SENATE EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS COMMITTEE

Inquiry

Fair Work Amendment (State Referrals and Other Measures) Bill 2009

ACCI SUBMISSION

NOVEMBER 2009

LEADING AUSTRALIAN BUSINESS

ACCI – LEADING AUSTRALIAN BUSINESS

ACCI has been the peak council of Australian business associations for 105 years and traces its heritage back to Australia's first chamber of commerce in 1826.

Our motto is "Leading Australian Business."

We are also the ongoing amalgamation of the nation's leading federal business organisations - Australian Chamber of Commerce, the Associated Chamber of Manufactures of Australia, the Australian Council of Employers Federations and the Confederation of Australian Industry.

Membership of ACCI is made up of the State and Territory Chambers of Commerce and Industry together with the major national industry associations.

Through our membership, ACCI represents over 350,000 businesses nation-wide, including over 280,000 enterprises employing less than 20 people, over 55,000 enterprises employing between 20-100 people and the top 100 companies.

Our employer network employs over 4 million people which makes ACCI the largest and most representative business organisation in Australia.

Our Activities

ACCI takes a leading role in representing the views of Australian business to Government.

Our objective is to ensure that the voice of Australian businesses is heard, whether they are one of the top 100 Australian companies or a small sole trader.

Our specific activities include:

- Representation and advocacy to Governments, parliaments, tribunals and policy makers both domestically and internationally.
- Business representation on a range of statutory and business boards, committees and other fora.

- Representing business in national and international fora including Fair Work Australia, Australian Industrial Relations Commission, Safe Work Australia, International Labour Organisation, International Organisation of Employers, International Chamber of Commerce, the Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development, the Confederation of Asia-Pacific Chambers of Commerce and Industry and the Confederation of Asia-Pacific Employers.

- Research and policy development on issues concerning Australian business.

- The publication of leading business surveys and other information products.

- Providing forums for collective discussion amongst businesses on matters of law and policy affecting commerce and industry.

Publications

A range of publications are available from ACCI, with details of our activities and policies including:

- The ACCI Policy Review; a analysis of major policy issues affecting the Australian economy and business.

- Issue papers commenting on business' views of contemporary policy issues.

- Policies of the Australian Chamber of Commerce and Industry – the annual bound compendium of ACCI's policy platforms.

- The Westpac-ACCI Survey of Industrial Trends - the longest, continuous running private sector survey in Australia. A leading barometer of economic activity and the most important survey of manufacturing industry in Australia.

- The ACCI Survey of Investor Confidence – which gives an analysis of the direction of investment by business in Australia.

- The Commonwealth-ACCI Business Expectations Survey - which aggregates individual surveys by ACCI member organisations and covers firms of all sizes in all States and Territories.

- The ACCI Small Business Survey – which is a survey of small business derived from the Business Expectations Survey data.

- Workplace relations reports and discussion papers, including the ACCI Modern Workplace: Modern Future 2002-2010 Policy Blueprint and the Functioning Federalism and the Case for a National Workplace Relations System and The Economic Case for Workplace Relations Reform Position Papers.

- Occupational health and safety guides and updates, including the National OHS Strategy and the Modern Workplace: Safer Workplace Policy Blueprint.

- Trade reports and discussion papers including the Riding the Chinese Dragon: Opportunities and Challenges for Australia and the World Position Paper.

- Education and training reports and discussion papers including ACCI's Skills for a Nation 2007-2017 Blueprint.

- The ACCI Annual Report providing a summary of major activities and achievements for the previous year.

- The ACCI Taxation Reform Blueprint: A Strategy for the Australian Taxation System 2004–2014.

- The ACCI Manufacturing Sector Position Paper: The Future of Australia's Manufacturing Sector: A Blueprint for Success.

Most of this information, as well as ACCI media releases, parliamentary submissions and reports, is available on our website – www.acci.asn.au.

TABLE OF CONTENTS

1. INTRODUCTION

1. The Australian Chamber of Commerce and Industry (ACCI) welcomes the opportunity to provide a written submission to the Committee's inquiry into the *Fair Work Amendment (State Referrals and Other Measures) Bill 2009* (the Bill).

2. A list of relevant ACCI members appears at the end of this submission.

3. This inquiry follows ACCI and ACCI members' extensive participation in previous Committee inquires, including the:

   a. Inquiry into the Provisions of the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009.[1]

   b. Inquiry into the Fair Work Bill 2008.[2]

   c. Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008.[3]

4. At all times ACCI and its members have attempted to engage constructively each element of the Government's fair work legislation. This has included advocating for appropriate amendments, which moderate some aspects of the above legislation in the interests of Australian employers and the broader Australian economy.

5. ACCI's position on the Bill is summarised as follows. Australian employers:

   a. Strongly support the goal of having one national industrial relations (IR) system and therefore generally supports a broad referral of powers by State Governments to the Commonwealth, subject to appropriate amendments below;

   b. Strongly support referrals of the private, public and local government sectors, which has been the case in Victoria since 1997 (the Victorian model);

[1] https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=1edfc1cf-9c22-4c5c-a246-f89dfe6bc054
[2] https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=26e772b3-634e-40c0-9b1d-0967f8fceaef and https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=d4a31543-b1e0-4773-a097-d0b13f1e2e4e
[3] http://www.aph.gov.au/Senate/committee/eet_ctte/wr_tff08/submissions/sub14.pdf

c. Prefer the Victorian model, as the legal framework to refer powers, as opposed to the model canvassed in the Bill;

d. Strongly oppose any ability for State or Territory Governments to veto future changes to the fair work laws, either directly (ie. through legislation) or indirectly (ie. via any inter-governmental agreement);

e. Strongly oppose conditional referrals, such as the ability for the States to withdraw their "amendment reference" if any subsequent changes to the fair work laws breach the "fundamental workplace relations principles" set out in the Bill. This will only cause unnecessary confusion, complication and threaten the viability of a national system.

f. Reiterate the importance that referral employers should not be prejudiced by moving into the federal system and that transitional provisions are essential;

g. Note that this Bill will not deliver a unified system for the private sector with Western Australia and New South Wales not referring their powers at this stage and therefore retaining their respective State systems.

