CCIWA SUBMISSION

Senate Education and Employment Legislation Committee

Inquiry into the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015* (Cth)

December 2015

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1. About CCIWA

1.1 The Chamber of Commerce and Industry WA (**CCIWA**) is the leading business association in Western Australia with approximately 9000 members.

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

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

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

2. Overview of CCIWA's Position

2.1 CCIWA welcomes the opportunity to provide a written submission to the Senate Education and Employment Legislation Committee regarding its inquiry into the *Fair Work Amendment (Remaining 2014 Measures) Bill 2014* (**Bill**).

2.2 A number of the amendments proposed by the Bill respond to several of the outstanding recommendations made by the Fair Work Review Expert Panel (**Expert Panel**) in its 2012 report *"Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation"*.[1] The report was the product of a post implementation review of the *Fair Work Act 2009 (Cth)* (**FW Act**), commissioned by the then Labor Government.

2.3 This Bill seeks to rectify parts of the FW Act which the Expert Panel identified as not operating as was intended or not operating effectively. These include:

a) payment of annual leave loading on termination;

b) accrual of annual leave during workers compensation;

c) limiting transfer of business provisions where an employee voluntarily moves between associated entities;

d) amendments to Individual Flexibility Arrangements; and

e) providing the Fair Work Commission (**FWC**) with greater discretion on how it deals with unfair dismissal applications.

2.4 We believe that it is important for Parliament to ensure that its legislation operates as it was intended to do and that any deficiencies are addressed. There should be bipartisan support to address those deficiencies highlighted in the Expert Panel's report.

2.5 There is a particular onus on members of the Australian Labor party to ensure that the recommendations of a review that it commissioned, into legislation it drafted, are enacted. Any other approach can only be considered hypocritical.

[1] Department of Employment (15 June 2012) *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation*.

2.6 The remainder of the Bill seeks to give effect to some of the election promises outlined in the *"Coalition's Policy to Improve the Fair Work Laws"*. These amendments are modest reforms to the FW Act that are aimed at providing a more balanced right of entry scheme. This effectively implements the broken promise made by Labor in the lead up to the 2007 election not to change these provisions.

2.1 CCIWA supports this Bill. The proposed amendments address issues associated with the operation of the FW Act and do not impinge on the intended rights or protections of employees.

3. Payment for Annual Leave

3.1 Annual leave loading is typically paid to compensate employees for the loss of overtime and other penalties whilst on annual leave.

3.2 Whilst originally applicable to the manufacturing industry, the entitlement spread to most awards, including industries where overtime and other penalties were not typically paid. This resulted in many employees being paid more when they took annual leave than they would normally earn.

3.3 Historically, a common feature of many annual leave loading provisions is that the loading is not payable on termination.

3.4 The Expert Panel identified that this long standing practice was potentially disrupted by the wording adopted by s 90(2) of the FW Act, which provides that annual leave is to be paid at the amount the employee would have been paid had they taken the leave. Consequently, the Expert Panel recommended that the FW Act should be amended "*to provide that annual leave loading is not payable on termination of employment unless a modern award or enterprise agreement expressly provides to that effect.*"[2]

3.5 The Expert Panel's concern has been realised, with the Federal Court recently concluding that, contrary to historical precedent, the current wording of the FW Act does in fact disrupt the provisions of the modern awards.[3]

3.6 However, there is nothing in the passage of the FW Act that suggests the then Labor Government intended to depart from this precedent. This is supported by the absence of any objection from either unions or the then Government on this issue during the establishment of the modern awards. If the Government had intended to change the status quo, this would have been made clear during this process.[4]

3.7 The current provisions of the FW Act clearly had an unintended consequence concerning the payment of annual leave and we therefore believe that it is incumbent on the Parliament to correct this error.

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[2] Department of Employment (15 June 2012) *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation*. P100

[3] *Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining and Energy Union [2015] FCAFC 100 (23 July 2015)*

[4] It should be noted that whilst the award modernisation process took place prior to the FW Act coming into operation, the Fair Work Commission and relevant parties were aware of the proposed legislation and it was relied upon in making the modern awards.

3.8 The proposed amendment achieves this effect and therefore should be supported.

4. Taking or Accruing Annual Leave while receiving Workers' Compensation

4.1 As part of its review, the Expert Panel recommended that s 130 of the FW Act be amended to make it clear that employees do not accrue annual leave while absent from work and in receipt of workers' compensation payments.

