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Chamber of Commerce and Industry of Western Australia (Inc)

Fair Work Amendment (Tackling Job Insecurity) Bill 2012 (Cth)

Submission to House Standing Committee on Education and Employment

1. In response to the House Standing Committee on Education and Employment's (**Committee**) invitation to interested individuals and organisations to prepare written submissions regarding the *Fair Work Amendment (Tackling Job Insecurity) Bill 2012* (Cth) (**Bill**), the Chamber of Commerce and Industry of Western Australia (Inc) (**CCI**) provides the following submissions.

2. CCI strongly opposes the passage of the Bill in its entirety.

History of casual conversion provisions

3. In 2000, the Full Bench of the Australian Industrial Relations Commission[1] established a test case standard regarding the conversion of casual employment to part time or full time employment (**Test Case**).

4. In this case, the Commission approved a model award clause in relation to casual conversion of employment. This clause provided, amongst other things, that casual employees engaged on a regular and systematic basis for at least six months were entitled to elect to convert to part time or full time employment.

5. Unsurprisingly, many of the provisions from the Test Case are largely replicated in the casual conversion clauses currently contained within modern awards. This means the casual conversion provisions in modern awards are virtually the same or very similar in nature. For example, refer to the casual conversion provisions set out in clause 14.4 of the *Manufacturing and Associated Industries and Occupations Award 2010* (**Manufacturing Award**) and clause 14.8 of the *Building and Construction General On-Site Award 2010*.

[1] Metal, Engineering and Associated Industries Award, 1998- Part 1: Application by the AFMEPKIU for variation of the Metals, Engineering and Associated Industries Award, 1998 — (2000) *T4991*

6. The similarities between the casual conversion clauses contained in many modern awards are unremarkable given the history surrounding these provisions.

Fundamental discrepancies between the terms of the Bill and modern awards

7. Notably the provisions of the Bill are fundamentally different to the typical casual conversion clauses currently contained within modern awards. Some of these discrepancies include, amongst other matters:

   a. **Increased scope** – under the Manufacturing Award, a casual employee must have completed a minimum length of service (i.e. 6 months service) and must not be an "irregular casual employee"[2] to be eligible to elect for casual conversion.[3] Whereas, the Bill allows for both, casual employees who have not completed any minimum periods of service, and "rolling contract employees",[4] to make a request for casual conversion. Therefore, CCI submits that the Bill increases the scope of casual employees eligible for casual conversion of employment by extending the eligibility criteria to casual employees, other than true casual employees. This in-turn departs from the position established in the Test Case;

   b. **Process for initiating change** – under the Manufacturing Award, an employer must give eligible casual employees written notice informing them of their right to elect for casual conversion.[5] Whereas, under the Bill eligible employees, or relevant employee organisations acting on behalf of eligible employees, may make a written request for casual conversion. CCI submits that the responsibilities for initiating the casual conversion process have been reversed under the Bill;

   c. **Substantially reduced time frames** – under the Manufacturing Award, an employer must give the relevant employee written notice within four weeks of the employee completing their minimum service period. Further, upon receipt of such notice or after the expiry time for giving such notice, the relevant employee must give four weeks written notice to their employer of their intention to elect for casual conversion. Further, within four weeks of receipt of this notice, the employer must consent to or

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[2] "Irregular casual employee" is defined in the Manufacturing Award as an employee who is engaged to perform work on an occasional or non-systematic or irregular basis

[3] Refer to clauses 14.4(a) and 14.4(k) of the Manufacturing Award

[4] "Rolling contract employee" is defined in the Bill and the accompanying EM as an employee employed on a fixed term basis by the same employer doing the same type of work on two or more occasions (and such employees are not caught by the "small business" exemption under the Bill)

