stages of development. In these cases it is essential the arrangements remain in place for a required time (as detailed in the documented arrangement) and therefore termination should only be by agreement or alternatively when the requirement for the arrangement ceases, e.g. on completion of that stage of development.

Where the employee and employer omit reference to notification of termination of the individual flexibility arrangement, the 28 days becomes the default position.

Recommendation: *Amend the clause to reflect termination by agreement only and the 28 days is the default position only.*

Clause 207 Variation of an enterprise agreement may be made by employers and employees

Provision needs to be made for variation of enterprise agreements to address changes in circumstances not contemplated by the parties when the agreement was being negotiated

Business opportunities for companies to undertake new business or projects can arise during the term of enterprise agreements. Where such opportunities were not contemplated when the enterprise agreement was being negotiated, the provisions of the enterprise agreement may be inadequate or inappropriate for such new business or projects.

The additions or changes to the enterprise agreement required to meet the circumstances of a new business opportunity or project will often only need to apply to a section of the existing workforce or, sometimes, none of the existing workforce. However, clause 207(1) of the FWB 2008 requires the approval of a majority of existing employees for any variation to an enterprise agreement.

Recommendation: *Allow for enterprise agreements to be varied without requiring the approval of existing employees who will not be affected by the variation*

Amend the FWB 2008 to allow variations to enterprise agreements to be approved:

- *where only a portion of the existing workforce will be affected by the variation, by a majority of those employees who will be affected, or*

- *where none of the existing workforce are affected by the variation, by a process similar to that recommended by CCI for the making of greenfields agreements*

Clause 228 Bargaining representatives must meet the good faith bargaining requirements

Where parties are engaged in 'Good Faith Bargaining' ("GFB"), threatened or engaging in industrial action, CCI is of the view that any such actions threatened or otherwise are fundamentally inconsistent with GFB requirements.

Unlike the *Industrial Relations Act 1979 (WA) ("The WA IR ACT")*, there is no formal commencement of bargaining. It is conceivable that an employee organisation may make an application under clause 229(4) alleging failure by the employer to GFB when neither party had sought the commencement of any negotiations.

If a bargaining representative is seeking the commencement of negotiations consistent with the terms of a current enterprise agreement or otherwise consistent with the FWB 2008, formal notification should be provided. This will ensure there is no doubt or uncertainty about the application of the GFB provisions of the FWB 2008.

Recommendation: *Amend the FWB 2008 to require, where a bargaining representative seeks to commence bargaining for an enterprise agreement, an initiation of bargaining notice similar to that provided for in section 42 of the WA IR Act.*

Clause 228 - Bargaining representatives and GFB

It is not clear whether the requirements of GFB apply to those people the bargaining representatives are representing – this is particularly relevant to clause 228(1)(e)- refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining – where it is the actions of, e.g. the members of an employee organisation (who may or not be employees of the employer) engaging in the proscribed behaviour.

Recommendation: Amend the FWB 2008 to clarify that the requirements of GFB also apply to members of the employee organisation or other bargaining representatives as relevant.

Clause 228(1)(c) and (d) – giving and responding to proposals

Claims or proposals need to be current, defined and realistic, and relate to the requirement enterprise agreements are to deliver productivity benefits – clause 171.

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Recommendation: *Amend the FWB 2008 to reflect the requirement that the proposals of bargaining representatives are to explicitly take into consideration the overarching Object of the FWB 2008 and particularly clause 171 Objects of Part 2-4.*

Clause 228(1)(e) – refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining

Whether a party has engaged in *". . . capricious or unfair conduct that undermines freedom of association or collective bargaining"* is likely to be the subject of litigation.

'Capricious' is defined as *'having a tendency to sudden unpredictable changes of attitude or behaviour*'.[28] In the context of complex industrial relations negotiations, there is a risk that actions arising from 'off the record' discussions between some representatives in negotiations will be labelled 'capricious' and 'undermining' by others not party to those discussions. Litigation (or even the potential for litigation) of such issues is, in itself, likely to 'undermine' the progress of collective bargaining.

'Unfair' is a difficult concept to apply to negotiations, assuming that it means something more than failure to do what is covered by (1)(a) to (1)(d).

Negotiating parties often make tentative or exploratory suggestions or proposals for the purpose of testing another party's willingness to change position. They should be free to do this on a 'without prejudice' basis even if a subsequent change of heart has a temporary adverse effect on progress of collective bargaining.

Recommendation: *The following options are presented in order of preference.*

That 228 (1)(e) be deleted, amended or qualified so as to reduce the potential for parties to be unnecessarily constrained in how they conduct negotiations.

Preferred Option

Delete 228 (1)(e). There will be little lost in doing this and it will remove a cause of litigation.

Option 2

Add a further sub clause 228 (3) in terms such as:

[28] Collins Compact Australian Dictionary.

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"To avoid doubt, the following conduct is not 'capricious' or 'unfair':

(a) Changing or proposing to change one's negotiating position in response to a change or perceived change in the bargaining position of another party or in response to lack of progress in the bargaining process.

(b) Withdrawing a proposal that has been presented on a 'without prejudice' basis and which has not been accepted in its entirety, or withdrawing any part of such a proposal.

(c) Refusing to be bound to a suggestion or proposal presented in a genuine attempt to find common ground between negotiating parties."