ABOUT THIS SUBMISSIONS

6. As the Committee is acutely aware, ACCI and its members have made numerous submissions to this Committee in relation to the Government's fair work legislative package.

7. It is important to recall that ACCI did not oppose outright the Government's entire fair work legislative package. Rather it sought to moderate aspects of each piece of legislation to ensure that employers' interests were not prejudiced and that any unintended consequences were addressed earlier rather than later. Whilst some elements of the Bill were amended, many substantive issues remain unresolved.

8. Therefore, ACCI's general support for this Bill should not be taken as an indication that the Australian employer community supports the entire fair work legislative framework. This submission will largely address the mechanism of the referral rather than the content of each State's referral legislation.

9. ACCI notes that the Bill was not scrutinised by the Committee on Industrial Legislation (COIL), which is a sub-committee of the National Workplace Relations Consultative Committee. ACCI and its members have had little time to digest the impact of the Bill on employers and any potential unintended consequences.

10. ACCI is also aware that some ACCI members were not consulted on the detail of the Bill or State referral legislation including the inter-governmental agreements underpinning the referrals.

11. Accordingly, these submissions are made without prejudice to ACCI members' views and ACCI's further consideration of these matters.

2. ACHIEVING A NATIONAL IR SYSTEM

BUSINESS SUPPORTS A NATIONAL IR SYSTEM

12. ACCI supported the Government's pre-election commitment to "*give sole traders, partnerships and companies a uniform industrial relations system.*"[4] As indicated extensively in the explanatory memorandum (EM) to the Bill, ACCI has previously advocated a national system.

13. The first step to achieving a uniform system is the result of the former Coalition Government's *WorkChoices* reforms[5], which utilised the corporations' power as the main Constitutional source of power. The Government's fair work laws are built upon this same foundation.

14. ACCI has been a strong advocate for the Commonwealth to rely upon the corporations' power to build the foundation for a national system. Importantly, the validity of relying upon the corporations' power for regulating the employment relationship was upheld in the seminal High Court decision of *New South Wales v Commonwealth* [2006] HCA 52.

15. ACCI has long supported the use of both corporations' powers in conjunction with s.51 (xxxvii) of the Constitution to achieve a uniform IR system. ACCI's *Modern Workplace: Modern Future Blueprint 2002-2010* laid the foundation for how the Commonwealth and States Governments should progress a unified system.

16. Section 51 (xxxvii) of the Constitution, provides as follows:

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to: ... matters referred by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.

17. Clearly, the States are able to refer the breadth of its plenary powers to the Commonwealth. This includes referring powers to cover the private and public sector workforce. [6] The Victorian Government beginning in 1997 referred broad subject matters to the Commonwealth for both private and public sectors, in reliance of s.51(xxxvii).

[4] *Forward with Fairness: Labor's plan for fairer and more productive Australian workplaces* (April 2007).
[5] It should also be recognised that the corporations' power was first used by the Keating Government in 1993 for the purposes of establishing the enterprise bargaining system.
[6] As recognised by the High Court in High Court in *Re Australian Education Union; Ex parte State of Victoria* ('*AEU Case*') (1995) 184 CLR 188, 224 there are certain Constitutional limitations for State Government officers.

18. In 2005, ACCI reiterated that whilst the goal of achieving a unified system remains as a worthy national building goal, the content of any unified system should take centre stage, noting:

> It is important though that a national system not be seen as the full measure of workplace relations reform that is needed by Australia. At the end of the day, what matters is the scope that employers and employees have to build direct relationships to set wages and employment conditions that are relevant to them in their workplace. The content of any national system will have a greater impact on outcomes for business people and working people than the existence of a national system itself.[7]

19. In response to the Government's pre-election commitments, the April 2008 ACCI Policy Review, "*Can 'New Federalism' Deliver A Durable National IR Framework?*" reiterated what national employers had been saying for many years as to how a national system could be achieved. The Policy Review provides a contemporary summary of ACCI policy for building unified and truly national IR system (Attachment A).

20. The Policy Review also highlighted a significant ACCI National Council resolution (comprising the collective voice of over 35 business organisations across Australia) on how the Government should progress a national system[8]:

> **ACCI National Council:**
>
> Reiterates the value of completing a genuinely national workplace relations system, expanding the application of the Workplace Relations Act 1996 to regulate those (essentially unincorporated) private sector workplaces remaining in State systems.
>
> Calls for a truly national system to be implemented in as unambiguous and comprehensive a manner as possible which will:
>
> - operate simply and comprehensibly as possible for employers.
> - operate nationally on a sustained basis, with no regions or States excluded.
> - develop in discussions with State Governments, employer and union stakeholders but without a State veto over future national reform, policy or legislation.
>
> Notes the Williams' model released by the NSW Government and its contribution to the debate but considers it to be flawed.

