Submission

to

Senate Education, Employment and Workplace Relations Committee

Inquiry into Fair Work Bill 2008

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Introduction

1. The Western Australian (**WA**) Government has serious concerns with aspects of the *Fair Work Bill 2008* (**the Bill**). In particular, the WA Government notes that significant parts of the Bill do not reflect the Federal Government's policy commitments as set out in *Forward with Fairness*.[1]

2. The WA Government is concerned that the bargaining, transfer of business, unfair dismissal and right of entry provisions of the Bill will negatively affect Western Australian workplaces. It is critical in the current economic climate that workplace laws encourage flexibility, productivity and business confidence. International financial turbulence has fostered an uncertain economic climate. Western Australia faces falling commodity prices and a moderation in consumer and business activity. Despite this, employers in Western Australia continue to face a skills shortage as businesses struggle to remain competitive.

3. This submission outlines the WA Government's primary concerns with the Bill and contains a summary of proposed amendments to the Bill at **Attachment A.** The WA Government formally acknowledges the Federal Government's consultative approach in developing the Bill and its attempt to streamline and simplify existing federal workplace legislation.

National Employment Standards – maximum weekly hours (Chapter 2, Part 2-2, Division 3)

4. The WA Government is concerned that the maximum weekly hours provisions under the Bill, like existing provisions under the *Workplace Relations Act 1996*, are unduly restrictive.

5. Clause 62 of the Bill effectively restricts maximum weekly hours to 38 hours for a full-time employee, plus reasonable additional hours. Clause 63 of the Bill enables modern awards and enterprise agreements to average hours over a specified period, provided the average weekly hours do not exceed 38 hours.

6. The maximum weekly hours provisions do not provide certainty for industries where employees regularly work more than 38 hours per week. For example, in the Western Australian mining, agricultural, forestry and fishing industries, employees typically work more than an average of 38 hours.[2]

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[1] *Forward with Fairness – Labor's plan for fairer and more productive Australian workplaces* (April 2007) and *Forward with Fairness – Policy Implementation Plan* (August 2007).

[2] Australian Bureau of Statistics 2008, **Labour Force Australia, Details, Quarterly, August 2008**, E03_aug94 - Employed Persons by Sex, Industry, Capital City-Balance of State, Hours Worked, August 1994 onwards data cube: SuperTABLE, Cat. no. 6291.0.55.003, viewed 08 December 2008, http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6291.0.55.003Aug%202008?OpenDocument

7. Employers will be unable to assume that additional hours are reasonable in any given case, even if they operate in an industry where the usual patterns of work exceed 38 hours per week (notwithstanding clause 62(3)(g) of the Bill). This creates an undesirable level of operational uncertainty for employers.

8. The WA Government supports an amendment to clause 62(1) of the Bill to the effect that an employer must not request or require an employee to work more than:

   (a) the ordinary weekly hours prescribed by a modern award or enterprise agreement; or

   (b) if there is no modern award or enterprise agreement that prescribes ordinary weekly hours, 38 hours (for a full-time employee); plus

   (c) reasonable additional hours.

9. This amendment would enable modern awards and enterprise agreements to prescribe weekly hours of work in excess of 38 for the purposes of clause 62(1) of the Bill. Similar provisions exist in section 9A of the *Minimum Conditions of Employment Act 1993* (WA).

10. The proposed amendment would still safeguard employees against unreasonable working hours. Given existing hours of work provisions in awards and the modern awards objective (clause 134 of the Bill), Fair Work Australia is unlikely to make modern awards which prescribe excessive ordinary weekly hours. In turn, enterprise agreements must pass the "better off overall test" compared with a relevant modern award and be approved by a majority of employees.

National Employment Standards – redundancy pay (Chapter 2, Part 2-2, Division 11)

11. The WA Government strongly supports clause 121(b) of the Bill, which exempts small business employers from the requirement to make redundancy payments under clause 119. However, the WA Government is concerned that this exemption will be of minimal or no practical benefit given modern awards can prescribe redundancy pay obligations for small business employers.