This reduces the potential for parties to be unnecessarily constrained in how they conduct negotiations.

Option 3

Delete the words 'capricious or unfair' from 228 (1)(e). That would mean that any 'conduct that undermines freedom of association or collective bargaining' would be prohibited. Removes potential for litigation over application of the words 'capricious' and unfair'. Little if anything would be lost by doing this.

Clause 236 Majority support determinations

Where employers have initiated or agreed to bargain with employees for a multi employer agreement, there should be no scope for any majority support determinations to be made for one of the included single enterprises.

What is proposed is consistent with 237(2)(b) that provides that such a determination cannot be made where employer(s) have initiated bargaining or agreed to bargain.

The proposal seeks to ensure clarity of interpretation and application.

Recommendation: *Vary clause 236 to prevent majority support applications and determination in relation to an enterprise that is to be covered by a multi-employer enterprise agreement and where the employers have initiated or agreed to bargain for an agreement covering the employees for whom the order is being sought.*

Clause 238 Scope orders

Where employers have initiated or agreed to bargain with employees for a multi-employer agreement, the potential for scope orders is no longer relevant for all or any of the single enterprises within the multi-employer agreement.

Recommendation: Vary clause 238 to prevent the application and making of scope orders in relation to an enterprise that is to be covered by a multi-employer enterprise agreement and where the employers have initiated or agreed to bargain for an agreement covering the employees for whom the order is being sought.

Clause 241 Objects of this Division – Low Paid Bargaining

CCI has several concerns about the provision for a specific low paid bargaining framework in the FWB 2008, including:

- The bargaining framework is predicated on pattern bargaining that is otherwise proscribed by the FWB 2008.
- Bargaining is not voluntary - employers may be forced into bargaining if they are nominated by the union. If the low-paid authorisation is approved by the FWA then they are required to bargain in good faith.
- There is no definition of what is 'low paid'. In light of the establishment of modernised awards and the NES as the improved safety net, it is hard to understand what is meant by "low paid". The child care industry has recently been characterised as one of the low paid industries by the Government. This is incorrect, as the recent Child Care Industry work value case set rates of pay linked to the Metals Industry Award so that anyone who holds a relevant qualification is paid the trades rate of pay.[29]
- It is not focused on the needs of individual employers - a low-paid multi-employer agreement will focus more on the industry as a whole. There is a potential for any so called agreements or FWA determinations will not cater for what is required at single enterprise levels - the delivery of productivity and flexibility is unlikely to occur notwithstanding clause 241 Objects.

[29] Australian Industrial Relations Commission, section 113 variation to the Child care industry (Australian Capital Territory) Award 1998 & Children's Services (Victoria) Award 1998, PR954938, 13 January 2005.

- The inevitability about matters pertaining to the 'relationship' between the employers and employee organisations (generally constraints to effective employer and employee engagement) introduce unnecessary conflict into any negotiations and detract from the necessary focus of delivering productivity and flexibility.

- As multiple employers would be involved the likelihood of reaching agreement without intervention from FWA is diminished.

- A new low paid bargaining stream opens an avenue for industry wide claims and access to arbitration in areas not traditionally covered by enterprise agreements such as in community service areas. Other areas likely to be targeted are those areas heavily reliant on government funding - such as health.

Clause 243 When FWA must make a low-paid authorisation

Clause 243(2) and related clause 263

Clause 243 provides that in making a low paid authorisation the FWA must take into account the history of bargaining in the industry.

Clause 263(3) provides that FWA must not make a special low paid determination where the employer has previously been covered by an enterprise agreement. Consistent with clause 243(2)(b) – history of bargaining in the industry – the term "enterprise agreement" should include all previous certified and collective agreements, including agreements made under the Act but also under previous versions of the Act including old 1993 IR Act agreements and s170LK and LJ agreements.

The term "enterprise agreement" should also include collective agreements made under a state industrial relations law, such as section 41 agreements made under the WA IR Act.

Recommendation: *Vary clause 243 to provide that FWA must not make an authorisation including any employer that has previously had a history of enterprise bargaining.*

Vary 263 to provide that enterprise agreement includes a collective agreement made under previous provisions and collective agreements made under state industrial relations law.

Amend clause 263 of the FWB 2008 to establish a requirement that FWA must consider the needs of the individual employer. In line with this FWA should be able to/required to make single enterprise low paid workplace determinations.

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Clause 243(2) and (3) - people with a disability working in a supported employment service

Without any definition of "low paid bargaining", clause 243(2)(a) *"or who face difficulty bargaining at the enterprise level"* can be interpreted to apply to employees with a disability working in supported employment services. CCI is of the view that employers of employees working in a supported employment service should be excluded.

The FWB 2008 does not indicate any intention to exclude a supported employment service from low paid bargaining. Disabled employees working in supported employment services are paid lower rates commensurate with the range of duties performed to the competence level required because of the effects of a disability on their productive capacity. Employers who engage disabled employees in supported employment services should be exempt from low-paid bargaining.

Where a person is unable to work at full productive capacity due to their disability in a supported employment service, a pro-rata award or special federal minimum wage rate is applied. An individual's productivity level is assessed utilising a compliant Wage Assessment Tool that meets the Disability Services Standards and service quality requirements.

Supported employment services are currently exempt from federal minimum wages for able bodied employees that is proposed to continue (see clause 294(4)(c) of the FWB 2008).