[5] Refer to clause 14.4(b) of the Manufacturing Award

refuse the election.[6] Whereas, under the Bill, an employer must give a written response to a request made by an eligible employee or representative organisation within 21 days of the request being made. Therefore, CCI submits that the time frame in which casual conversion of employment is addressed has been substantially reduced under the Bill; and

d. **Secure Employment Orders** – under the Manufacturing Award, any dispute regarding casual conversion would typically be caught by the relevant dispute resolution clause in the award. Notably, this means that matters will likely be referred to the Fair Work Commission (**FWC**) if enterprise level discussion were unsuccessful for mediation, conciliation or as a last resort arbitration. Whereas, in the event there is a dispute under the Bill (i.e. the employer refuses a request for ongoing employment), relevant parties may immediately apply to the FWC for secure employment orders. These orders can apply to casual employees, rolling contract employees, prospective employees, employees who already have a secure employment arrangement or a class of relevant persons etc. Therefore, CCI submits that the Bill encourages ineffective and costly resort to the FWC in circumstances where disputes would likely be most appropriately addressed, at least initially, through internal dispute resolution procedures. CCI also submits that these provisions will place further pressure on the already stretched resources of the FWC.

Addressing inconsistencies between the Bill and modern awards

8. Paragraphs 7.a to 7.d of our above submissions illustrate that there are some fundamental discrepancies between the casual conversion provisions in the Bill and modern awards. However, there are currently no provisions within modern awards or the Bill which rectify this issue.

9. Proposed clause 306U of the Bill only provides that a term of a modern award or enterprise agreement will have no effect to the extent it is less beneficial for an employee when compared to the terms of a secure employment order that applies to an employee. However, as mentioned above, the Bill does not provide guidance about how all other inconsistencies between the casual conversion clauses in modern awards and the Bill will be addressed.

10. Consequently, if the Bill was introduced in its current form, CCI submits that it would be unworkable from a practical perspective for any employees where the casual conversion provisions of a modern award are also applicable. For example, it would be impossible for an employer to comply with the different procedural requirements and time frames in both the Bill and the modern award.

[6] Refer to clauses 14.4(b) and 14.4(d) of the Manufacturing Award

11. CCI also submits that these inconsistencies will unsurprisingly create confusion for both employees and employers.

12. Despite the inconsistency issues identified above, CCI also submits that there is no cogent reason to depart from the position established in the Test Case which is now largely reflected in modern awards.

13. Nonetheless, whilst CCI strongly opposes the passage of this Bill in its entirety, in the event the Bill was passed we would suggest that at the very least:

    a. the terms of the Bill should be amended to more closely align with the relevant provisions in modern awards to avoid any discrepancies between the casual conversion terms in these awards and the Bill; and/or

    b. a term should be included in the Bill which provides that casual conversion provisions in modern awards do not apply to the extent that such terms conflict with the Bill.

Unnecessary duplication

14. As mentioned above, a number of modern awards already contain provisions allowing for casual conversion. CCI's submits that the introduction of the Bill is unnecessary as not only will it create inconsistencies and confusion for both employers and employees, it will also create unnecessary duplication of casual conversion provisions in some industries.

15. Further, in the event that an employer is not already covered by casual conversion provisions in a modern award, CCI objects to the Bill on the basis that the introduction of the Bill will increase the regulatory burden on employers in an already heavily regulated and complex environment.

Proposed changes not recommended by Expert Panel

16. As the Committee will be aware, during 2012 the *Fair Work Act 2009* (Cth) (**FW Act**) underwent a rigorous review process. At the conclusion of the review process, an Expert Panel made 53 recommendations for reform of the FW Act.

17. Notably, none of the Expert Panel's recommendations even remotely align with the content in the Bill. Therefore, CCI submits that the changes proposed in the Bill are unwarranted and unnecessary.

Other avenues for casual conversion

18. The 2014 modern award review is intended to be wider in scope than the 2 yearly modern award review process currently taking place.

19. With this in mind, CCI submits that any proposals to extend the current casual conversion requirements would be best addressed as part of the 2014 modern award review process.

Chamber of Commerce and Industry of Western Australia (Inc)

1 February 2013