4.2 They identified that the relevant provision is not clearly worded, creating confusion for employers and employees as well as an uneven playing field for employees.[5]

4.3 Section 130(1) of the FW Act establishes a general rule that employees are not entitled to take or accrue leave whilst receiving workers' compensation. The confusion arises out of s 130(2), which provides that the FW Act does not prevent an employee from taking or accruing leave that is permitted by a relevant workers' compensation law.

4.4 Section 130(2) is intended to act as a limited exception. However, the unclear application of the provision creates confusion regarding the interaction between the FW Act and relevant state or territory workers compensation legislation.

4.5 A recent Federal Court ruling has determined that an employee in NSW accrues annual leave during workers' compensation despite the relevant workers' compensation legislation not specifically permitting annual leave to accrue or be taken.[6] This conclusion was reached largely because the relevant workers' compensation legislation did not *prevent* leave from being taken, with the Court construing that in the absence of any clear prohibition, the legislation should be interpreted as permitting leave to accrue.

4.6 With respect, this logic is akin to saying that because you have not told your children not to jump off the roof, that you have then given them permission to do so.

4.7 This decision has ramifications for other jurisdictions which have similarly worded provisions in their respective workers' compensation legislation. This includes Western Australia.

4.8 Given that s 130(2) is intended as a limited exemption, we support the proposed amendment to remove this provision, allowing for the general rule to apply. This brings the treatment of a period of workers' compensation in line with other periods of unpaid leave,[7] such as parental leave, during which paid leave does not accrue.

5. Transfer of Business

5.1 The transfer of business provisions are intended to provide for the enterprise agreement or award applicable to a group of employees to transfer across to a new employer where the business is sold or services are outsourced.

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[5] Department of Employment (15 June 2012) *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation*. P88

[6] *Anglican Care v NSW Nurses and Midwives' Association [2015] FCAFC 81 (5 June 2015)*

[7] It is important to note that during periods of workers compensation, it is not wages that are paid, rather compensation payments provided by a third party.

5.2 They also apply where employees are transferred from one organisation to another associated entity, such as part of a corporate restructure. However, they are designed only to apply where the transfer occurs as a result of a decision made by the employer.

5.3 A concern identified in the Expert Panel's report is that these provisions can also apply where an employee voluntary elects to move between associated businesses. The Expert Panel concluded that:

> *"… it does appear to the Panel that when employees voluntarily seek to transfer from one associated entity to another, they should be employed under the terms and conditions to which they would be subject as an employee of the 'new employer'".*[8]

5.4 There are a number of situations in which an employee may elect to voluntarily move between associated businesses, such as an employee applying for a different job with a related business (e.g. a Jetstar employee applying for a similar role at Qantas).[9]

5.5 The Expert Panel identified that the transfer of business provisions should be amended to make it clear that when employees, on their own initiative, seek to transfer to a related entity of their current employer they will be subject to the terms and conditions provided by the new employer.

5.6 We believe that the proposed amendment to the FW Act achieves this purpose and will correct the unintended consequence of the current legislation. It will also make it easier for employees to seek out new employment opportunities within related businesses.[10]

6. FWC Hearing and Conferences

6.1 Last year the FWC dealt with over 14,600 unfair dismissal claims, constituting the major part of its workload.[11]

6.2 Currently, the work of the FWC is frequently frustrated by frivolous applications, or applicants who fail to attend hearings or comply with directions.

6.3 Not only does this result in a significant cost to the taxpayer in wasted FWC resources, it also imposes significant additional cost on the respondents in defending claims.

6.4 Section 587 of the FW Act currently allows the FWC to dismiss an application where:

a) the applicant has unreasonably failed to:
   (i) attend a conference or hearing;
   (ii) comply with a direction of the FWC;
   (iii) discontinue an application after a settlement agreement has concluded; or

b) the application:
   (i) is not made in accordance with the FW Act;
   (ii) is frivolous or vexatious; or
   (iii) has no reasonable prospect of success.

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[8] *Department of Employment (15 June 2012) Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation. p206*

[9] The above example was utilised in Expert Panel's report.

[10] The current complexity and confusion regarding the transfer of business provisions means that some employers are reluctant to employ staff employed by a related business.