[7] ACCI Issues Paper, *Using the 'Corporations Power' to Make Commonwealth Industrial Relations Laws* (March 2005) http://www.acci.asn.au/text_files/issues_papers/Labour_Relations/March%202005%20-%20Using%20the%20Corporations%20Power.pdf

[8] Sydney, 4 April 2008.

> Supports instead an approach based on a constitutional referral of powers (the Victorian model).
>
> Encourages members to communicate with State governments in the terms of this resolution / employers' views on implementing a national system.

21. This remains ACCI's current policy position. Whilst ACCI has consistently argued for a national system in its Issues Paper, "*Functioning Federalism and the Case for a National Workplace Relations System*"[9], which has been quoted extensively in the EM, it did not do so on an unqualified basis.

22. As reiterated in the ACCI Policy Review, from a business perspective, the objective of moving to a single system is not to re-centralise or re-regulate industrial relations. The Issues Paper concluded "*that a unified national system should set a framework and a safety net, beyond which employees and employers are empowered and encouraged to develop mutually beneficial and reinforcing wages and conditions.*"

23. Whilst ACCI considers that the Bill may not be the ideal method for achieving such a unified system, it represents a step forward toward the ultimate goal of achieving a truly national system for all employers across Australia.

COST OF MULTIPLE IR SYSTEMS

24. In the Policy Review, ACCI quantified that the State industrial relations system cost taxpayers at least $122 million per year, and on top of a federal system of at least $312 million per year.[10]

25. Page 12 of the EM indicates that:

> Victoria (a referring State under Division 2A) has referred matters relating to its public and local government (subject to certain exceptions set out in its referral Act). It is anticipated that none of the Division 2B referring State will refer matters relating to public sector employment.

26. ACCI understands that the current status of State Government referral legislation is as follows:

[9] http://www.acci.asn.au/text_files/Discussion%20Papers/Functioning%20Federalism%20Paper%20Electronic%20Version.pdf
[10] Page 2.

Victoria	Continues to refer private, public and local government sectors.
Tasmania	Has referred private and local government sectors, but not the public sector workforce.[11]
South Australia	Subject to Parliamentary approval, refer only its private sector workforce and not its public sector or local government workforce.[12]
Queensland	Subject to Parliamentary approval, will refer only its private sector workforce and not its public sector or local government workforce.[13]
New South Wales	Has not indicated whether they will or will not refer its powers, and for which sectors.
Western Australia	Will not be referring their workforce at this stage and is currently conducting a review of their system.
ACT/NT	Remain covered by the federal system.

27. ACCI is concerned that the current approach for certain State Government to retain control over public and or local government sectors, and therefore retain associated infrastructure, is a wasteful use of taxpayers' monies. The private sector demands efficiency from the public sector. Industrial relations laws can drive some of those

[11] Industrial Relations (Commonwealth Powers) 64 of 2009.
http://www.parliament.tas.gov.au/bills/64_of_2009.htm
[12] Fair Work (Commonwealth Powers) Bill 2009
http://www.legislation.sa.gov.au/LZ/B/CURRENT/FAIR%20WORK%20(COMMONWEALTH%20POWERS)%20BILL%202009/C_AS%20PASSED%20HA/FAIR%20COMMONWEALTH%20POWERS%20BILL%202009.UN.PDF
[13] Fair Work (Commonwealth Powers) and Other Provisions Bill 2009.
http://www.legislation.qld.gov.au/Bills/53PDF/2009/FairWorkCPOPB09Exp.pdf

efficiencies and it is unknown what laws may apply to these sectors in the future.

28. Furthermore, the private sector also competes with the Government sector in some commercial matters and different industrial relations frameworks can alter cost structures.

29. Finally, harmonisation of state IR laws with federal laws leads to differences in regulation. This was tried in Queensland in 1997. It is not a permanent solution because changes in a State government or Parliament can "un-harmonise" State laws at any time.

30. Unfortunately, the Bill supports a winding back of a more fulsome national system by allowing local government or public sector corporations which are currently within the purview of the federal system, to be "carved out" by virtue of a Ministerial declaration (dealt with in chapter 3 below).

31. In short, the most preferred approach is a general referral of IR powers to apply to all employers and employees, without caveats, conditions, or mechanisms to allow State or Territory Governments to unduly restrict changes to the federal system.

COST VS BENEFITS

32. Whilst there will be significant cost savings for State Governments that do refer their powers, as indicated in ACCI's submission on the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009, the Committee should appreciate that there will be some additional costs and regulatory burdens on referral employers.

33. This should be particularly taken into account by the Committee as many referral employers are smaller businesses, many operating on tight margins, and many with as little as one employee on their books.

34. ACCI notes that the Bill provides a narrow cost/benefit analysis, without due regard to the increased regulatory burden on referral firms. The EM states (at p.xvii) that *"[s]tate referral of workplace relations powers for private sector unincorporated businesses is expected to incur only minor transitional costs to businesses in terms of their understanding and compliance with the FW Act"*. The only cost/benefit analysis in relation

to referred private sector employers, appears to *"primarily relate to the staff time required to attend or undertake the Government run education sessions"* off-set against *"savings in time and money associated with reduced compliance costs and increased simplicity and certainty"*.[14]

35. As stated by ACCI in its primary submission to the Fair Work Bill 2008, most workplaces in Australia do not operate on a collectivist basis. Many referral employers do not have any history of bargaining, nor have any desire to engage in formal bargaining. Small firms engage with their employees on an individual basis. Many referral employers will have only had experience in complying with any applicable statutory or award minima, with common law contracts (written and/or oral) being the only instrument that governs the employment relationship.