12. The majority of draft modern awards issued by the Australian Industrial Relations Commission (**AIRC**) to date have included redundancy pay obligations for small business employers. The WA Government submits that modern awards should be subject to the exemption in clause 121(b) of the Bill. There would be nothing to prevent small business employers from making redundancy payments pursuant to an enterprise agreement or contract of employment.

13. Approximately 35% of businesses operating in Western Australia are small business employers.[3] These businesses are vital to the Western Australian economy and have the capacity to contribute significantly to jobs creation (given around 60% of businesses in Western Australia are currently non-employing businesses).[4] While the intent of clause 121(b) of the Bill is clear, small businesses are unlikely to benefit in practice without an appropriate amendment.

Modern awards – flexibility terms (Chapter 2, Part 2-3, Division 3)

14. Clause 144 of the Bill requires modern awards to include a flexibility term, to enable the making of an individual flexibility arrangement (**IFA**) between an individual employer and employee. The WA Government supports the inclusion of flexibility terms in modern awards.

15. However, the WA Government supports an amendment to clause 144 so that employers may offer employment conditional on a prospective employee entering an IFA (which is currently prevented by clause 341(3) of the Bill). Without this flexibility, IFAs could be of limited value to employers who are seeking to implement and maintain operational change through IFAs.

16. The ability for employers to offer IFAs as a condition of employment would not disadvantage or be detrimental to employees, given that:

    (a) an IFA must result in an employee being "better off overall" than if no IFA had been agreed to; and

    (b) an employee can terminate an IFA by giving four weeks' written notice.

Enterprise agreements – general (Chapter 2, Part 2-4)

17. The WA Government supports employers and employees having genuine choice as to their preferred employment arrangements. In particular, the WA Government supports employers and employees being able to freely negotiate enterprise agreements with minimal third party involvement.

18. While the Bill removes the current distinction between union and non-union collective agreements, most enterprise agreements will effectively be union agreements. The combined effect of a number of the Bill's

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[3] Australian Bureau of Statistics 2008, **Counts of Australian Businesses, including Entries and Exits, Jun 2003 to Jun 2007**, 'Businesses by Industry Class by Main State by Employment Size Ranges - 2006-07' Excel spreadsheet, Cat. no. 8165.0, viewed 8 December 2008, http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/8165.0Jun%202003%20to%20Jun%202007?OpenDocument (the ABS defines a small business as one that employs fewer than 20 employees, as opposed to clause 23 of the Bill which defines a small business as one that employs fewer than 15 employees).

[4] Ibid.

provisions will be to ensure union involvement during the agreement-making process and throughout the life of an enterprise agreement:

(a) clause 172 expressly enables enterprise agreements to deal with matters pertaining to the relationship between employers and unions that will be covered by the agreement (such matters could include the appointment of union site delegates or even certain rights of entry);

(b) clause 175 requires employers who intend to make a greenfields agreement to notify all "relevant employee organisations", which could frustrate negotiations where unions have overlapping coverage of employees or a history of demarcation disputes;

(c) clause 176 provides that unions will be default bargaining representatives for employees who are members (and who do not appoint an alternative bargaining representative);

(d) clauses 183 and 201(2) effectively entitle a union that was a bargaining representative to be covered by an enterprise agreement, which in turn confers the union with certain rights (such as the right to seek enforcement of the agreement or termination of the agreement after its nominal expiry date);

(e) clauses 186(6) and 205 require enterprise agreements to contain dispute settlement and consultation terms that entitle employees to be represented (e.g. by a union).

19. The WA Government does not support such broad rights being conferred on unions when just 18.9% of all Australian employees are union members (this figure is even lower in Western Australia, with only 15.7% of Western Australian employees being union members). More than 86% of Western Australian employees in the private sector are not union members.[5] Despite this, the Bill will enable a union with a single member at the workplace to effectively unionise negotiations for a proposed agreement.

