CCIQ SUBMISSION

Inquiry into the Fair Work Amendment Bill 2014 (Cth)

Senate Education and Employment Legislation Committee
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OVERVIEW

1. CCIQ welcomes the opportunity to make a submission to the inquiry into the Fair Work Amendment Bill 2014 (the bill) by the Senate Education and Employment Committee (the Committee).

2. The bill would, if passed, give effect to a number of election promises outlined in the *Coalition's Policy to Improve the Fair Work Laws*, the Federal Government's pre-election workplace relations policy. The bill also responds to a number of recommendations made by the Expert Panel in the 2012 review of the *Fair Work Act 2009* (the FW Act), *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation* (the FW Report).

3. CCIQ views the bill as an important first step toward improving the FW Act, and largely supports the measures that it includes. In particular, CCIQ welcomes the more business-friendly approach encapsulated in the bill and considers it a good indication of the Federal Government's willingness to take on board the concerns of small and medium businesses with respect to the Fair Work regime. CCIQ considers that this may be contrasted with the approach taken by the previous federal government, which was unwilling to consider any of the concerns held by employers and was only interested in implementing measures sought by unions. This was evident in the fact that despite being aware of the broad gamut of employer issues with the FW Act, set out extensively in submissions to the FW Act review, it introduced a range of new measures in the *Fair Work Amendment Act 2013* (the FW Amendment Act) which added significantly to the regulatory burden posed by the Fair Work regime.

4. However, CCIQ emphasises that the measures contained in this bill serve only as a starting point for changes to the FW Act, and that by no means do they complete the reform task that is required. CCIQ considers that the bill could have been a vehicle for bringing about more substantive change to workplace relations laws, and represents something of a missed opportunity. Importantly, the bill does not address a broad number of issues on which members have been seeking redress, including making changes to the framework around the national minimum wage, addressing the unsustainable penalty rates regime, and allowing individual flexibility arrangements to be offered as a condition of employment.

PROPOSED AMENDMENTS

Response to Expert Panel Recommendations

5. Much of the bill seeks to amend the FW Act to 'respond' to a number of recommendations of the FW Report. The FW Report was released on 3 August 2012 as part of the post-implementation review of the FW Act (as no Regulation Impact Statement was undertaken prior to its introduction). The Expert Panel broadly found that the FW Act was operating well, and that the system of enterprise bargaining

underpinned by the National Employment Standards (NES) and modern awards was delivering fairness to employer and employees.

6. Respectfully, CCIQ continues to strongly disagree with the Expert Panel's conclusion that the FW Act was operating well. CCIQ's previous submissions to this Committee have highlighted the high level of employer dissatisfaction with the FW Act, and the particularly negative impact it has had on the ongoing viability and profitability of small and medium businesses. While the Expert Panel made several sensible recommendations that CCIQ is pleased to see being implemented by the Federal Government in the bill, CCIQ remains of the view that the Expert Panel did not give appropriate weight to employer submissions to the review process.

Recommendation 2: The Panel recommends that s 130 be amended to provide that employees do not accrue annual leave while absent from work and in receipt of workers' compensation payments.

7. Schedule 1, Part 3 (item 5) of the bill proposes to implement this recommendation. It would provide that an employee who is absent from work and in receipt of workers' compensation will not be able to take or accrue any type of leave or absence under the FW Act during the compensation period. Currently, an employee who is absent from work due to a personal illness or injury cannot accrue any leave under the NES while they are receiving compensation under Commonwealth, state or territory compensation law, unless those laws allow leave to be taken or accrued. This is particularly relevant in Queensland and under Commonwealth law, where annual leave can currently be taken or accrued while workers are absent from work and in receipt of workers' compensation payments.

CCIQ Recommendation

8. CCIQ strongly supports this amendment. Employers subject to these laws have long sought consistency in this respect on the basis that the existing laws place them at an unfair disadvantage in relation to other jurisdictions. This measure would not only promote consistency by operating to remove uncertainty among employers about whether an employee in receipt of workers' compensation is entitled to accrue or take leave, but is consistent with the nature and purpose of workers' compensation schemes.