36. Some of these direct on-costs and challenges, which is not reflected in the EM to the Bill, to private sector referral employers includes (but is not limited to):

    a. The application of National Employment Standards (NES) which may increase referral employers' current employment obligations.

    b. The application of modern awards, which may increase employers' current costs (in the form of higher wage rates, penalties and conditions) and introduce new inflexibilities in managing the employment arrangements of some staff. If Fair Work Australia (FWA) does include transitional provisions in the modern awards for referral employers[15], this may cushion the immediate impact of increased costs, but it does not address the situation that some conditions (ie. penalty and casual loadings) will result in high employment costs in the future.

    c. Potential increased costs and compliance burdens for many award-free referral employers who will be subject to the modern award from 1 January 2010 without the benefit of any transition period.

[14] EM, p.xxi.
[15] ACCI notes that item 29 of Schedule 2 requires FWA to consider varying modern awards to include transitional arrangements for employers and employees covered by Division 2B awards (other than Division 2B enterprise awards). It does not address award-free referral employers who will be subject to a relevant modern from referral commencement.

d. The possibility for referral employers coerced into formal bargaining, by virtue of majority support determinations. This will mean that employers will have to bargain in good faith, regardless of their desire to engaging in formal bargaining.

e. Increased costs if referral employers are subject to low-paid arbitration proceedings resulting in above award determinations imposed upon them.

f. Increased wage rates under a modern award applying to all existing state based agreements (*Division 2B State enterprise agreements*).

g. The National Employment Standards applying to all existing agreements from referral commencement (expected to be 1 January 2010), when some of those agreements may have provided for additional compensation to cover similar entitlements under their respective No Disadvantage Test (NDT).

h. Higher penalty provisions if referral employers breach fair work instruments or laws.

i. New *general protection* laws applying to referral employers, which will impose a new set of complex regulation, including new anti-discrimination laws. We note that this is a form of forum shopping for which this Bill will not overcome, despite p. xi of the EM suggesting that forum shopping will be somewhat ameliorated by this Bill.

THE WAY FORWARD

37. ACCI indicated that Victoria had led the way in 1997 with a straightforward, essentially unconditional referral of legislative powers to the Commonwealth. This covered, in broad terms (and subject to some minor exceptions) all private, public and local Government sector employers and employees.

38. The Policy Review stated that:

> This Victorian approach, with only minimal changes, should be the model for the transfer of legislative powers by the remaining States. The completion of

> the transfer of private sector industrial relations into a genuinely national system should be implemented through that referral of legislative powers.[16]

39. In considering the *Report on Inquiry into Options for a New National Industrial Relations System*, by Professor George Williams, ACCI rejected the so-called "optimal model" (Williams model) for the progression of a national system.

40. This model essentially called for two-elements:

    a. The creation of a Ministerial Council of the Australian and State Governments. Majority approval of this council would be required for future amendments to national workplace relations legislation.

    b. A standing capacity for States to opt out of the national system at any stage in the future in whole or part, for whatever reason.

41. ACCI opposed this model on the following basis:

> Such caveats or conditions for the completion of any national system are unsustainable.
>
> A Ministerial Council of this character could polarize decision making in industrial relations, and freeze the system in its 2008 form unless the agreement of a majority of the states could be secured.
>
> - the proposal would effectively deliver the States a veto over national reform, and over the essential ongoing evolution of the system.
>
> - this is at odds with what we know about the need for industrial elations laws to be responsive to changed circumstances. Reasonably substantial amendments to the national industrial relations statute (industrial relations amendment acts) have been passed in 16 of the past 20 years, with more to come in 2008 (1988, 1990, 1991, 1992 1993, 1994, 1995, 1996, 1997, 1999, 2000, 2001, 2002, 2003, 2005, and 2007).
>
> - the proposal could deliver a policy veto in exchange for what is essentially a one off transfer of just 6-7% of overall employment. This seems disproportionate and unjustifiable.
>
> Compounding this, a standing capacity to opt out would make any national system only as strong as the ongoing capacity of the Australian Government and State Governments to agree on policy detail. It would be far from ideal if decisions by States to opt out and incentives to opt back in again became common whenever different views emerged on Australian industrial relations policy. Industrial relations, where it is hard enough to achieve consensus

[16] Page 2.

between union and business stakeholders, would become a horse-trading issue between governments. A durable and stable industrial relations system could also be exposed to trade-offs between the Commonwealth and the States in other policy areas.

This would not enhance the position of employers, employees, employment or productivity, and it will not reflect the reality that over 90% of private sector employment already falls within the federal system.

Further, under the Williams model, the policy gridlock that the system would likely encounter would make it unable to further evolve in the face of competitive pressures and an increasingly internationalised economy and labour market, where quick domestic policy responses may be needed.

Put simply, the benefits of a national industrial relations system will be compromised if unnecessary conditions upon the further referral of State legislative powers are imposed.

In this context, the Williams model is not the best way forward for a truly Australian industrial relations system.

INTER-GOVERNMENTAL AGREEMENT

42. The above observations are relevant in considering the mechanism by which this Bill attempts to deliver a national system for the private sector. The Minister's second reading speech refers to the inter-government agreement (IGA) that will regulate State referrals. The Minister indicates that the IGA has been signed by participating States and Territories, including Victoria, South Australia, Tasmania, Northern Territory, Australian Capital Territory.

43. It is understood that Queensland has referral legislation before its State Parliament, and may have signed the mutli-lateral IGA subsequent to the introduction of the Bill. ACCI understands that each State may also enter into bi-lateral IGAs to deal with particular issues, such as the sharing of resources and infrastructure.

