CCIWA SUBMISSION

Senate Education and Employment Legislation Committee

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

APRIL 2014

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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 and with over 8,500 and is the second largest organisation of its kind in Australia..

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

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

1.4 Approximately 70 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 CCI's Position

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

2.2 The Bill essentially seeks to give effect to a number of election promises outlined in the *"Coalition's Policy to Improve the Fair Work Laws"* (**Coalition's Policy**). Further, in the Details-Stage Regulation Impact Statement for the Fair Work Amendments (DS RIS), it is explained that these amendments are the *"first round of measures to implement the Policy".*

2.3 The Bill also responds to several of the outstanding recommendations made by the Fair Work Review Expert Panel in the report entitled *"Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation"*, dated 15 June 2012 (**Expert Panel Report**).

2.4 CCIWA broadly supports the submissions made by the Australian Chamber of Commerce and Industry (**ACCI**) to this committee and would like to take this opportunity to raise further additional points which are relevant to CCIWA's members with respect to:

a) 28 day unilateral termination for IFAs;

b) union coverage for greenfield agreements;

c) protected action ballot orders; and

d) right of entry.

2.5 CCIWA would also like to commend the Government on taking the first steps towards creating a more balanced industrial relations framework. CCIWA is of the view that further reform is necessary to help promote a flexible industrial relations system that promotes productive workplaces whilst providing appropriate protections for employees.

3. Schedule 1, Part 4 – Individual Flexibility Agreements

28 Days Unilateral Notice

3.1 The Bill also seeks to amend the *Fair Work Act 2009* (**FW Act**) to provide that if an Individual Flexibility Agreement (**IFA**) is made under an enterprise agreement flexibility term but it does not meet the requirements under section 203 of the FW Act, the IFA may be terminated by:

a) unilateral, written notice of termination of not more than 28 days;

b) at any time by agreement in writing between the parties; or

c) any other means of termination provided for under the term.

3.2 CCIWA also notes that under section 202(4) of the FW Act if an enterprise agreement does not include a flexibility term then the model flexibility term is taken to be a term of the agreement. Notably, item 5(a) of the model flexibility term contained in Schedule 2.2 of the *Fair Work Regulations 2009* (Cth) still provides that the written notice period for unilateral termination of an IFA is not more than 28 days.

3.3 CCIWA supports the move of the adoption of a 13 week notice period for the termination of an IFA, in that it provides greater certainty to both the employee and employer who have entered into the arrangement. We are therefore of the view that this period should apply to all IFA's.

3.4 The establishment of different termination periods depending upon how the provisions allowing for the IFA to come into operation were created will cause unnecessary confusion to both employers and employees.

3.5 Furthermore, it is not uncommon for enterprise agreements to be deliberately silent on flexibility arrangements due to neither party being able to agree on the terms of the clause. In these circumstances a deliberate decision is made to leave the agreement silent on this matter on the understanding that the model provisions will apply. CCIWA does not believe that allowing shorter notice period to apply in these circumstances will promote flexibility for either employees or employers.

4. Schedule 1, Part 5 - Greenfields Agreements

Union Coverage

4.1 The Bill also provides that where the FWC approves a single-enterprise greenfields agreement under proposed new section 182(4) of the FW Act, the agreement covers each employee organisation that was a bargaining representative for the agreement, despite their lack of consent. Accordingly, such unions will have right of entry privileges under the right of entry changes proposed in the Bill.

4.2 We submit that this amendment will provide unions with little incentive to reach agreement.

4.3 This is particularly so when considered in light of the proposed requirement that greenfields agreements must also provide for prevailing terms and conditions applicable to the industry.

4.4 A guarantee that terms and conditions will be in line with prevailing standards for the industry and no impact on right of entry means that there is little benefit for unions to enter into greenfields agreements unless the terms are superior to existing agreements, which in the current economic climate is unsustainable.

4.5 CCIWA is of the view that in the case where unions are made a party to an agreement by arbitration, they should not gain automatic right of entry privileges. By allowing unions to become a party to the agreement through arbitration and automatically affording the union right of entry privileges, further removes a union's incentive to bargain. Right of entry privileges should only be afforded to a union party that is actively involved in the bargaining process and consents to the agreement.

5. Schedule 1, Part 7 – Protected Action Ballot

5.1 CCIWA supports the proposed amendments to protected action ballot orders to prevent strike first, talk later approach to bargaining; although CCIWA does agree with ACCI's submission that more could be done to reduce the ease by which industrial action can be taken.