Recommendation 3: The Panel recommends that s 76 be amended to require the employer and the employee to hold a meeting to discuss a request for extended unpaid parental leave, unless the employer has agreed to the request

9. Schedule 1, Part 1 (item 1) of the bill seeks to implement this recommendation and would provide that an employer must not refuse a request for extended unpaid parental leave unless the employer has given the employee a reasonable opportunity to discuss the request. Currently under the NES, an employee has the right to up to twelve months'

unpaid parental leave with a right to request up to an additional twelve months' leave where the employee has exhausted their entitlement to the initial twelve months' unpaid parental leave and wishes to remain on parental leave. In the event of an employee requesting continuing unpaid parental leave, the employer must respond in writing as soon as practicable and within no later than 21 days after the employee's request. An employer may only refuse the request on reasonable business grounds.

CCIQ Recommendation

10. CCIQ opposes this recommendation on the basis that it is unnecessarily prescriptive. When an employee makes a request to extend unpaid parental leave, it is likely that most employers would meet with the employee to discuss their request, or at least seek further clarity via an email or telephone call, if they required further information about the request prior to making a decision. While it is clear that this proposed requirement would not place any added obligation on employers to approve such requests, it imposes an added compliance burden on employers to keep records of such meetings in the event of a dispute arising subsequently about whether such a meeting occurred. Further, it is unclear what constitutes a 'reasonable opportunity' to discuss the request – that is, to what extent an employer must go to in order to facilitate such a meeting.

11. While CCIQ does note that the Fair Work Commission's (FWC) data indicates that formal requests for extending unpaid parental leave are fairly rare: around 1.5 per cent of employers receive a written request for extension of unpaid parental leave beyond their initial twelve month entitlement under NES, and the vast majority of these requests were granted without variation. However, this in itself indicates the unnecessary nature of this proposed regulation and merely adds an additional layer of regulation to an area where it has been shown to be superfluous.

Recommendation 6: The Panel recommends that s 90 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

12. Schedule 1, Part 2 (items 2-4) of the bill proposes to implement this recommendation. It would provide that upon termination of employment, the employer must pay an employee for a period of untaken annual leave based on the employee's base rate of pay. The effect of the proposed amendments is that annual leave loading will not be payable on termination of employment unless an applicable modern award, enterprise agreement or contract of employment expressly provides for its payment on termination.

13. Under the NES, an employer is obliged to pay an employee who takes annual leave in the ordinary course of employment at the base rate of pay. However, this obligation is often supplemented by industrial instruments (including modern awards and enterprise bargaining agreements) and employment contracts, so that in many cases employee taking annual leave are paid annual leave loading for the period of leave taken.

Historically, annual leave loading has been paid to compensate employees for the loss of overtime earnings while on leave, and was an entitlement directly associated with the taking of leave.

14. Currently, if on termination an employee has a period of untaken annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave. The view of the Fair Work Ombudsman (FWO) has been that this meant that if an employee is entitled under an industrial instrument to leave loading when they take annual leave, it must be included in the amount paid on termination for untaken leave. This is not universally accepted, and has been a contentious issue for those employers who have not been required to pay annual leave loading on termination in the past, but have, since the inception of the modern awards or the negotiation of a new enterprise agreement, since been required to. There is little evidence that the Commonwealth Parliament intended to introduce a new national entitlement to be paid annual leave loading on termination. Moreover, as explained in the FW Report, 112 modern awards include a provision for annual leave loading, and of these:
    - 29 awards either explicitly or implicitly provide that the loading is not payable on termination of employment;
    - 9 awards provide that loading is payable on termination of employment; and
    - 74 awards are silent on the issue.

15. Despite this, a number of employers pay annual leave loading on termination even in circumstances where a relevant award or agreement, or FWC decision, provides to the contrary.