The FWB 2008 should be clear in terms of excluding employers of employees employed in supported employment services for the following reasons:

- Supported employment services are a particular type of disability service combining commonwealth funded services for the disabled and commercial operations. For the most part, these services employ persons with a disability to undertake commercial operational tasks within workplaces also providing disability services and care.

- This service sector operates as distinct and unique operations in the community. These discrete operations have, for the most part, been established to provide meaningful work and social interaction for people with disabilities. They are often run based on a mix of commercial income and government funding. Employees engaged in this sector also receive a Disability Support Pension.

- Supported employment services have specific exemptions from federal minimum wages for able bodied employees.

- The very nature of these operations should exclude low paid bargaining from operating in the sector given the minimal likelihood of improvements to productivity and service delivery in the sector.

- Should employers chose to collectively bargain, the threshold to meet the "genuinely agreed" to approve a collective agreement criteria is such that significant training is required to educate and train disabled employees - more so for persons with an intellectual disability - to achieve a certain level of comprehension about the content of a proposed agreement, relevant award(s) and the agreement making process. This should be managed in an environment that is supportive to these employees. Employers tread a fine line to ensure effective and successful training and education is provided and that none of their actions can be construed as influencing employees to vote a particular way. The environment must be sensitive, respectful and supportive, and all information provided about the proposed agreement needs to clear, simple and objectively conveyed.

Recommendation: Insert a specific exemption provision for employers who engage disabled employees in supported employment services to clarify that FWA does not have the authority to approve a low-paid authorisation for this sector. The proposed wording should be inserted under clause 243 as follows:

"Exemptions

(6) Employers engaged in supported employment services for people with disabilities are exempt from the application of this section."

Clause 261 When FWA must make a consent low-paid workplace determination

In circumstances where employers consent to a low paid determination under clause 260, it is implied, but not clear, that only those employers who will be the subject of the determination - see clause 260(3) relating to the identification of the employers the subject of the application and to be covered by any determination.

Recommendation: *To prevent any doubt, it is suggested that clause 261 specifies that a low paid determination only binds those employers who have consented to it being made.*

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Clause 262 When FWA must make a special low-paid workplace determination—general requirements

The clause will allow FWA to make a special low paid determination. The primary pre-requisite is that the parties are genuinely unable to reach agreement and there is no reasonable prospect for this to occur.

The incidence of securing multi employer agreements is likely to be low, therefore special low-paid workplaces determinations are likely to be widely used.

There is no requirement that the FWA must consider the needs of an individual employer.

Recommendation: *Only provide for consent low paid determinations (as specified in clause 261); or in order for a determination to be made:*

- *the initiating bargaining representative must have made attempts to genuinely negotiate a single enterprise agreement; and*
- *before a determination is made, the FWA must exhaust all opportunities to assist the parties to reach agreement; and*
- *determination can only be made in relation to a single enterprise, taking into account the circumstances of that employer (including capacity to pay, etc)*

Clause 266 When FWA must make an industrial action related workplace determination

Currently the AIRC is not required to arbitrate or determine the matters at issue between the parties after the termination of industrial action.

The FWB 2008, however, provides the FWA with the ability to make a determination after termination of industrial action. This is likely to encourage a party to escalate industrial action to invoke FWA's powers to determine matters at issue.

Recommendation: *Remove the ability of FWA to determine the substantive matters at issue after terminating industrial action other than to make any appropriate GFB orders.*

Clause 270 Terms etc. of a bargaining related workplace determination

The employer cannot be forced to negotiate or reach agreement. It therefore should not be possible that forced or compulsory arbitration is inevitable – where arbitrated outcomes are effectively imposed by a third party in circumstances where, for whatever reason, an employer and employee organisation has not reached agreement.

Arbitration, other than consent arbitration, should be last resort arbitration only limited to circumstances concerning the health and safety of the community and/or risk to the economy.

If the employer does not agree to make a collective agreement, provided it can be established that employees are receiving the NES safety net, the employer should not be forced to make an agreement, nor as proposed in the FWB 2008 otherwise have the matters determined by the FWA.

CCI reiterates its' comments that given the proposed expansion of "permitted matters" to include those matters pertaining to the relationship between the employer and employee organisation – i.e. matters more likely to promote union/member interests external to the enterprise - it is especially important for such matters if remaining in dispute not to be the subject of FWA interpretation.

Recommendation: *Remove FWA's power of compulsory arbitration or determination.*

Part 2-8—Transfer of business

The FWB 2008 significantly alters the rules surrounding a 'transfer of business'. These proposed changes were not foreshadowed in the Labor party's FWF policy or FWF-PIP documents and therefore have reduced the ability to fully consider all the implications.

The FWB 2008 proposes a broader definition of 'transfer of business'. This means a transfer of business will now occur when an employee and the work they perform transfers from one employer to another rather than the notion of a "business" transferring as established in the High Court decision *Minister for*

Employment and Workplace Relations vs Gribbles Radiology Party Ltd ("The Gribbles decision").[30]

The FWB 2008 proposes that any industrial instrument approved by FWA or employer specific award will automatically transfer and will be in place indefinitely for that transferring employee, subject only to an order of FWA.[31] Additionally, in certain circumstances, the transferring instrument will extend to cover non-transferring employees who are engaged in the work that has been transferred.