Bargaining representatives (Chapter 2, Part 2-4, Division 3)

20. The WA Government notes the significant status of bargaining representatives under the Bill, including their ability to seek majority support determinations, scope orders, low-paid authorisations, bargaining orders and workplace determinations. Employees may appoint themselves or another person as a bargaining representative. Clause 179 of the Bill provides that an employer or the employer's bargaining representative must not refuse to recognise or bargain with

[5] Australian Bureau of Statistics 2008, Table 11 **Employee Earnings, Benefits and Trade Union Membership August 2007**, Cat. no. 6310.0, ABS, Canberra, p.31.

another bargaining representative (this provision is a civil remedy provision).[6]

21. The WA Government is concerned about the efficacy of the bargaining representative provisions, particularly for large employers. An employer could be required to bargain with a multitude of bargaining representatives at any one time – individual employees, unions and other representatives. This requirement could be unwieldy in practice and frustrate the bargaining process. While the *Workplace Relations Act 1996* currently requires an employer to deal with multiple bargaining agents for an employee collective agreement, the employer is only required to do so within a limited period.[7]

22. It is acknowledged that clause 229(4) of the Bill will enable Fair Work Australia to make bargaining orders where bargaining is not proceeding efficiently because there are multiple bargaining representatives. However, an employer will generally have to give the bargaining representatives a reasonable time to respond to the employer's concerns. In the meantime, the employer will have to continue dealing with the bargaining representatives to comply with the good faith bargaining requirements and clause 179 of the Bill.

23. The WA Government supports an amendment to clause 229 of the Bill so that an employer's bargaining representative can apply to Fair Work Australia at <u>any</u> time on the ground that bargaining is not proceeding efficiently because there are multiple bargaining representatives (i.e. without having to obtain Fair Work Australia's leave under clause 229(5) of the Bill).

Enterprise agreements – flexibility terms (Chapter 2, Part 2-4, Division 5)

24. As with flexibility terms in modern awards, the WA Government supports the inclusion of such terms in enterprise agreements. However, the WA Government is concerned that the ability for one party to unilaterally terminate an IFA, by giving not more than 28 days' written notice, undermines the efficacy of IFAs.

25. Clause 203(6) of the Bill seemingly enables IFAs to be terminated immediately on the provision of written notice. This could cause both employers and employees difficulties if they have arranged their affairs around the particular flexibility arrangement. For example, an employer may have to change payroll or rostering arrangements, while an employee may have to change childcare or transport arrangements.

[6] The WA Government queries why clause 179 is limited to employers and employers' bargaining representatives and does not apply to bargaining representatives generally.
[7] Section 335(3) of the *Workplace Relations Act 1996* prescribes a period beginning seven days before the agreement is approved and ending when the agreement is approved.

26. The WA Government supports that clause 203(6) require at least 28 days' written notice for one party to terminate an IFA. This would be consistent with the notice period prescribed in the model flexibility term issued by the AIRC for the purposes of modern awards.

27. The WA Government also supports employers being able to offer employment conditional on a prospective employee entering an IFA (see paragraph 15 above).

Bargaining – general (Chapter 2, Part 2-4)

28. The WA Government has serious concerns with aspects of the bargaining provisions of the Bill. The capacity for bargaining orders and workplace determinations will have the coercive effect of requiring employers to make enterprise agreements or face the prospect of an arbitrated outcome.

29. The WA Government notes the Federal Government's policy commitments in *Forward with Fairness* about parties' options where they are unable to reach agreement:

    "Where agreement cannot be reached, bargaining participants will have a range of options:

    - they can walk away, in which case the industrial arrangements already in place would remain in force;
    - they can jointly request Fair Work Australia help them reach agreement or jointly request Fair Work Australia determine particular matters; or
    - they can, in certain circumstances, take protected industrial action."[8]

30. *Forward with Fairness* only outlines three situations in which Fair Work Australia may arbitrate an outcome:

    (a) where the parties jointly agree to arbitration;

    (b) where industrial action is causing significant harm to the bargaining participants;

    (c) where industrial action or threatened industrial action is causing, or may cause, significant harm to the wider economy or to the safety or welfare of the community.[9]

[8] *Forward with Fairness*, page 16.
[9] Ibid.