CCIQ Recommendation

16. CCIQ strongly supports this amendment. It is clear from the fact that the majority of modern awards are silent on the issue of whether leave loading is payable on termination that there is no reasonable basis on which such an obligation should be imposed on employers in the absence of a specific requirement. This amendment would ensure that employers will have certainty on this issue, and not be required to meet employee obligations that have essentially been 'inferred' into the relevant modern award or industrial instrument.

Recommendation 9: The Panel recommends that the better off overall test in s 144(4)(c) and s203(4) be amended to expressly permit an individual flexibility arrangement to confer a non-monetary benefit on an employee in exchange for a monetary benefit, provided that the value of the monetary benefit foregone is in writing and is relatively insignificant, and the value of the non-monetary benefit is proportionate

17. Schedule 1, Part 4 (items 6-18) of the bill seeks to introduce a number of changes with respect to individual flexibility arrangements (IFAs). CCIQ has long argued that IFAs have not provided the flexibility between employer and employee that they were intended to

because they have been loaded with restrictions that undermine their effective operation – the most important of these being that they cannot be offered as a condition of employment; and that unions have sought to severely limit the scope of IFAs when negotiating enterprise agreements.

18. Item 8 of the bill seeks to implement this recommendation by proposing to introduce legislative notes into the FW Act that would provide that the requirement that an IFA agreed to under a modern award or enterprise agreement leave an employee better off overall can be satisfied by the provision of benefits that are non-monetary. Item 6 of the bill also seeks to introduce a new provision into the FW Act that provides that modern award an enterprise agreement flexibility terms must require the employer to ensure that an IFA includes a genuine needs (GNS) by the employee setting out why the employee believes at the time of agreeing to the arrangement that it meets their genuine needs and results in them being better off overall. This is to provide a written record to assist in any assessment of the IFA requirements under the FW Act.

CCIQ Recommendation

19. CCIQ supports the proposed amendments. While guidance material on the FWC website makes it clear that these IFAs can contain trade-offs between financial and non-financial arrangements, there has been confusion as to whether this is the case. CCIQ has long argued that the express capacity of IFAs to confer a non-monetary benefit on an employee in exchange of for a monetary benefit is essential to the effective and meaningful operation of IFAs. However, CCIQ does suggest that the term 'relatively insignificant' be removed as it is ambiguous and highly subjective. The purpose of the GNS is to ensure that both parties agree to the arrangements contained in the IFA – this should obviate concerns as to whether parties to the IFA are satisfied with its contents.

Recommendation 11: The Panel recommends that the FW Act be amended to provide a defence to an alleged contravention of a flexibility term under s 145(3) or s 204(3) where an employer has complied with the notification requirements proposed in Recommendation 10 and believed, on reasonably grounds, that all other statutory requirements (including the better off overall test) have been met

20. Items 9, 10, 16 and 18 of the bill largely seek to implement this recommendation. They would amend the FW Act to provide that an employer does not contravene a modern award or enterprise agreement flexibility term in relation to an IFA if at the time when the arrangement is made, the employer reasonably believes that the requirements of the term were complied with. Importantly, the amendment differs from Recommendation 11 to the extent that it does not require employers to notify the FWC on the making of an IFA.

CCIQ Recommendation

21. CCIQ supports these proposed amendments, and considers it an important step in encouraging the increased uptake by small and medium employers of IFAs.

Recommendation 12: The Panel recommends that s 144(4)(d) and s 203(6) be amended to require a flexibility term to require an employer to ensure that an individual flexibility agreement provides for termination by either the employee or the employer giving written notice of 90 days, or a lesser period agreed between the employer and employee, thereby increasing the maximum notice period from 28 days to 90 days

22. Items 7 and 15 of the bill largely seeks to implement this recommendation by providing that modern award and enterprise agreement flexibility terms require thirteen weeks unilateral written notice of termination.

CCIQ Recommendation

23. CCIQ supports this recommendation. As the Expert Panel noted, one of the reasons for the low uptake of IFAs was the lack of certainty created by the short notice period for their termination. However, CCIQ remains of the view that the notice period must be at least one year in duration, and that employers must be allowed to offer IFAs as a condition of employment in order for them to be meaningful vehicles for providing flexibility.