44. ACCI notes that the IGA which the Minister refers to in the second reading speech has not been tabled in Parliament. It is difficult for ACCI and its relevant members to comment on the Bill without any authorised version of the IGA. The Committee should request a copy of the IGA to ensure that it is fully aware of how this proposed national system will operate.

45. Nonetheless, there are aspects of the IGA that are mentioned in State referral legislative materials which provides some guidance on the content of the IGA:

> Subclause (1)(b) (the amendment reference) refers to the Commonwealth the ***referred subject matters*** as defined in clause 3(1), but only to the extent of making laws with respect to any such matter by making express amendments of the Commonwealth Fair Work Act. The processes for gaining State and Territory agreement to such amendments are contained in the IGA.

46. The explanatory materials to the Queensland referral legislation suggests their exists within the IGA an ability for States and Territories to veto amendments to the federal laws in the future:

> An Inter-Governmental Agreement, which will be signed by each referring State, the Territories and the Commonwealth (the Agreement), underpins the Bill. The Agreement includes the fundamental workplace relations principles which provide the basis for the national system. These principles are also enshrined in the Bill. The Agreement provides that, if a Commonwealth proposal or amendment to the Fair Work Act 2009 (Cwth) is considered by one or more of the referring States or the Territories to undermine the fundamental workplace relations principles, that proposal or amendment will not proceed unless it is endorsed by a two-thirds majority of referring States, the Territories and the Commonwealth[17]. (emphasis added)
>
> …
>
> This bill is the result of significant negotiations with the federal government on a range of issues.
>
> The Queensland government has been clear that several conditions need be met to ensure the security of Queensland workers as part of the referral of power. Importantly, the referral of state power is cast in such terms as to prevent the Commonwealth from unilaterally changing the scope of the national system.
>
> …
>
> There were a number of very important issues that needed to be considered before Queensland gave agreement to the referral of power. Therefore, a number of conditions were sought on the referral, including—
>
> • the Queensland government having power to apply to Fair Work Australia to end industrial action in government owned corporations in specified circumstances;
> • preservation of Queensland's unique and beneficial conditions for apprentices and trainees until Fair Work Australia reviews national conditions in this area;
> • protection of certain state entitlements of employees transferring to the national system, as outlined at clauses 30 to 44 of the bill;

[17] Page 5 of explanatory materials.
http://www.legislation.qld.gov.au/Bills/53PDF/2009/FairWorkCPOPB09Exp.pdf

> • preservation of certain award wage rates arising from Queensland Industrial Relations Commission decisions affecting the community and disability services sector;
> • a high degree of control and input by Queensland over changes to law and policy in the national system.[18] (emphasis added).

47. Given the above indications as to how the Bill operates within the context of the IGA, ACCI is concerned that the effect of the multi-lateral IGA is to in fact introduce a de-facto *Williams model*. As foreshadowed by ACCI in the Policy Review this may lead to less than desirable consequences.

48. Employers would have concerns with any of the following types of clauses in an IGA because of its ability to undermine the future viability of a national system, and to potentially prejudice the rights of employers operating in the federal system:

    a. Clauses which allow a majority of States and Territories to veto any subsequent changes to the fair work laws as it applies to national system employers;

    b. Clauses which allow a majority of States and Territories to veto any subsequent changes to the fair work laws as it applies to referral employers;

    c. Clauses which require consultations to be confidential and which have the effect of denying employer organisations appropriate opportunities to be consulted on amendments to the fair work laws;

49. To reiterate ACCI's position: The IGA should only deal with administrative, transitional and resource matters. Matters of substance which will greatly alter the future evolution of the federal system should not be left to States and Territories to determine through legislation or side deals.

50. Noting the above objections, ACCI does not oppose within any IGA, provisions which require the Commonwealth to consult with State or Territory Governments prior to any amendments to the fair work laws, as has been the situation with the Victorian referral.

[18] Second reading speech http://www.parliament.qld.gov.au/view/legislativeassembly/tableOffice/documents/HALnks/091027/FairWork.pdf

3. PROPOSED AMENDMENTS

51. ACCI has considered the Bill through the prism of its National Council policy position. As a result, ACCI recommends a number of minor amendments to the Bill which is consistent this broad policy position.

52. ACCI has not engaged with the detail of each provision in the Bill, nor cross-referenced how the Bill will interact with each States' referral legislation. We note upfront that the Bill makes complicated amendments to the FW Act and *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* and the Government should be prepared to consider amendments if implementation issues arise in future.

TERMINATION OF REFERENCES

53. The Bill creates a legislative mechanism for States to make three referrals of powers, namely: the "initial reference", "amendment reference" and "transition reference". It allows States to refer and terminate each one of those references under proposed clause 30L of Schedule 1.

54. ACCI does not have an in-principle objection to the States terminating their general referral of powers upon adequate notice. This has been the case with the Victorian referral since 1997. However, ACCI is concerned with the ability for a State to terminate an "amendment reference". This is a new concept which is not supported by employers for the following reasons.

Amendment Reference

55. If a State terminated its "amendment reference" in accordance with clause 30L(7) or (8), it would still be able to remain a referring State.

56. A State may terminate the amendment reference within either (a) six months notice (if the amendment reference of all other referring States all terminate on the same day) or (b) three months, if the Governor considers that an amendment to the FW Act is inconsistent with the "*fundamental workplace relations principles*" (set out at cl. 30L(9)).

57. There is no reason why such a provision should be part of the referral process for a national system. This may be used as a political tool to stymie further amendments to the Commonwealth laws and put pressure on the Commonwealth by threatening to withdraw from the federal system.