[11] *Fair Work Commission Annual Report 2014-15*, p186

6.5 These provisions are used sparingly by the FWC. In situations where an applicant fails to attend a hearing or comply with directions, the FWC provides them with significant leeway by relisting conferences or extending deadlines, before considering the applicant's actions as unreasonable. Likewise, the FWC has taken a narrow view in considering whether a claim is frivolous or without reasonable prospect of success, meaning that it will hear a matter even where the prospects of success are remote.

6.6 However, before dismissing a matter on these grounds the FWC is currently required to hold a hearing where the matter is disputed, further contributing to the wasted resources and cost incurred by both the FWC and the respondent.

6.7 This proposed amendment would allow the FWC to exercise its discretion in determining whether or not to hold a hearing before dismissing an application, after taking into account the views of the parties.

6.8 This is in line with the Expert Panel Report recommendations which identified that "*there is merit in expanding the capacity of [FWC] to dismiss applications that are totally lacking in merit, or when an applicant has failed to attend a proceeding, adhere to a settlement or comply with FWA directions.*"[12]

6.9 This amendment will help make the FWC more efficient and allow it to focus its attention on those applications where employees have a genuine claim.

7. Individual Flexibility Arrangement

7.1 Individual Flexibility Arrangements (**IFA's**) are designed to allow the operation of a modern award or enterprise agreement to be varied to meet the genuine needs of an individual employee and their employer.

7.2 In establishing these provisions the then Labor Government identified that they *"will assist employees in balancing their work and family responsibilities and improve retention and participation of employees in the workforce."*[13]

7.3 To illustrate this point the explanatory memorandum provided the example of an employee (Josh) who wanted to start and finish work early one day a week in order to coach the junior footy team. The early start would attract a penalty rate making the option unviable for the employer. The example then goes on to outline how Josh and his employer could use an IFA to allow him to start early on that day and be paid his normal rate because the benefit he placed on being able to leave early was greater than penalty rate that would otherwise have been payable.[14]

7.4 Despite the potential benefits of IFAs in helping employees achieve greater flexibility in their employment, the take up has been low. Some of the reasons for this include the uncertainty about how the Better Off Overall Test (**BOOT**) is applied to non-monetary benefits (such as the above example) and the ease with which the arrangement can be terminated.

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[12] Department of Employment (15 June 2012) *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation.* p229.

[13] Parliament of the Commonwealth of Australia (2008) *Fair Work Bill 2008 – Explanatory Memorandum*, pxxviii.

[14] Parliament of the Commonwealth of Australia (2008) Fair Work Bill 2008 – Explanatory Memorandum, p137.

7.5 These concerns were identified in the Expert Panel's report, with the amendments proposed by the Bill being substantially based on their recommendations.

7.6 We believe that reforming the IFA system will benefit individual employees, particularly those seeking to balance family and other commitments around their work.

7.7 In particular, we believe that:

a) clearly identifying that non-monetary entitlements can be considered in applying the BOOT will remove the current uncertainty and will provide employees, such as Josh, with greater opportunity to enter into arrangements which suit their family and other commitments;

b) having an IFA include an employee statement identifying why he/she believes the arrangement results in them being better off will reduce some of the risk employers face in agreeing to such requests. The current uncertainty discourages many employers from entering into an IFA, ultimately preventing employees from obtaining greater flexibility. The clarification that an employer does not breach the FW Act if they reasonably believed the IFA requirements were met will also give employers greater comfort in considering these requests;

c) a longer notice period for terminating an IFA under an enterprise agreement provides greater certainty to both employees and employers, giving them additional time to consider alternative arrangements. In the case of Josh, a minimum of 13 weeks' notice would allow him to discuss other options with his employer or find someone to replace him as coach; and

d) removing the ability for an enterprise agreement to restrict what matters can be agreed to in an IFA ensures that an individual employee's rights cannot be curtailed. Under many union negotiated enterprise agreements, flexibility is frequently limited to minor matters, such as when meal breaks can be taken. Under these provisions Josh would not have the option of starting and leaving early. Consequently, he and the children he coaches would be the ones to suffer. We are concerned that attempts to limit the level of flexibility of IFAs are driven by an ideological opposition to individual agreements and are not in the best interest of individual workers.