Recommendation 24: The Panel recommends that s 203 be amended to require enterprise agreement flexibility terms to permit individual flexibility arrangements to deal with all the matters listed in paragraph 1(a) of the model flexibility term in Schedule 2.2 of the FW Regulations, along with any additional matters agreed by the parties

24. Item 11 of the bill seeks to implement this recommendation by providing that if an enterprise agreement contains terms which deal with one or more of the following matters:
    - arrangements about when work is performed;
    - overtime rates;
    - penalty rates;
    - allowances; or
    - leave loading,

    then the flexibility term must provide, as a minimum, that the effect of these terms may be varied by an IFA agreed to under the flexibility term.

CCIQ Recommendation

25. CCIQ supports this proposed amendment on the basis that it would limit the capacity of unions to restrict the scope of IFAs. CCIQ also recommends that the amendment provide that matters under the NES that may be dealt with by a modern award or

enterprise agreement may also be the automatic subject matter of the flexibility term.

Recommendation 31: The Panel recommends that Division 8 of Part 3-3 be amended to provide that an application for a protected action ballot order may only be made when bargaining for a proposed agreement has commenced, either voluntarily or because a majority support determination has been obtained. The Panel further recommends that the FW Act expressly provide that bargaining has commenced for this purpose despite any disagreement over the scope of the agreement

26. Schedule 1, Part 7 (item 56) of the bill would largely implement this recommendation. It seeks to amend the rules around the making of protected action ballot orders by providing that the conditions for a protected action ballot order (PABO) could be satisfied before bargaining has formally commenced (before the 'notification time' by providing that an application for a PABO cannot be made unless there has been a 'notification time' under s173(2) of the FW Act in relation to the proposed enterprise agreement. This includes when the employer agrees to bargain, or initiates bargaining; a majority support determination comes into operation; a scope order comes into operation; or a low paid authorisation comes into operation.

27. This amendment would overcome the result of the Federal Court decision in *JJ Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCACF 53, which essentially endorsed a 'talk first, strike later' approach to protected industrial action. In that case, it was held that there is no requirement for unions, when confronted with an employer who refused to bargain, to seek a majority support determination before seeking a protected ballot order from the FWC and asking members to authorise industrial action. The FWC must only be satisfied that an application has been made under section 437 of the FW Act, and that it is satisfied that each applicant has been, and is genuinely trying to reach an agreement.

CCIQ Recommendation

28. CCIQ strongly supports the proposed amendments. Industrial action can have particularly harmful impacts on small and medium employers, and it is important that where it takes place, it does so in accordance with stringent rules.

Recommendation 43: The Panel recommends that the FW Act be amended to provide that the Fair Work Commission is not required to hold a hearing when exercising powers to dismiss an application under s 587, nor when exercising the recommended powers to dismiss an application involving a settlement agreement or a failure by an applicant to attend a proceeding or comply with an FWC direction or order. In each of those circumstances, FWA must be required to invite the applicant and the employer to provide further information before making a decision to dismiss the application or not

29. The bill seeks to respond to Fair Work Review Panel recommendation 43 by providing that, subject to certain conditions, the FWC is not required to hold a hearing or conduct a conference when determining whether to dismiss an unfair dismissal application under section 399A or section 587

CCIQ Recommendation

30. CCIQ supports this recommendation. It is a sensible amendment that is aimed at saving parties time and money.

Amendments to the FW Act right of entry framework

31. Schedule 1, Part 8 (items 57-71) of the bill seeks to make a number of amendments with respect to the right of entry provisions in the FW Act.

Narrowing circumstances of entry

32. Item 61 would narrow the circumstances of entry for holding discussions to circumstances in which:
    - The permit holder's organisation is covered by the enterprise agreement that applies to work performed on the premises; or
    - 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.

33. Currently, employers are generally required to facilitate a relevant union representing their employees, with right of entry based on a union's capacity to represent relevant employees under its eligibility rules. Prior to the introduction of 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.