This new concept of transfer of "work" may result in new employers being covered by several industry awards that are not applicable to the industry in which the new business operates. This will perpetuate award coverage of particular individuals along occupational rather than industry lines, which contradicts the intention of the award modernisation process. This may also result in employees undertaking identical work being subject to completely different industrial instruments and hence completely different terms and conditions.

The proposed changes have a number of practical implications that need to be considered. For illustrative purposes, this submission uses WA Local Government examples that exemplify the general issues of concern about the FWB 2008 transfer of business provisions.

Many Local Government authorities are covered by the Act. Most have federal collective agreement in place covering the majority of their employees across the range of service delivery areas.

Services provided to the public include, but are not limited to: Community services such as Child Care and Aged Care and Accommodation; Recreational Facilities; Health Services such as water and food inspection: Medical Services; Infrastructure and Property services: Security Services; Waste Collection and Management.

In WA Local Government Authorities have traditionally been regulated by the Federal Industrial Relations jurisdiction with two main federal awards covering the majority of employees working in local government namely:

- Pre Reform Local Government Officers' (WA) Award 1999; and

[30] (2005) 222 CLR 19430.
[31] Above n27, paragraph 1207.

- Pre Reform Municipal Employees' (WA) Award 1999.

There are also a range of additional Pre Reform Federal Awards and Notional Agreements Preserving State Awards ("NAPSA") that cover the remaining employees. As part of the award modernisation process Local Government across Australia has made strong representation that an industry award should be created to cover all their employees.

The Local Government industry has over the many years changed the nature of the services it provides. This fluxing environment is likely to continue as the role of local government is continually reviewed and assessed to meet the needs of the community (and that of the state governments) and financial impediments.

The current employment conditions within Local Government may be an impediment in outsourcing services to many smaller specialised private companies. These companies may not have the financial capacity to deliver employment condition established under local government agreements.

Examples of outsourcing could include waste management, aged care facilities, security services, and minor works.

This 'hurdle' may impact on a Local Government's ability to change and rationalise their services in order to either improve services to meet community needs or respond to financial or political needs.

Conversely in the process of 'in sourcing" services Local Government authorities may find themselves subject to an enterprise agreement read in conjunction with an award which isn't the local government 'industry' award created by award modernisation.

If over time the scenario repeats itself the Local Government authority may find itself subject to a number of agreements read in conjunction with a number of awards. This appears to defeat the intention of award modernisation that focuses on minimising the number and complexity of awards through the establishment of, primarily, industry based awards.

The proposed transfer of business provisions creates some barriers for companies wishing to either outsource sections of its business it decides are no longer core business or can be better delivered by specialised companies, or alternatively 'in sourcing' of services.

It appears the new transfer of business rules are based on the notion that transfer of work and employees will only occur within an industry boundary (.i.e. 'like industry' with 'like industry').[32] This will, however, not always be the case as detailed in the example above.

Another example is ABC Learning Pty Ltd that recently experienced significant financial difficulties. It was reported that a number of organisations were interested in taking on the child care centres including a not-for-profit group.[33]

Under the FWB 2008 these new owners would be required to continue the employment conditions under ABC Learning's federal collective agreement if they employed existing staff. Whether a new employer can afford to meet the requirements of the transferring agreement will be determined case by case however if the costs associated with an agreement are cost prohibitive it makes a failing business less attractive.

It is acknowledged the FWB 2008 provides for an employer to seek an order from FWA to prevent an enterprise agreement or employer award from transferring.

The FWB 2008 outlines factors FWA must take into consideration when deciding to make the order. These include the views of the new employer and the transferring employees, whether the employees would be disadvantaged and the public interest.

There is, however, no certainty an employer would be granted such an order and is yet another hurdle a business must go through when deciding to take on a business or part of a business.

Therefore an employer seeking to take over a business or part of a business may choose not to employ any of the existing staff in order to avoid the transfer of an enterprise agreement.

The transferring agreement may not suit the new employers operations (e.g. the way hours are rostered), it may be cost prohibitive and may also lead to inequity between employees (current and transferring) who are doing the same work.

Thus many employees who could have been gainfully employed by the new employer may in CCI's view be made unnecessarily redundant.

[32] Above n27, paragraph 1230.
[33] The Age, 'Companies eye off ABC Learning centres', 11 November 2008, page 2.

Recommendation:

Preferred option: *The FWB 2008 is amended to reflect a narrower definition of "transfer" than currently proposed that defines "Transmission of business" as construed by the Gribbles decision; and a transferring employee and new employer may agree before or after transfer date to terminate the transferring instrument and for the employee to be covered by the new employer's industrial instrument*

Option 2: The FWB 2008 allow a transferring employee and the new employer to make an agreement ,before or after transfer date, to terminate the transferring instrument and revert to the new employer industrial instrument.

Option 3: The FWB 2008 clarifies that any new collective agreement established by the new employer with its workforce will override any transferring industrial instrument.

Option 4: In order to provide new employers with an ability to offer staff common terms and conditions, the current provisions of the Act prescribing a transmission period of 12 months for the transmitted/ transferred instrument be retained.