31. However, the Bill departs from these policy commitments in *Forward with Fairness* by:

    (a) allowing one party to refer a dispute about bargaining to Fair Work Australia (i.e. not on joint application) under clause 240(2);

    (b) allowing one party to apply for a "special low-paid workplace determination" (i.e. an arbitrated outcome for low-paid employees) under clause 260(4);

    (c) requiring Fair Work Australia to make a "bargaining related workplace determination" (i.e. an arbitrated outcome where there has been a serious contravention of a bargaining order) under clause 269.

32. The WA Government considers that the capacity for Fair Work Australia to intervene in bargaining disputes and arbitrate outcomes may undermine the bargaining process. Parties should be able to freely negotiate, and apply legitimate pressure in the bargaining process, with minimal third party involvement. This is particularly the case if bargaining does not involve industrial action.

33. For example, clause 228(1) of the Bill requires a bargaining representative to give "genuine consideration to the proposals of other bargaining representatives" (among other things). Clause 228(2) provides that a bargaining representative is not required "to make concessions during bargaining for the agreement". What constitutes "genuine consideration" is largely subjective. The making of bargaining orders to enforce this requirement could paradoxically have the effect of requiring a party to make concessions.

Low-paid bargaining (Chapter 2, Part 2-4, Division 9)

34. The WA Government supports appropriate minimum safety nets for all employees, as represented primarily by the National Employment Standards and national minimum wage orders, and to a lesser extent by modern awards.[10] The WA Government does not believe that enterprise agreements should be considered a minimum safety net. For this reason, the WA Government does not support aspects of the low-paid bargaining provisions of the Bill.

35. The WA Government queries the need for a specialised low-paid bargaining stream, given the new bargaining provisions of the Bill will more readily facilitate bargaining for all employees (regardless of their income). The WA Government also notes the enhancement of statutory minimum conditions of employment (the National Employment

[10] As reflected by clause 3 of the Bill, which lists as one of the objects of the Act "ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders" (emphasis added).

Standards) and the modern awards objective to "provide a fair and relevant minimum safety net of terms and conditions", specifically taking into account the needs of the low-paid.

36. The WA Government is concerned with the potential scope of the low-paid bargaining provisions. There is no definition of "low-paid" in the Bill, which could lead to inconsistency in the application of the low-paid bargaining provisions.[11] While the Explanatory Memorandum for the Bill refers to the community services, cleaning and child care sectors, there is scope for employees in a much broader range of sectors to also be considered "low-paid". For example, the retail trade, accommodation, cafes and restaurant industries have the lowest average earnings of all industries.[12]

37. Aside from the lack of clarity about who is a "low-paid" employee, the WA Government has concerns with the following aspects of the low-paid bargaining provisions:

    (a) the requirement that employers of low-paid employees bargain together for a multi-enterprise agreement, which is contrary to bargaining being voluntary and focussed on the needs of the particular enterprise;[13]

    (b) the ability for a union to apply for a low-paid authorisation under clause 242(1)(b), even if no employees to be covered by the agreement are union members;

    (c) the ability for a union who applied for a low-paid authorisation to be the default bargaining representative of employees under clause 176(2), even if they are not members of the union (and may in fact be members of another union);

    (d) the requirement that Fair Work Australia compulsorily arbitrate a special low-paid workplace determination in the circumstances prescribed by clauses 262 and 263.

38. Clause 263(3) of the Bill requires Fair Work Australia to be satisfied, before making a special low-paid workplace determination, that no employer has previously been covered by an enterprise agreement in relation to the work to be covered by the determination. This appears consistent with one of the objects of the low-paid bargaining provisions,

[11] In contrast to clause 333 of the Bill, which prescribes a high income threshold for the purposes of defining a "high income" employee.

[12] AWE table 10 Australian Bureau of Statistics 2008, 'Average Weekly Earnings, Industry: Original' table 10, **Average Weekly Earnings August 2008**, Cat. no. 6302.0, ABS, Canberra, p.13.

