
Chamber of Commerce and Industry of Western Australia (Inc)

Fair Work Amendment Bill 2012 (Cth)

Submission to the Senate Education, Employment and Workplace Relations Committee

1. In response to the Senate Education, Employment and Workplace Relations Committee's (**Committee**) invitation to interested individuals and organisations to prepare written submissions regarding the *Fair Work Amendment Bill 2012 (Cth)* (**Bill**), the Chamber of Commerce and Industry of Western Australia (Inc) (**CCI**) provide the following submissions.

The underwhelming first tranche response and Bill

2. CCI welcomes a number of the proposed amendments in the Bill. For example, CCI endorses the proposed amendments to the *Fair Work Act 2009 (Cth)* (**FW Act**) which seek to:
 - a. discourage unmeritorious unfair dismissal claims;
 - b. prohibit union officials from becoming bargaining representatives of employees if they are not permitted to represent the industrial interests of such employees; and
 - c. widen the scope of parties entitled to bring an application to vary a modern award to remove ambiguity or uncertainty or to correct an error.
 3. However, CCI submits that the Minister for Employment and Workplace Relations's first tranche response and in-turn the Bill are illustrative of the Government's unwillingness to address the tougher industrial relations issues. We note that a number of employer groups have made media releases criticising the Government on this basis.
 4. Notwithstanding CCI's concerns about some of the recommendations that were made by the Expert Panel in their final report entitled, *Towards More Productive and Equitable Workplaces*, it is disappointing that the Bill only seeks to introduce approximately 18 of the 53 recommendations which were made.
 5. The Bill also only addresses the prima facie superficial industrial relations issues as the proposed amendments are largely technical or minor in nature. For example, the Bill fails to address the following key recommendations (amongst others) made by the Expert Panel:
 - a. rectifying anomalies with annual leave loading and public holidays;
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- b. refining issues surrounding bargaining claims and the capacity for unions to take industrial action to overcome the "strike now, bargain later" outcome in the case of *JJ Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53; and
 - c. the implementation of a more effective framework which encourages the making of individual flexibility arrangements.
6. CCI further submits that the Bill fails to implement many reasonable recommendations made by the Expert Panel. For example, one of the recommendations made by the Expert Panel was to amend the adverse action provisions in the FW Act so that the central consideration when assessing the reason for adverse action is the subjective intention of the person allegedly taking the adverse action, rather than any potential unconscious motivations. The outcome of the recent High Court case of *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32 aligned with this recommendation. However, despite this, the Expert Panel's recommendation has not been included in the Bill.
 7. The Minister for Employment and Workplace Relations has announced that the Government will continue to consult with stakeholders about the remaining recommendations made by the Expert Panel. However, CCI, and to our awareness other employer groups, have not yet been contacted by the Government to discuss the remaining recommendations.
 8. CCI submits that the Government's decision to delay addressing the remaining Expert Panel recommendations is problematic for two reasons. Firstly, various key issues as outlined at paragraph 5 above currently remain unresolved. Secondly, with the upcoming 2013 Federal Election fast approaching, it is questionable if any of the remaining recommendations will be implemented.

Additional considerations in relation to the Bill

Unfair Dismissals

9. The Minister for Employment and Workplace Relations announced that it would be implementing recommendation 44 of the Expert Panel's recommendations as part of the first tranche response. This recommendation provides:

The Panel recommends that the FWA President give consideration to requiring applicants to provide more information about the circumstances of the dismissal in the initial documentation lodged with FWA.

10. CCI has been unable to identify the above recommendation within the text of the Bill.
11. CCI submits that the Bill should give effect to this recommendation by for example, stipulating what additional information the President will request from applicants. Alternatively, CCI acknowledges that the Government may have decided that such a recommendation was not appropriate for inclusion in the FW Act. If this is the case, it is CCI's preference that the

Government provides relevant parties with further information about what measures are being taken to implement this recommendation.