Chapter 3—Rights and responsibilities of employees, employers, organisations etc

"workplace rights" and "adverse actions"

The FWB 2008 introduces the notion of "workplace rights" and "adverse actions". "Workplace rights" cover a broad range of matters that are otherwise understood to include entitlements or benefits provided in statutes or industrial instruments. There has been a general enhancement of employee rights and a consequential expansion of related employee protections and remedies.

Most notably there is an absence of employer rights and the scope of "adverse actions" is predominantly about identifying actions by employers against employees.

This imbalance will not assist in a mutual engagement and recognition of employer and employee rights, responsibilities and duties in workplaces.

The FWB 2008 does not promote and enshrine balance in the workplace. Instead of facilitating and encouraging a sustainable and long term engagement between employees and employers, the FWB 2008 is proposing a highly regulated bargaining framework designed mainly to promote employee organisation – employer agreements.

The drafting suggests that "workplace rights" and "adverse actions" are absolute, that the context and the individual circumstances are not relevant. This is a departure from how matters are normally dealt with, e.g. in relation to alleged discrimination where the test of reasonableness is applied.

Employee organisations are being given by the FWB 2008 access and participation benefits/rights (akin to affirmative action) but without the rigours and corresponding accountability, as employers are, of ensuring enterprises are flexible, productive and fair.

Clause 351 Discrimination

The FWB 2008 is likely to generate higher levels of dispute and complaint driven matters, especially about allegations of "adverse actions" and discrimination.

Experience shows that complainants forum shop between federal and state discrimination legislation as well as use the Act for claims of unlawful termination.

There is no limit on damages that can be claimed or awarded if made under the FWB 2008.

The incorporation of clause 351 appears contrary to the Government's objective of harmonisation and simplification.

Recommendation: *Remove clause 351 on the basis it duplicates current federal and state discrimination laws.*

Clause 386 Meaning of dismissed

Clause 386(1)(b)

The current drafting allows an interpretation/application of the meaning of "dismissed" to include a person's resignation due to a course of action of their former employer who instigated an unsatisfactory performance management or disciplinary process against the employee.

It appears an application could be made by that former employee after their resignation claiming that the conduct of their former employer "forced" that person to resign.

If this was alleged, it must be incumbent on the applicant to fully substantiate and provide documentary verification in the application the instigation of such unsatisfactory performance management or disciplinary process by their former employer was contrived and unfounded. Without such verification and substantiation the application should be allowed to proceed.

Recommendation: *Amend the FWB 2008 [including clause 396 – Initial matters to be considered before the merits] to exclude applications by resigned employees citing conduct by the employer involving the instigation or management of unsatisfactory performance or disciplinary process unless adequate verification and substantiation that the performance or disciplinary matters were contrived and without any foundation.*

Recommendation: Clause 386(2) *CCI also seeks to retain the following exclusions from the definition of "dismissed":*

- *trainees;*
- *short term casual employees, who are by their very nature hired and fired at short notice – conventionally "One hour";*
- *all terminations not at the initiative of the employer;*
- *out of time applications are not considered and therefore the capacity to litigate is forfeited; and*
- *all high income employees whether covered by minimum conditions, awards or agreements.*

Clause 386(3)

Where a person is on a fixed term contract [clause 386(2)(a)] and it can be established the employer's intention [i.e. the contract's substantial purpose] at the time of the person's employment was the avoidance of the employer's unfair dismissal obligations, this can be viewed as an unfair dismissal.

This requirement, or "anti-avoidance rule", imposes a test of whether the substantial purpose of the employment of a person on contract was to avoid the unfair dismissal obligations[34] – how this will be assessed is not explicit.

It does, however, raise concerns that employers no longer have the flexibility to place an employee on a fixed term contract, if there is any assertion substantiated or not, the role/work required is a permanent position. Employee organisations persistently claim positions are "permanent" regardless of the specific context or circumstances.

[34] Above n27, paragraph 1536.

It remains common and accepted practice that engagements for fixed terms are just that - it is illogical to suggest that a person's engagement on fixed term contract was to avoid an employer's obligations under the unfair dismissal provisions. Engagement on a fixed term is for the specified period - there is no reasonable prospect of further employment. The end of a fixed term contract cannot therefore be viewed as a dismissal – the end date of fixed term contract is what was agreed between the employer and employee.

The primary concern is given labour market dynamics, the changing nature or work and work structures, where permanent positions are increasingly not the norm, employee organisations may exploit such a provision to advance arguments of permanency, resulting in vexatious applications.

Recommendation: *Remove clause 386(3)*

Clause 396 Initial matters to be considered before merits

See recommendation re 386(1)(b).

Clause 397 Matters involving contested facts, clause 398 Conferences and clause 399 Hearings

Notwithstanding the reference to "Fair go all round" CCI remains concerned that conferences and hearings are not guaranteed a framework where natural justice and procedural fairness are paramount.

"Quick, flexible and informal" [clause 381(1)(b)] cannot by its very application be interpreted or applied as casting aside the well understood and accepted principles of due process and natural justice.

In the context of a more "inquisitorial" conference setting provided for in the FWB 2008, there is a risk that due process and natural justice may not be adhered to.

Although it is acknowledged the FWA is not bound by the rules of evidence and procedure [clause 591], there has been an historical practice that arbitration proceedings generally follow such rules to promote consistency and fairness.

Without articulated and clear 'guidelines' all the risks associated with oral testimony v documentary evidence vis a vis probative value may jeopardise the veracity and integrity of the intended process.