[13] Clause 3 of the Bill lists as one of the objects of the Act "achieving productivity and fairness through an emphasis on enterprise-level collective bargaining" (emphasis added). Again, clause 171 lists as one of the objects of Part 2-4 "to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level" (emphasis added).

namely to assist low-paid employees who have not historically had the benefits of collective bargaining.[14]

39. However, it is important that the reference to "enterprise agreement" in clause 263(3) of the Bill extend beyond enterprise agreements as defined by clause 12 of the Bill. Employers who have made collective agreements under State legislation or the *Workplace Relations Act 1996* will otherwise be caught by the special low-paid workplace determination provisions.

Transfer of business (Chapter 2, Part 2-8)

40. The WA Government does not support the broadening of the definition of "transfer of business" under the Bill. The effect could be counterproductive by deterring the transferee of a business from employing some or all of the transferor's employees.

41. The implications of a transfer of business are significant. A transferee (**the new employer**) will inherit an enterprise agreement (including an IFA), workplace determination or named employer award of the transferor (**the old employer**). This is the case even if the new employer only employs one employee of the old employer, and even if the new employer is already covered by an enterprise agreement. The new employer is also required to recognise an employee's service with the old employer for the purposes of certain entitlements under the National Employment Standards.[15]

42. It is acknowledged that clause 318 of the Bill enables a new employer to apply to Fair Work Australia for an order preventing the old employer's industrial instrument from covering the new employer. However, there is no requirement for Fair Work Australia to make such an order.

43. Inheriting another employer's industrial instrument has the potential to cause significant commercial, operational and practical difficulties. The old employer's industrial instrument might not allow for the same flexibilities as the new employer's existing industrial instrument. Having different terms and conditions of employment apply at the workplace, even for a short period, could affect productivity. The old employer's industrial instrument could have different union coverage to the new employer's existing industrial instrument, which in turn could affect industrial harmony.

44. For these reasons, the WA Government does not support any extension of existing transmission of business provisions under the *Workplace Relations Act 1996*. At the least, the definition of "transfer of business" in clause 311 of the Bill should be amended to reflect the current jurisprudence on what constitutes a "transmission of business".

[14] Clause 241(a) of the Bill.
[15] Clause 22(5) of the Bill.

45. In order for there to be a transmission of business currently, the character of the transferred business activities in the hands of the new employer must bear a "substantial identity" to the old employer's business (the "substantial identity test").[16] Furthermore, the old employer must have "disposed" of its business (or a part of the business). It is not sufficient that the old employer merely changes the method by which it carries on its business.

46. In contrast, the Bill defines "transfer of business" by reference to the activities of employees. Clause 311(1)(c) provides that there is a transfer of business where, inter alia, the employee performs the same or substantially the same work for the new employer as for the old employer.

47. The definition of "transfer of business" in clause 311 of the Bill expressly captures outsourcing and in-sourcing arrangements. A transfer of business is possible even if a business outsources or in-sources functions that are incidental or ancillary to its main activities. A transfer of business will also be possible if a business does not dispose of any part of its business, but merely changes the method by which it carries on business.

48. For example, a hotel that previously outsourced cleaning to a cleaning contractor could decide to in-source that function again. If the hotel employed one of the contractor's employees, there will be a transfer of business within the meaning of clause 311(5) of the Bill. The hotel could inherit an enterprise agreement of the contractor, even though the hotel's core business is not "cleaning". The risk of a new employer inheriting a commercially unviable industrial instrument is exacerbated by the removal of the substantial identity test (by focussing on similarities in employees' work activities, rather than the nature of the business).

49. *Forward with Fairness* was silent on the Federal Government's policy concerning transfer of business. To date the Federal Government has not explained its justification for expanding the definition under the Bill.

Guarantee of annual earnings (Chapter 2, Part 2-9, Division 3)

50. The WA Government supports employers and high income employees being able to negotiate terms and conditions of employment without reference to modern awards.

51. For clarity, the WA Government supports an amendment to Division 3 of Part 2-9, Chapter 2 to expressly provide that an employer may offer employment conditional on a prospective employee accepting a guarantee of annual earnings. This ability is implied by clause 341(4) of

[16] *PP Consultants Pty Ltd v Finance Sector Union of Australia* (2000) 201 CLR 648 and *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* (2005) 222 CLR 194.

the Bill, but is not sign-posted in the guarantee of annual earnings provisions.