Fair Work Commission

12. The Bill seeks to change the name of “Fair Work Australia” to “Fair Work Commission”. However, we note that the Expert Panel’s recommendation in this respect was:

The Panel recommends that the FW Act be amended to change the name of Fair Work Australia to a title which more aptly denotes its functions. It is recommended that the new title contain the word ‘Commission’ and that it no longer contain the words ‘Fair Work’.¹

13. In the Expert Panel’s final report they explained that the above amendment was necessary to:
- a. clearly separate the tribunal and its functions from the administrative arm of Fair Work Australia; and
 - b. eliminate confusion regarding the various bodies that have the words “Fair Work” form part of their title.²

14. The Minister for Employment and Workplace Relations announced that it would be seeking to implement the Expert Panel’s above recommendation in its first tranche response. However, notably the proposed amendment in the Bill does not appear to align with the above recommendation and accordingly fails to address the underlying reasons identified by the Expert Panel when making the recommendation.

15. CCI also has concerns that the words “Fair Work” are indicative of a more politicized function and therefore fail to adequately denote the independent nature of the tribunal.

16. Based on the above reasoning, CCI proposes that Fair Work Australia would be more appropriately named the “Australian Industrial Relations Commission” or the “Australian Employee Relations Commission” as these terms adequately reflect the role of the tribunal. However, given the history of the previous Australian Industrial Relations Commission and the general understanding of its role, we would recommend that Fair Work Australia be renamed the Australian Industrial Relations Commission.

Vice-Presidents

17. The Bill seeks to introduce two new Vice-President positions. Notably, this proposed change to the FW Act was not recommended by the Expert Panel.

¹ Recommendation 50, see *Towards More Productive and Equitable Workplaces*, pp 251

² See *Towards More Productive and Equitable Workplaces*, pp 249 -251

18. The Government has failed to identify why the introduction of these new positions is required and what benefits these positions will provide. Therefore, it does not appear that the introduction of these positions is necessary.
19. However, if these positions were to be introduced, CCI submit that the Vice-President roles should not be based in Melbourne or Sydney to facilitate a truly national system. Currently all panel heads are located in these two locations which potentially limits Fair Work Australia's understanding of the industrial relations issues affecting other States and Territories at a senior level.

Modern Awards

20. In accordance with recommendation 15 of the Expert Panel's recommendations, the Bill seeks to amend section 160 of the FW Act to widen the scope of parties entitled to bring an application to vary a modern award to remove ambiguity or uncertainty or to correct an error.
21. This amendment seeks to ensure that the relevant parties who have standing to make applications to vary, revoke or make modern awards under section 158 of the FW Act are also entitled to make applications to vary modern awards under section 160 of the FW Act.
22. Generally speaking, the effect of this amendment is that the following parties may make applications under sections 158 and 160 of the FW Act:
 - a. employers, employees, organisations or outworker entities that are covered by a modern award;
 - b. an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award; or
 - c. an organisation that is entitled to represent the industrial interests of one or more outworkers to whom the outworker terms relate.
23. CCI submits that both sections 158 and 160 of the FW Act should be further amended to clarify that unregistered organisations such as employer associations also have standing to make such applications. CCI's proposed amendment would facilitate various employer associations that are not registered under the *Fair Work (Registered Organisations) Act 2009* (Cth) (**FW RO Act**) to bring such applications in the future.
24. CCI submits that our proposed further amendment is necessary because:
 - a. unregistered employer associations have traditionally, and will continue to have, an active interest in such applications on behalf of employers;
 - b. as a matter of practice, it aligns with the scope of relevant parties currently participating in the 2 year modern award review process as notably a number of

employer associations that are not registered organisations under the FW RO Act are actively participating in this process; and

- c. the FW Act provisions dealing with the 4 yearly review of modern awards do not seek to prevent unregistered organisations (or any other party) from participating in the review process.

FW Act Review

25. CCI refers to its Submissions dated 17 February 2012 in relation to the FW Act Review. CCI maintains the position taken in these submissions and would encourage the Committee to further consider our Submissions at this time.

Expedite the Bill

26. We encourage the Committee to have regard to the above factors when preparing their report regarding the Bill. In addition, CCI strongly encourages the expeditious introduction of the Bill to at least initiate the much needed FW Act reform process.

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13 November 2012