7.8 In order help ensure the IFAs meet their intended purpose we believe that these amendments should be adopted.

8. Right of Entry

8.1 In the lead up to the 2007 Federal election, Labor stated as part of its industrial relations platform that it would not change the right of entry laws. This pledge was most clearly expressed by the then Deputy Opposition Leader, Julia Gillard, who stated:

> *"I'm happy to do whatever you would like. If you'd like me to pledge to resign, sign a contract in blood, take a polygraph, bet my house on it, give you my mother as a hostage, whatever you'd like ... we will be delivering our policy as we have outlined it."*[15]

8.2 However, contrary to the promises made, the FW Act made significant changes to the right of entry laws, both at its commencement in 2009 and later in 2013 as part of the *Fair Work Amendment Act 2013 (Cth)*.

[15] National Press Club Debate. 8 November 2007.

8.3 The amendments proposed in this Bill largely seek to rectify the broken promises made by Labor.

Frequency of Visits

8.4 In response to concerns about the high number of right of entry visits experienced in some workplaces, the Expert Panel's report recommended that the FWC be provided with *"greater power to resolve disputes about the frequency of visits … in a manner that balances the right of unions to represent their members in a workplace and the right of occupiers and employers to go about their business without undue inconvenience"*.[16]

8.5 It has been the experience of many CCIWA members that unions are exercising right of entry at the same workplace several times a week, largely to sell union membership. This is particularly so in the resources, mining and construction sectors, where the number of visits can be excessive. At the high end of the scale, one project had an average of 56 visits per month and nearly 700 visits for the year. On one day alone, 17 union visits to the site were recorded.

8.6 Excessive visits are costly for employers and unnecessarily disruptive for both the employer and employees.

8.7 The 2013 amendments to the FW Act made a token effort to implement this recommendation by allowing the FWC to resolve disputes about frequency of visits where they unreasonably diverted the employer's critical resources. These provisions were explicitly drafted to prevent employers from making a successful claim by establishing an unattainable hurdle. Consequently, the Expert Panel's recommendation of providing balance between the interests of employers and unions was not achieved.

8.8 The amendments proposed by this Bill implement the Expert Panel's recommendation for a balanced approach to resolving disputes about excessive numbers of right of entry visits and installs trust in the FWC to effectively fulfil its role in resolving disputes.

Location of Meetings

8.9 In 2013 the previous Labor Government amended the rules regarding where unions could meet for discussions with employees, setting the lunch room as the default location.

8.10 This has caused significant concern for many non-union employees who have reported feeling bullied or harassed by union officials into joining the union. As a result, many non-union employees feel compelled to have their lunch break outside.

8.11 In one extreme case a CFMEU official has been accused of locking the door to the crib room with a padlock, throwing workers' lunches onto the ground and declaring that *"those sheds were won by f***en unionists? Where do you think people used to sit; under a f***en tree. You can go p**s in a bucket for all I care"*.[17]

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[16] Department of Employment (15 June 2012) *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation.* p195.

[17] Fair Work Building and Construction (13 February 2015) Media Statement - *CFMEU official allegedly locks non-union workers out of smoko shed and throws out their lunch*.

8.12 Lunch breaks are intended to allow employees to rest and enjoy their lunch before recommencing their shift.

8.13 The proposed amendments to this Bill will allow right of entry to be held in a particular room that is fit for purpose and does not intimidate or discourage employees from meeting with the union. This will continue to allow those employees who wish to meet with union officials the freedom to do so, while allowing those who do not, the ability to enjoy their lunch break.

Providing Transport and Accommodation

8.14 The 2013 amendments to the FW Act also introduced new provisions that required employers to provide union officials with transport and accommodation for access to remote sites.

8.15 The need to include these provisions is questionable given that very few requests have been made. The low number of requests is particularly noticeable in the Western Australian context given the size of the State.

8.16 Given the complexity of these provisions when compared against its limited use, CCIWA supports the proposed amendment.

Basis for Entry

8.17 The Bill also seeks to provide that right of entry only applies to a union official who is a party to an enterprise agreement, or who has been invited by at least one employee.

8.18 These proposed amendments bring the right of entry rules closer to Labor's 2007 commitment not to amend these provisions.

8.19 In particular, these amendments will ensure that there is some existing relationship or connection between the employees and the unions. CCIWA believes that the objectives of the right of entry provisions are best served where there is an established connection between the union and employees to facilitate discussion about matters relevant to the workplace.