58. The combination of any possible veto power in the IGA, coupled with a State Government's ability to terminate its amendment reference, is not the best method of progressing a national system.

59. If the termination of an amendment reference is ever invoked by a State Government, this will cause confusion and unnecessary dislocation for referral employers, as non-referred employers continue to be bound by the fair work laws, but their referral counterparts do not. It also appears to indicate that State Governments are not fully committed to achieving a national system for the private sector.

60. It would be unfortunate if it was ever used by States as a tool to extract concessions from the Commonwealth in modifying or refusing to modify the fair work laws in the future. And with a confidentiality clause in an IGA, we may all be none the wiser. Whilst it appears Victoria has introduced amendment legislation which would align their referral to these provisions, Victoria has not had such provisions since 1997 and this not caused any problems to date. Whilst such action would not be supported by employers, a State which is truly concerned with future amendments to the fair work laws should withdraw from the system in toto, rather than cherry pick which parts it does or does not like.

61. Therefore, ACCI recommends that such provisions be removed from the Bill.

DECLARATION TO "CARVE OUT" NATIONAL SYSTEM EMPLOYERS

62. ACCI notes that Schedule 3 of the Bill allows the Minister to make a declaration which would have the effect of excluding the fair work laws applying to certain national system employers, as outlined in item 2.

63. This would effectively allow local governments that are currently subject to the federal laws to be carved out of the so-called national

system. This ability for States to opt-out of the system would have a destabilising effect on the national system, particularly for those employers that have been subject to the federal system for a considerable period of time.

64. ACCI is also concerned if such provisions were ever amended in the future to allow other employers to be excluded from the federal system, such as not-for-profit organisations, many of which are currently within the federal system.

65. To reiterate, ACCI's strong preference is for a referral to encompass all employers and employees. We therefore consider such provisions as sub-optimal and recommend they be omitted.

TRANSITIONAL ARRANGEMENTS

66. ACCI notes that the Government has attempted to provide in the Bill a number of transitional mechanisms to support referring employers and employees integrate into the federal system in an orderly fashion.

67. Upon our reading of the Bill, referral employers subject to federal awards (transitional awards) will become bound to an applicable modern award from 1 January 2010. These instruments were to terminate on 27 March 2011. If the Bill does not already contemplate transitional provisions for these employers, it is important that FWA is able to insert into modern awards applicable model transitional provisions.

68. It is our further understanding that referral employers subject to state awards (Division 2B State awards), will continue to be subject to these instruments for 12 months upon referral commencement. We note that state enterprise awards (Divisions 2B State enterprise awards) will be able to be modernised within four years of referral commencement (similar to federal enterprise awards).

69. ACCI supports item 29 of Schedule 2 to the Bill, which requires FWA to consider varying modern awards to include transitional provisions for referral employers covered by Division 2B state awards.

70. Page 19 of the EM states:

> 108. During the 12 month period FWA will be required to consider whether a modern award should be varied to provide appropriate transitional arrangements for incoming State employees and employers. This would be subject to the existing rules in the FW Act about what may be included in modern awards.
>
> 109. Given that the AIRC will have determined transitional arrangements for employers and employees covered by NAPSAs which are derived from State awards, there will be a framework already in place for translating Division 2B State reference employers and employees to coverage by modern awards.
>
> 110. FWA will be able to make remedial take-home pay orders where the take-home pay of one or more employees is reduced as a result of movement to the modern award.
>
> 111. Given the industry and occupational coverage of modern awards, it is expected that Division 2B State reference awards will be fully replaced by modern awards on 1 January 2011. However, if there are parties covered by a Division 2B State award for which there is no corresponding modern award at that time, they will be covered by the miscellaneous modern award.

71. For those employers that are currently award-free, the Bill appears to indicate that they would be subject to any applicable modern award from referral commencement (ie. 1 January 2010).

72. Page 19, paragraph 112 of the EM states:

> State employers and employees who are not covered by a State award at referral commencement but who are capable of being covered by a modern award will become covered that modern award from referral commencement.

73. ACCI is concerned, based upon our reading of the Bill that currently award-free referral employers, who will be subject to an applicable modern award (including the miscellaneous award) from 1 January 2010, will not be subject to adequate transitional provisions. It appears that FWA is only obliged to consider such transitional provisions for referral employers subject to State awards. This should be rectified by the Bill.

74. One way to ensure that award-free referral employers are prepared by the application of a modern award may be to delay the commencement of any applicable modern award for 6 months (or up to 12 months consistent with the time for employers who will continue to be on State awards) from referral commencement. This would allow for a sufficient

period of time and opportunity for referral employers to seek advice from relevant agencies and their employer organisations.

75. At this stage, referral employers will only have a month and a half or so to understand their applicable modern award. It has been difficult enough for experienced practitioners within the award modernisation process to grapple with the details of modern award provisions (noting also that many awards will not be finalised until 4 December 2009), let alone how a small business will understand this from 1 January 2010. There will also be significant civil penalties that will apply from 1 January 2010 which will be costly for employers that get it wrong.

76. It appears that such a short window of time will be inadequate for a small business to receive any education or assistance, as well as implement the necessary changes that may be needed to existing workplace arrangements. A small delay will also assist with the Fair Work Ombudsman from having to devote additional investigative resources and time into compliance issues for smaller firms.