Accordingly CCI considers important that such conventions and practices continue to provide guidance to the FWA member and the parties.

It is current practice in the conduct of conciliation conferences, the parties and Commissioner seek to resolve the matters in dispute in a without prejudice framework. If not resolved and the matter goes to formal hearing the conciliating commissioner will not necessarily conduct the hearing.

The FWB 2008 approach appears very different with the FWA member making a determination on the merits if the matter is not resolved through conference.

Whereas the current processes require formal submissions, the giving and testing of witness testimony through cross examination, it is unclear whether such check and balance mechanisms will be observed in the proposed FWA process.

This also has implications for any subsequent appeal and the basis upon which an appeal can be made.

Recommendation: *FWA ensure:*

- *senior independent commissioners (or such status) within FWA deal with unfair dismissal ("UFD") matters;*
- *employers are able to elect to have UFD matters dealt with in a more formal fact-finding process (i.e. formal arbitration vs "coffee table" arbitration);*
- *UFD processes are transparent and open;*
- *UFD process generate written decisions;*
- *appropriate filing fees are imposed on employees, and these fees are sufficient to discourage speculative claims;*
- *other procedural/substantive provisions are retained, including:*
  - *Automatic discontinuation of a matter where the applicant does not attend.*
  - *Employees cannot lodge multiple claims (e.g. with anti-discrimination tribunals).*
  - *Employees cannot lodge frivolous, vexatious applications or those lacking in substance.*
  - *Costs to be awarded against a party who acts unreasonably and allows costs to be incurred on the other side.*

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Clause 400 Appeal rights

FWA can only grant permission to appeal from a decision of the FWA if it considers it is in the public interest to do so but in so doing cannot take clause 402(2) - general appeal right into consideration.

Clause 400(2) provides that to the extent there is an appeal on a question of fact, it must be considered "a significant error of fact".

As a consequence of the drafting and the interrelationship with clause 604, it appears the public interest test to be applied by the FWA for unfair dismissals has been circumscribed.

To avoid doubt the clause is amended to ensure the public interest test is construed widely [similar to Section 120(2) of the Act], and in particular cannot be interpreted as removing the grounds of an error of law or denial of due process and natural justice.

The requirement for clarifying clause 400 is strengthened in light of a move towards a less formal and more inquisitorial process, where the conventional procedural and substantive checks and balance may not apply.

Recommendation: The public interest test remains an unqualified ground for appeal from FWA decisions in the first instance similar to the current provision i.e. Section 120(2) – application of such a clause is to necessarily include: grounds for appeal of law, fact and denial of due process/natural justice.

Clause 409 Employee claim action (Industrial action)

Consistent with the objects of enterprise bargaining - it is only employer and employee matters pertaining that potentially deliver enterprise productivity benefits. Although CCI's view is that GFB and industrial action are fundamentally inconsistent, if protected industrial action remains allowed in the FWB 2008 whilst there is GFB taking place, protected industrial action must only relate to clause 172(1)(a) - matters pertaining to the employer and employee relationship. No other matters, permitted or otherwise, should be the subject of industrial action.

Recommendation: *Restrict protected industrial action to clause 172(1)(a) matters only.*

Clause 409(1) "..or are reasonably believed to be about, permitted matters.."

Clause 409(1) refers to the "*..supporting or advancing of claims in relation to an agreement..*". It therefore follows that industrial action if it is to be determined as protected must necessarily be directly in relation to these "claims". It defies logic

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that industrial action becomes protected on the basis the employees/employee organisation "reasonably believes" such action is about permitted matters.

CCI is of the view that the incorporation of: *"..or are reasonably believed to be about, permitted matters.."* will promote the taking of (purported) protected industrial action and extend arguments in justification for such actions by employee organisations.

Recommendation: *Delete "..or are reasonably believed to be about, permitted matters.." from clause 409(1)(a)*

Clause 423 FWA may suspend or terminate protected industrial action—significant economic harm etc.

Clause 423(2) and (3)

Clause 423 contemplates three types of action.

1. Clause 423(2) - Action by employees / unions in support of claims. To suspend or terminate this protected industrial action, FWA must be satisfied that it is causing or threatening significant economic harm to both the employer and at least some of the employees. That is, it is not sufficient for the harm to be confined to the employer.

2. Clause 423(3)(a) – action taken by employees/union in response to action by employer. FWA must be satisfied that the employees'/union's own industrial action is causing or threatening harm to one or more of the employees - no consideration of any harm to the employer.

3. Clause 423(3)(b) - action being taken by an employer in response to industrial action by employees/union. FWA must be convinced the employer's action - in response to the action of the employees - is causing or threatening significant economic harm to one or more employees.

In summary, it seems that if the employees/union causes significant economic harm to the employer, the employer has to just grin and bear it. But if the employer retaliates and the employees begin to suffer, FWA can step in and call the fight off.

It is self evident that effective industrial action is going to cause or threaten economic harm to varying degrees – actions like wearing black arm bands or T shirts with slogans on them fall outside the definition of 'industrial action'.

The requirement therefore that industrial action must be causing economic harm before FWA can act seems unnecessary. As it stands, FWA is only going to exercise this power in circumstances where employees are suffering or threatened

with significant economic harm and cannot do anything in situations where an employer is threatened or suffering significant economic harm but employees are not affected to the same extent.