5.2 The proposed amendments in the Bill seek to:

a) provide that an application for a protected action ballot order (**PABO**) cannot be made unless there has been a 'notification time' under section 173(2) of the FW Act[1] in relation to the proposed enterprise agreement; and

b) presumably provides that a disagreement over the scope of a proposed enterprise agreement does not, of itself, prevent the taking of industrial action.[2] However, we note that the exact intention of this proposed amendment is currently unclear. The Bill purports to insert a legislative note into the FW Act which provides that:

> *"Protected industrial action cannot be taken until after bargaining has commenced (including where the scope of the proposed enterprise agreement is the only matter in dispute)."*

5.3 CCIWA interprets the provision to mean that bargaining will not be considered to have commenced just because there is disagreement over the scope of the agreement. This would include, for example, where a scope order has been sought but not granted.

5.4 However, the Bill's Explanatory Memorandum suggests a different interpretation by providing the following:

> *"The Fair Work Review Panel further recommended that the Fair Work Act expressly provide that bargaining has commenced for this purpose despite any disagreement over the scope of the agreement (see Stuartholme v Independent Education Union [2010] FWAFB 1714 and MSS Security v LHMU [2010] FWAFB 6519) (recommendation 31). The amendment implements this recommendation by including a legislative note to make clear that disagreement over the scope of a proposed enterprise agreement does not, of itself, prevent the taking of protected industrial action*."[3]

[1] This includes when the employer agrees to bargain, or initiates bargaining, for the agreement; a majority support determination comes into operation; a scope order comes into operation or a low paid authorisation comes into operation

[2] See Schedule 1, Part 7 of the Bill

[3] See [146] on p.94 of the Explanatory Memorandum

These amendments largely reflect recommendation 31 of the Expert Panel Report.[4]

5.5 Both the taking of, and the threat of, industrial action has a detrimental impact upon employers, employees and the wider community. We are therefore of the opinion that industrial action should not be available where alternative mechanisms exist for resolving the dispute.

5.6 We therefore submit that where the scope of the agreement is the basis for taking industrial action then the appropriate course of action is for the parties to seek a Scope Order and that the Bill should make it clear that industrial action is not available to advance a dispute over the scope of the agreement.

6. Schedule 1, Part 8 – Right of Entry

Narrowing Circumstances of Entry

6.1 CCIWA generally supports the amendments proposed in the Bill, which seek to narrow the circumstances for right of entry for holding discussions, to circumstances in which:

a) the permit holder's organisation is covered by the enterprise agreement that applies to work performed on the premises; or

b) either an enterprise agreement applies to work performed on the premises, but the agreement does not cover the permit holder's organisation, or no enterprise agreement applies to the work performed on the premises and a member or prospective member who performs work on the premises has invited an organisation which is entitled to represent their industrial interests to send a representative to the premises to hold discussions.

6.2 However, it is CCIWA's view that the proposed circumstances of entry should be narrowed further which truly aligns with the Coalition's Policy.

6.3 Prior to the FW Act, unions could only exercise right of entry for the purposes of holding discussions if they were named as a party to an industrial instrument which applied at the workplace. Following the introduction of the FW Act, the right of entry provisions were expanded upon so that a union could exercise right of entry provided it was eligible to represent relevant employees under the union's eligibility rules. The Expert Panel Report explained the impact of the expansion of the right of entry rights in the FW Act as follows:

> *"The change requires employers who were previously able to exclude many, or all, unions from their workplace due to the nature of the industrial instrument that applied, to facilitate a relevant union representing their employees."*

6.4 In order for employers to facilitate these additional union visits, employers have been required to invest further time (and resources) and incur associated costs.

6.5 The Bill does not reinstate the right of entry position that applied in 2007. Instead, the Bill proposes a completely new position whereby unions which represent a minority of workers will still retain right of entry privileges.

[4] See p. 177 of the Review Panel Report

6.6 CCIWA provides conditional support for this amendment. Whilst CCIWA acknowledges that the 2007 position cannot be completely reinstated due to the fact that unions are no longer named parties in awards, we are of the view that further amendments should be made to the FW Act to more closely reflect the 2007 right of entry position.

Submitted on behalf of the

Chamber of Commerce and Industry of WA

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Paul Moss

Manager – Employee Relations

24 April 2014