CCIQ Recommendation

34. CCIQ supports this recommendation. It would curtail union entry into workplaces, and the requirement that an employee invite the union as a way of demonstrating that someone wishes to have discussions appears to be a reasonable compromise. However, given the contentious nature of union entry, CCIQ maintains that it is preferable that a request should also be required in circumstances where the permit holder's union is covered by an agreement.

Excessive entry requests

35. Items 65 and 66 of the bill seek to strengthen the powers of the FWC in making orders to resolve excessive right of entry requests. Recommendation 35 of the FW Report favoured providing greater powers to the FWC to address excessive workplace visits; however, this was only partially implemented by the FW Amendment Act.

CCIQ Recommendation

36. CCIQ strongly supports this amendment. Excessive entry is a serious matter that seriously interferes with managerial prerogative. Where this occurs, the FWC must have the powers to act as necessary to stop unwarranted workplace visits.

Restoring pre-existing rules for interviews and discussions

37. Items 57, 59, 60, 69 and 70 of the bill seek to repeal the changes which were introduced by the FW Amendment Act which:
    - required employers or occupiers to facilitate transport and accommodation arrangements for permit holders exercising entry rights at work sites in remote locations; and
    - made lunch rooms the default location for union officials to hold discussions or conduct interviews.

38. While the FW Amendment Act implemented a number of the FW Report recommendations, the above provisions were not recommended by the Expert Panel.

CCIQ Recommendation

39. CCIQ strongly supports the proposed amendments. The amendments made by the former federal government in this respect were a clear case of overreach: despite significant employer dissatisfaction with the FW Act and in the absence of any supporting recommendations by the Expert Panel, it chose to expand union entry rights, require employers to actively facilitate union officials to travel to worksites, and remove the capacity of employers to specify where union meetings could occur in the workplace.

Establishing a new process for negotiation of single enterprise greenfield agreements

40. Schedule 1, Part 5 (items 19-55) of the bill seeks to establish a new process for the efficient negotiation of single-enterprise greenfields agreements by:
    - extending good faith bargaining to the negotiation of these agreements to bargaining representatives to parties who are negotiating single-enterprise greenfields agreements; and
    - providing an optional three month negotiation timeframe for the parties to reach agreement. An employer bargaining representative may give written notice to each employee organisation that is a bargaining representative for the

agreement to commence a three month 'notified negotiation period'. At the conclusion of this period, the good faith bargaining rules will cease to apply and the employer bargaining representative will then be able to apply to the FWC for approval of its agreement.

41. Where an agreement is made under these amendments, the bill proposes to retain the existing approval tests under the FW Act, notably, the better off overall test. The bill also proposes that the FWC be required to consider a new criterion during the approval process; that the agreement, on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work.

CCIQ Recommendation

42. CCIQ supports the proposed amendments. While greenfields agreements are typically of greatest relevance to largest businesses involved in major projects, they are essential to the creation of opportunities for smaller operators. Moreover, it is uncontroversial to state that the current arrangements for greenfields agreements have agreed to be inherently vulnerable to significant delays caused by the bargaining practices adopted by some unions. However, CCIQ suggests that the requirement that pay and conditions be consistent with the 'prevailing pay and conditions' within the relevant industry is vague and opens the door to potential disputes. It should be removed.

Providing for the FWO to pay interest on unclaimed monies

43. Schedule 1, Part 10 (items 79-80) of the bill seeks to amend the FW Act to ensure that the FWO must also pay an amount of interest to the former employer on unclaimed monies which it has collected but not dispersed. The proposal arises from the pre-election policy.

44. Where a worker has been underpaid and the FWO recovers those wages for an employee, the Government holds the money until the worker can be found and the unpaid money returned to them. The Coalition will require that the interest earned on money which has been recovered the FWO for underpaid workers be given to those workers who have been underpaid.

CCIQ Recommendation

45. CCIQ supports this amendment. It is a sensible amendment consistent with the aim of ensuring that workers who are underpaid are appropriately compensated.