Unfair dismissal (Chapter 3, Part 3-2)

52. The WA Government supports a more streamlined process for dealing with unfair dismissal applications as provided under the Bill (subject to the issues raised in paragraph 54 below). However, the WA Government is concerned that the removal of unfair dismissal exemptions will deter businesses from employing new staff, particularly small businesses.

53. The WA Government does not consider that the Small Business Fair Dismissal Code will provide small business employers with sufficient flexibility. The utility of the Code will depend almost entirely on how it is interpreted and applied by Fair Work Australia. There is the potential that small business employers, by virtue of having to comply with the Code, will be held to a higher standard than non-small business employers by Fair Work Australia.

54. The WA Government's primary concerns with the unfair dismissal provisions of the Bill are:

    (a) the inclusion of short-term casuals when calculating whether an employer has fewer than 15 employees and is therefore a "small business employer" under the unfair dismissal provisions. Short-term casuals should be excluded from the calculation;[17]

    (b) the removal of the existing "genuine operational reasons" exclusion from unfair dismissal. An employee will not be unfairly dismissed under the Bill if their dismissal was a case of genuine redundancy. However, the definition of "genuine redundancy" in clause 389 of the Bill is narrower than the definition of "genuine operational reasons" in section 643(8) of the *Workplace Relations Act 1996*. The WA Government supports the retention of the existing "genuine operational reasons" exclusion;[18]

    (c) the lack of a comprehensive definition of "serious misconduct" for the purposes of the Small Business Fair Dismissal Code (see for example the definition in regulation 12.10 of the *Workplace Relations Regulations 1996*);

[17] Clause 23 of the Bill. A short-term casual, or a "casual employee engaged for a short period" is defined by section 638(4) of the *Workplace Relations Act 1996*.

[18] For example, under the *Workplace Relations Act 1996* it is sufficient if the employee was dismissed for reasons that include genuine operational reasons (i.e. there may be other contributing reasons) – no such allowance is made under the Bill. Under the Bill, a redundancy will not be "genuine" if an employer failed to consult about the redundancy as required by a modern award or enterprise agreement (e.g. failing to comply with procedural or notification requirements).

(d) the uncertainty as to whether the Small Business Fair Dismissal Code will be complied with if a small business employer reasonably believes there to be a valid reason for dismissal. A reasonable belief should be sufficient to comply with the "valid reason for dismissal" requirement of the Code;

(e) the ability for Fair Work Australia to potentially order reinstatement or compensation without holding a conference or hearing (if there are no facts in dispute);

(f) the limited capacity to appeal an unfair dismissal decision of Fair Work Australia under clause 400 of the Bill (the appeal must be in the public interest). Given Fair Work Australia is not required to give reasons for decision, it may be practically difficult for a party to appeal a decision;

(g) limited legal representation rights, which could disadvantage employers (particularly small businesses) and employees. At the least, there should be capacity for both parties to agree to allow legal representation.

Right of entry (Chapter 3, Part 3-4)

55. The WA Government opposes the relaxing of right of entry requirements under the Bill. Right of entry is a statutory modification of the law of trespass and should be treated seriously. It has the potential to infringe upon employees' privacy and to disrupt workplace productivity. The WA Government strongly supports the retention of existing right of entry provisions under the *Workplace Relations Act 1996*.

56. Of particular concern is the ability for unions to inspect non-members' records under clauses 481-483 of the Bill (for the purposes of investigating a suspected breach of the Act or a prescribed industrial instrument).[19] Given that the majority of Australian employees are not union members, it is reasonable to assume that many employees would oppose a union inspecting their records. Such records could contain personal information including an employee's contact details or even medical details.

57. While clause 504 of the Bill purports to prevent the misuse of employee records by a union, it will be difficult to establish a contravention in practice. Furthermore, National Privacy Principle 2.1(c) in Schedule 3 to the *Privacy Act 1988* would potentially allow a union to use an employee's contact details for the secondary purpose of "direct marketing". Given the declining rates of union membership in Australia, unions are likely to take advantage of such information for recruitment purposes.