If FWA's power to terminate a bargaining period is not legislated in a balanced way it is therefore incapable of being applied in an even handed fashion and should be completely removed.

Recommendation: *CCI is of the view any form of industrial action (threatened or otherwise) and howsoever defined, is fundamentally inconsistent with GFB.*

Accordingly whilst GFB is in place and the requirements are being met, there should be a prohibition on any industrial action, threatened or otherwise.

Alternatively, amend clauses 423(2) and (3) to ensure there is a balanced consideration of both employer and employee interests by FWA – in particular, any action taken by employees/employee organisation that is causing significant economic harm to the employer is sufficient grounds for the termination of industrial action.

Or delete clauses 423 (2) and (3), noting that in order to exercise the power to terminate a bargaining period, FWA still needs to be satisfied the industrial action has been engaged in for a protracted period and the dispute cannot be resolved in the reasonably foreseeable future [clause 423(6)].

Corresponding amendments to clause 423(4) will then be required to reflect the changes to clauses 423(2) and (3).

Recommendation: *Delete clause 423(4) (e).*

Clause 431 Ministerial declaration terminating industrial action

FWB 2008 gives FWA the power to terminate industrial action and in so determining is required to give on the record reasons; prima facie the process and rationale for the determination is transparent.

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Currently any person, including the Minister, may make application for the termination of industrial action, whether directly or indirectly affected.[35] Clause 424(2) of the FWB 2008 similarly enables the Minister to make application.

Establishing a power for the Minister to make a declaration under clause 431ff – terminating industrial action, especially as it fails to require procedural and substantive transparency of the Minister, seems inconsistent with the distinct and separate functions of the Minister from the FWA.

This power also creates yet another opportunity for FWA to become involved in determining substantive matters at issue; a facility that is appropriately currently not available. CCI reiterates where industrial action is terminated then the parties are to recommence GFB, with or without facilitating orders from FWA. Within the context of enterprise bargaining within the GFB framework, no party is obliged to make concessions or come to an agreement.

Accordingly, another opportunity for FWA determination of substantive matters at issue is opposed.

Recommendation: *Remove clauses 431 to 434 - There is no necessity for this provision. FWA should be properly equipped to deal with this matter*

In the alternate require Minister to provide written reasons for decision only after having given all affected parties an opportunity to be heard, with an ability for the determination to be appealed.

Chapter 3, Part 3-3, Division 9—Payments relating to periods of industrial action

The FWB 2008 weakens the prohibitions on payment during the taking of protected industrial action and therefore lessens the disincentives.

CCI is of the view that whether the industrial action is a full or partial ban, there should remain a blanket prohibition on payment.

The permitting of full payment in circumstances of partial work bans by individual employees unless the employer provides the required notice [clause 471] is likely to promote unintended consequences, as follows:

- Disproportionate assessment or inquisition in to what each employee is doing or not doing, thereby exacerbating tensions and conflict; and

[35] *Workplace Relations Act 1996*, section 496(4).

- Creating another FWA assessment process about proportionate pay reductions potentially detracting from addressing the industrial action at first instance.

Recommendation: *Amend FWB 2008 to retain the blanket prohibition on any payments to employees whilst there is protected industrial action.*

Chapter 3, Part 3-4—Right of entry

The Government stated in its FWF policy it will *"maintain the existing right of entry rules."*[36] This requires the retention of all provisions of the Act in Part 15, including:

- Issuing of permits to fit and proper persons only;
- Requirement to show permits if required;
- Requirement to give notice prior to entry;
- Revoking of permits where the FWA determines the permit holder is no longer a fit and proper person;
- Entry is confined to suspected breaches of the Act or award or industrial instrument applicable to the employee or for discussions with members or potential members of an employee organisation; and
- Discussions with members or potential members of an employee organisation can only take place during legitimate break periods.

CCI supports the full retention of the current right of entry (ROE) provisions in the Act.

Clause 481 Entry to investigate suspected contravention (ROE)

Clause 481(1) provides a ROE to a permit holder to investigate a suspected contravention of the FWB 2008 etc relating to a member of the permit holder's organisation.

Clause 481(3) places on the permit holder the burden of proof that the suspicion of a contravention is reasonable - there is however no explicit requirement on the

[36] Above n1, page 23.

permit holder to provide proof there is a member of the permit holder's organisation to which the alleged contravention relates.

It is also not uncommon for one or more employee organisations to have coverage over a group of employees.

To prevent confusion and unwarranted interference of the employer's business, a permit holder must be required to provide verifiable evidence there is a member of the permit holder's organisation on site.

Recommendation: *Clause 481(3) must also explicitly require the permit holder to provide verifiable evidence that there is a member of the permit holder's organisation in the workplace.*

Clause 482 Rights that may be exercised while on premises

Clause 482(1)(c) allows the permit holder to inspect and make copies of records alleged to be relevant to the suspected breach, including those records of employees who are not members of the employee organisation.

Clause 504 – Unauthorised use or disclosure of employee records refers and seeks to rely on the National Privacy Principle 2 to ensure such records are not abused. The failsafe way to ensure there can be no breach by an employee organisation of use or disclosure of an employee who is not a member is to prevent disclosure of it at first instance.

Employees who choose not to be a member of an employee organisation should not have any personal and private information disclosed to an employee organisation or otherwise have that information held by the employer at risk of being provided to an employee organisation.