77. ACCI has considered whether items 19 or 29 of Schedule 2 are broad enough to deal with every possible issue that may arise for referral employers. It appears that as many referral employers (both award covered and award-free) are likely to be micro small businesses, there should be a broad power inserted into the Bill to allow a referred employer, upon application, to transition into the federal system with minimum dislocation and cost. Whilst there exists extensive protections afforded to referral employees, including take-home pay orders and minimum wage protections, there appears to be absent any equivalent power for referral employers.

78. The Bill should also allow FWA to consider whether special transitional provisions should apply to currently state award-free employers as there doesn't appear to be any power for FWA to consider such arrangements within the Bill.

79. Therefore, the Bill should include a general provision, the effect of which would operate in a similar manner to item 40 to Schedule 2 of the Bill, to:

a. Allow an affected referral employer to apply to FWA to vary the application of a transitional instrument, NES, modern award, or minimum wage order.

b. Require FWA to consider a number of factors, including:

i) Productivity, labour costs and the regulatory burden on business;[19]

ii) The viability of the business, employment of existing or future employees.

iii) Any other matter considered relevant.

80. Such a provision should allow FWA to include appropriate transitional provisions in modern awards dealing with award-free referral employers.

81. Orders could apply to individually named employers or a class of employers.

82. The provision and any orders should sunset after a sufficient transitional period (which would start from the commencement of the States referrals). Given that the AIRC has created model transitional provisions for 5 years, this may also be an appropriate amount of time.

83. It is not intended that the proposal would override an existing order, such as a take-home pay order.

84. ACCI's priority during any referral of powers is to ensure that employers are not prejudiced by moving into the federal system, and such measures would be akin to protections afforded to referral employees.

EXCLUDED AND REFERRED MATTERS

85. ACCI notes that there are many employment related matters that are excluded from the referral (based upon exclusions set out in s.27 of the

[19] This is adapted from Schedule 5, Part 2, item 2, sub cl (5)(c) of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* which deals with considerations the AIRC must have regard to when modernising awards.

FW Act). These excluded subject matters are outlined at Schedule 1, item 15 of the Bill.

86. ACCI also notes that State referral legislation may refer particular matters to the Commonwealth that differs between States.

87. The Government should continue to monitor the interaction between State laws and Commonwealth laws and where necessary, amend the fair work laws to specifically override areas where the State laws being used in a way that undermines the primacy of the fair work laws dealing with employment law matters.

4. EDUCATION AND ASSISTANCE

88. ACCI welcomes the Government's indication that it will be providing additional services to assist transferring employers and employees understand the federal system.[20]

89. Employer organisations are cognizant that many referral employers will be micro small businesses that will require face-to-face assistance and who may not have time to attend seminars or access online information.

90. A many ACCI members are successfully delivering, on behalf of the Government, the $12.9 million *Fair Work Education and Information* program. Given the proven success of employer organisations delivering these services to firms in metropolitan and regional Australia, the Government should consider providing a further round of funding to all organisations in order to deliver information services specifically to referral employers. There is also no reason why this could not be achieved in co-operation with state based services who may also be delivering targeted services.

91. In addition, the Fair Work Ombudsman should be encouraged to produce a dedicated fact sheet prior to 1 January 2010 for each State/Territory outlining which basic employment obligations apply to employers and their employees. This is because transitional arrangements may differ for employers depending on (a) whether they were within the federal system prior to 27 March 2006, (b) whether they were a constitutional corporation, (c) whether they were bound by a industrial instrument and (d) whether the State has referred their powers. ACCI believes that such information will assist with overall compliance.

[20] Second Reading speech to the Bill.

ACCI MEMBERS

ACT and Region Chamber of Commerce & Industry
12A Thesiger Court
DEAKIN ACT 2600
Telephone: 02 6283 5200
Facsimile: 02 6282 5045
Website: www.actchamber.com.au

Australian Federation of Employers and Industries
PO Box A233
SYDNEY SOUTH NSW 1235
Telephone: 02 9264 2000
Facsimile: 02 9264 5699
Website: www.afei.org.au

Business SA
Enterprise House
136 Greenhill Road
UNLEY SA 5061
Telephone: 08 8300 0000
Facsimile: 08 8300 0001
Website: www.business-sa.com

Chamber of Commerce & Industry Western Australia
PO Box 6209 Hay Street East
EAST PERTH WA 6892
Telephone: 08 9365 7555
Facsimile: 08 9365 7550
Website: www.cciwa.com

Chamber of Commerce Northern Territory
Confederation House
Suite 1, 2 Shepherd Street
DARWIN NT 0800
Telephone: 08 8982 8100
Facsimile: 08 8981 1405
Website: www.chambernt.com.au

Chamber of Commerce and Industry Queensland
Industry House
375 Wickham Terrace
BRISBANE QLD 4000
Telephone: 07 3842 2244
Facsimile: 07 3832 3195
Website: www.cciq.com.au

New South Wales Business Chamber
Level 15, 140 Arthur Street
NORTH SYDNEY NSW 2060
Telephone: 132696
Facsimile: 1300 655 277
Website: www.nswbusinesschamber.com.au

Tasmanian Chamber of Commerce and Industry Ltd
GPO Box 793
HOBART TAS 7001
Telephone: 03 6236 3600
Facsimile: 03 6231 1278
Website: www.tcci.com.au

Victorian Employers' Chamber of Commerce & Industry
GPO Box 4352
MELBOURNE VIC 3001
Telephone: 03 8662 5333
Facsimile: 03 8662 5367
Website: www.vecci.org.au

ACCORD
Fusion Building, Suite 4.02,
Level 4, 22-36 Mountain Street
ULTIMO NSW 2007
Telephone: 02 9281 2322
Facsimile: 02 9281 0366
Website: www.accord.asn.au