[19] Section 748(4) of the *Workplace Relations Act 1996* currently prevents unions from inspecting non-members' records.

58. The WA Government supports an amendment to clause 482 of the Bill to prevent unions from inspecting non-members' records. At the least, the consent of non-members should be required as a condition of inspection.

59. The WA Government is concerned about the potential for industrial and demarcation disputes under clause 484 of the Bill (right of entry for the purposes of holding discussions with employees). Currently, a union can only exercise right of entry for discussion purposes if employees' work is covered by an award or collective agreement that is binding on the union. The Bill removes this requirement.

60. The result is that unions with overlapping coverage will be able to exercise right of entry with respect to the same employees. A union will be able to exercise right of entry even if another union is covered by a modern award, enterprise agreement or workplace determination that applies to employees' work. The WA Government supports an amendment to clause 484 of the Bill to limit right of entry for discussion purposes to where a union is covered by a prescribed industrial instrument.

61. While clause 492 of the Bill is based on existing right of entry provisions, the WA Government queries the inclusion of clause 492(2). The effect of the clause is to deem certain requests of an occupier of premises to be unreasonable. The focus of clause 492 should properly be on the "reasonableness" of an occupier's request, rather than subjective criteria such as the occupier's presumed intention.

General matters

62. The WA Government has a direct interest in industrial relations matters that affect a significant part of the Western Australian population or economy. As such, the WA Government supports relevant State Ministers being entitled to make submissions to Fair Work Australia as outlined in clause 597(1)(a) of the Bill (i.e. where a matter is before a Full Bench and it would be in the public interest for a submission to be made).

63. The WA Government encourages the utilisation of existing State industrial relations services as facilitated by clauses 631 and 650 of the Bill. There would be particular merit in State services being utilised to process enterprise agreements. *Forward with Fairness* states that Fair Work Australia will approve enterprise agreements within seven days.[20] While this timeframe has not been mandated in the Bill, it is in the interests of all parties that agreements are processed as quickly as possible.

[20] *Forward with Fairness*, page 15.

Attachment A

Summary of Proposed Amendments to Fair Work Bill 2008

1. Clause 62 of the Bill (maximum weekly hours) be amended to enable modern awards and enterprise agreements to prescribe weekly hours of work in excess of 38 for the purposes of clause 62(1).

2. Clauses 144 and 202 of the Bill be amended to enable an employer to offer employment conditional on a prospective employee entering an individual flexibility arrangement.

3. Clause 229 of the Bill be amended to enable an employer's bargaining representative to apply to Fair Work Australia at any time for a bargaining order on the ground that bargaining is not proceeding efficiently because there are multiple bargaining representatives.

4. The Bill be amended so that there be no capacity for Fair Work Australia to make serious breach declarations or to arbitrate a bargaining related workplace determination.

5. Clause 240 of the Bill be amended so that Fair Work Australia may only deal with a bargaining dispute by consent of all the bargaining representatives.

6. Clause 311 of the Bill be amended so that the definition of "transfer of business" reflects the current jurisprudence on what constitutes a "transmission of business" under the *Workplace Relations Act 1996*.

7. Division 3 of Part 2-9, Chapter 2 be amended to expressly provide that an employer may offer employment conditional on a prospective employee accepting a guarantee of annual earnings.

8. Clause 482 of the Bill be amended to prevent unions from inspecting non-members' records when investigating a suspected breach of the Act or an industrial instrument. At the least, the consent of non-members should be required as a condition of inspection.

9. Clause 484 of the Bill be amended to limit right of entry for discussion purposes to where a union is covered by a prescribed industrial instrument that applies to employees' work (e.g. a modern award or enterprise agreement).

10. Clause 596 of the Bill be amended to allow for legal representation in a matter before Fair Work Australia by consent of the parties.

11. Clause 597 of the Bill be amended to entitle State Ministers with responsibility for industrial relations matters to make submissions in a matter before a Full Bench of Fair Work Australia (if it is in the public interest).