Recommendation: *The FWB 2008 requires amendment to prohibit the inspection and copying of the records of any non member of the permit holder's organisation.*

Clause 482(1)(c)

In the Explanatory Memorandum it is not intended to allow the permit holder to engage in a "fishing expedition", instead it is to allow the verification or otherwise of the suspected contravention.[37]

[37] Above n27, paragraph 1923.

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Further to clause 481(3), the employer to ensure compliance with clause 482(1)(c) – i.e. employer to allow inspecting/copying records etc - must be provided with adequate and relevant information about the suspected contravention and to the employees it affects. To ensure, however, the burden of proof as required in clause 481(3) is enforceable, such a requirement needs to be replicated in 482(1)(c).

Recommendation: *Clause 482(1)(c) is amended to ensure the affected employer or occupier is protected from allegations of a contravention where the permit holder fails to meet the burden of proof either about the suspected contravention or the existence of a member of the permit holder's organisation in the workplace.*

Clause 482(1)(c) also requires amendment that the purposes of inspection/copying is for verification only not for fishing expeditions and the similar vexatious activities

Clause 483 Later access to record or document

Clause 482(1)(c) allows the permit holder to inspect and make copies of records alleged to be relevant to the suspected breach, including non employee organisation records.

Were there to be a later access under clause 483, such access also should not involve the records of any non member of the permit holder's organisation.

Recommendation: The FWB 2008 requires amendment to prohibit the inspection and copying of the records of any non member of the permit holder's organisation as a result of "later access".

Clause 484 Entry to hold discussions

The issue relates to the potential of multiple unions accessing the same employer to conduct meetings on site.

In the past an employee organisation could only access a site to hold discussions if it was party to an award or agreement that covered work on that site. This limited the number of employee organisations accessing the site.

Under the FWB 2008, the boundary is set by the constitutional coverage of the employee organisation. Given there are overlapping constitutional rules, a potential exists for a single employer required to allow access by several employee organisations to the same group of employees. This is likely to cause unnecessary disruption in the workplace that may exacerbate any pre existing demarcation disputes.

Accordingly, where an agreement is binding on the employer, the employer is given a legislative right to apply to FWA for determination the employee organisation party to the agreement has the right to conduct meetings during meals breaks to the exclusion of all other employee organisations.

The rationale for this is proposal is to prevent:

- unnecessary disruption and the potential loss of productivity where unions have overlapping employee coverage; and
- demarcation disputes from occurring with employers where there is an established relationship with a union through an agreement.

Without this provision, employers will potentially be exposed to disruption and "turf war" mentality in industries that now enjoy stable and 'settled' relationships.

Recommendation: *An employer has the right to apply to FWA for determination that the employee organisation party to the agreement has the right to conduct meetings during meals breaks to the exclusion of all other employee organisations.*

Clause 593 Hearings

In the Explanatory Memorandum it states the FWA are still required to operate in accordance with the principles of natural justice,[38] although there is no reference to operate in accordance with "due process".

In light of the express objective by FWA to discourage "*overly formal and adversarial processes*" and a shift to a more 'inquisitorial" approach it remains desirable that a general framework of principles are explicitly mandated.[39]

Recommendation: *Amend clause 593 to require adherence to the principles of natural justice and due process.*

[38] Above n27, paragraph 2281.
[39] Ibid.

Clause 598 Decisions of FWA

Clause 598(1) refers to "decisions" of the FWA "however described" and in the Note that follows provides some examples of FWA "decisions".

The illustrative examples, it may be argued, typify or characterise what is meant by a "*decision or however described"*.

Recommendation: *To ensure clarity and unambiguous application it is suggested the term "determination", which prima facie should come within a definition of "decision", is expressly included in the definition of "decision" in the FWB 2008.*

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ATTACHMENT A – Potential Union Coverage in the Construction Industry							
	Australian Workers' Union (**AWU**)	Construction, Forestry, Mining and Energy Union (**CFMEU**)	Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (**AMWU**)	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (**CEPU**)	Transport Workers' Union of Australia (**TWU**)	The Australian Institute of Marine And Power Engineers **(AIMPE)**	The Association of Professional Engineers, Scientists and Managers, Australia (**APESMA**)
Aluminium							
Arc Lamp Trimmers							
Armature Winders							
Battery Fitters							
Cable Joiners							
Carpenters and Joiners							
Clerical Staff (relevant industry)							
Coal Industry							
Coke Industry							
Construction Workers							
Copper							
Crane Drivers							
Dynamo, Motor and Switchboard Attendants							
Electrical Crane Attendants							
Electrical Fitters							
Electrical Labourers							
Electrical Mechanics							
Engine Drivers							

Engineers							
Excavator Drivers							
Explosives							
Firemen							
Forklift Drivers							
Garage Attendants, Greasers, Tyre Fitters							
Gas Industry							
Greasers, cleaners, trimmers							
Linesmen							
Metaliferous Mining							
Minerals and Ores							
Mobile Crane Drivers							
Motor Drivers							
Oil and Hydrocarbons							
Pile Drivers							
Pilots							
Printing and Packaging							
Pump Attendants							
Radio Workers							
Scientists							
Surveyors							
Technical and Supervisory							
Tow Motor Drivers							
Truck Drivers							