Agribusiness Employers' Federation
GPO Box 2883
ADELAIDE SA 5001
Telephone: 08 8212 0585
Facsimile: 08 8212 0311
Website: www.aef.net.au

Air Conditioning and Mechanical Contractors' Association
30 Cromwell Street
BURWOOD VIC 3125
Telephone: 03 9888 8266
Facsimile: 03 9888 8459
Website: www.amca.com.au

Association of Consulting Engineers Australia
Level 6, 50 Clarence Street
SYDNEY NSW 2000
Telephone: 02 9922 4711
Facsimile: 02 9957 2484
Website: www.acea.com.au

Australian Beverages Council Ltd
Suite 4, Level 1
6-8 Crewe Place
ROSEBERRY NSW 2018
Telephone: 02 9662 2844
Facsimile: 02 9662 2899
Website: www.australianbeverages.org

Australian Food and Grocery Council
Locked Bag 1
KINGSTON ACT 2604
Telephone: 02 6273 1466
Facsimile: 02 6273 1477
Website: www.afgc.org.au

Australian Hotels Association
Level 1, Commerce House
24 Brisbane Avenue
BARTON ACT 2600
Telephone: 02 6273 4007
Facsimile: 02 6273 4011
Website: www.aha.org.au

Australian International Airlines Operations Group
c/- QANTAS Airways
QANTAS Centre
QCA4, 203 Coward Street
MASCOT NSW 2020
Telephone: 02 9691 3636
Facsimile: 02 9691 2832

Australian Made, Australian Grown Campaign
Suite 105, 161 Park Street
SOUTH MELBOURNE VIC 3205
Telephone: 03 9686 1500
Facsimile: 03 9686 1600
Website: www.australianmade.com.au

Australian Mines and Metals Association
Level 10, 607 Bourke Street
MELBOURNE VIC 3000
Telephone: 03 9614 4777
Facsimile: 03 9614 3970
Website: www.amma.org.au

Australian Paint Manufacturers' Federation
Suite 1201, Level 12
275 Alfred Street
NORTH SYDNEY NSW 2060
Telephone: 02 9922 3955
Facsimile: 02 9929 9743
Website: www.apmf.asn.au

Australian Retailers' Association
Level 10, 136 Exhibition Street
MELBOURNE VIC 3000
Telephone: 1300 368 041
Facsimile: 03 8660 3399
Website: www.retail.org.au

Bus Industry Confederation
Suite 6, 6 Lonsdale Street
BRADDON ACT 2612
Telephone: (02) 6247 5990
Facsimile: (02) 6230 6898
Website: www.bic.asn.au

Live Performance Australia
Level 1, 15-17 Queen Street
MELBOURNE VIC 3000
Telephone: 03 9614 1111
Facsimile: 03 9614 1166
Website: www.liveperformance.com.au

Master Builders Australia
Level 1, 16 Bentham Street
YARRALUMLA ACT 2600
Telephone: 02 6202 8888
Facsimile: 02 6202 8877
Website: www.masterbuilders.com.au

Master Plumbers' and Mechanical Services Association Australia
525 King Street
WEST MELBOURNE VIC 3003
Telephone: 03 9329 9622
Facsimile: 03 9329 5060
Website: www.plumber.com.au

National Baking Industry Association
Bread House,
49 Gregory Terrace
SPRING HILL QLD 4000
Telephone: 1300 557 022
Website: www.nbia.org.au

National Electrical and Communications Association
Level 4, 30 Atchison Street
ST LEONARDS NSW 2065
Telephone: 02 9439 8523
Facsimile: 02 9439 8525
Website: www.neca.asn.au

National Fire Industry Association
PO Box 6825
ST KILDA ROAD CENTRAL VIC 8008
Telephone: 03 9865 8611
Facsimile: 03 9865 8615
Website: www.nfia.com.au

National Retail Association Ltd
PO Box 91
FORTITUDE VALLEY QLD 4006
Telephone: 07 3251 3000
Facsimile: 07 3251 3030
Website: www.nra.net.au

Oil Industry Industrial Association
c/- Shell Australia
GPO Box 872K
MELBOURNE VIC 3001
Telephone: 03 9666 5444
Facsimile: 03 9666 5008

Pharmacy Guild of Australia
PO Box 7036
CANBERRA BC ACT 2610
Telephone: 02 6270 1888
Facsimile: 02 6270 1800
Website: www.guild.org.au

Plastics and Chemicals Industries Association Inc
Level 1, Unit 7
651 Victoria Street
ABBOTSFORD VIC 3067
Telephone: 03 9429 0670
Facsimile: 03 9429 0690
Website: www.pacia.org.au

Printing Industries Association of Australia
25 South Parade
AUBURN NSW 2144
Telephone: 02 8789 7300
Facsimile: 02 8789 7387
Website: www.printnet.com.au

Restaurant & Catering Australia
Suite 17, 401 Pacific Highway
ARTARMON NSW 2064
Telephone: 1300 722 878
Facsimile: 1300 722 396
Website: www.restaurantcater.asn.au

Standards Australia Limited
Level 10, 20 Bridge Street
SYDNEY NSW 2000
Telephone: 02 9237 6000
Facsimile: 02 9237 6010
Website: www.standards.org.au

Victorian Automobile Chamber of Commerce
7th Floor
464 St Kilda Road
MELBOURNE VIC 3000
Telephone: 03 9829 1111
Facsimile: 03 9820 3401
Website: www.vacc.com.au