



***Productivity Commission  
Review into the  
Workplace Relations Framework***

***Submission by the  
Chamber of Commerce and Industry  
of Western Australia***

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# Submission to the Productivity Commission Review into the Workplace Relations Framework

## 1. ABOUT CCIWA

- 1.1 The Chamber of Commerce and Industry WA (**CCIWA**) is the leading business association in Western Australia, and with over 9,000 members is one of the largest organisations of its kind in Australia.
- 1.2 CCIWA members operate across Western Australia (**WA**) in all industries including: manufacturing; resources; agriculture; transport; communications; retail trade; hospitality; building and construction; local government; community services; and finance. Most of CCIWA's members are private businesses, although we also have a significant proportion of members in the not for-profit sector and the government sector.
- 1.3 Approximately 80 per cent of CCIWA members are small businesses employing up to 19 employees, with over 15 per cent employing between 20 and 99 employees and over 5 per cent employing more than 100 employees.
- 1.4 CCIWA traces its history back to 1890 and since that time we have sought to represent the interests of the WA business community in industrial relations (**IR**) matters in both the State and National jurisdictions. We support the WA business community on this issue through a range of services including our:
  - 1.4.1 Employee Relations Advice Centre which provides free over the phone advice to CCIWA members on the full range of employee relations (**ER**) and human resource (**HR**) matters. During 2014 this service addressed over 30,000 calls for information on issues including:
    - Interpretation of modern awards;
    - Wages enquiries;
    - Contracts of employment
    - Enterprise agreements;
    - Performance management and workplace bullying;
    - Termination of employment and dismissal claims;
    - Redundancies
    - Transmission of business; and
    - General HR queries.

This information is supplemented by a range of publications, including information sheets, detailed guides and an award service.
  - 1.4.2 Employee Relations Consulting unit which provides direct assistance to employers in addressing their ER and HR issues, including:
    - Drafting and negotiating enterprise agreements;
    - Representing employers in unfair dismissal, workplace bullying and general protection claims;

- Resolving disputes and managing industrial action;
- Managing union right of entry;
- Drafting and implementing HR policies, contracts of employment, and individual flexibility agreements;
- Development of strategic ER and HR plans;
- Addressing claims before the Fair Work Ombudsman and other government agencies; and
- Managing the ER and HR issues arising out of a transmission of business.

The unit also provides training to employers on a range of IR and HR issues, including an “IR MasterClass” programme which is designed to provide HR practitioners with a detailed understanding of the industrial relations systems and framework.

- 1.4.3 Construction Services unit which provides specialist services to manage the IR outcomes on major construction projects by providing advice and assistance to clients, service providers, fabricators, contractors and lower tier subcontractors.
- 1.5 Our experiences in providing advice and assistance to our members are reflected in our policy activities. Within this submission we have drawn the experiences of both our members and team of professional IR practitioners to identify the practical application and effect of the current workplace relations framework.
- 1.6 However CCIWA, like most employer organisations, does not focus solely on IR. Our overall vision is to make WA a world leading place to live and do business. We believe this is best achieved through the pursuit of free enterprise which guides our advocacy and professional service offerings.
- 1.7 In seeking to achieve this vision, our purpose is to make it easier to do business. In furthering this aim we provide a range of other activities including:
  - 1.7.1 Workplace health and safety, and workers’ compensation;
  - 1.7.2 Apprentice and trainees services;
  - 1.7.3 International trade;
  - 1.7.4 Migration and visas;
  - 1.7.5 Workforce development and business improvement services;
  - 1.7.6 Business training; and
  - 1.7.7 Policy development and advocacy across a range of business issues.

## 2. EXECUTIVE SUMMARY

- 2.1 CCIWA welcomes the opportunity to make submissions to the Productivity Commission Review of the Workplace Relations Framework.
- 2.2 The national industrial relations (**IR**) system has a significant impact upon the ability for Australian businesses to compete in a global economy, be adaptive to change, and provide opportunities for Australian employees to improve their standard of living.
- 2.3 For most businesses, the key to their success is derived from the value that their employees add to the business. Our IR system has a significant impact on regulating how work is performed, by affecting not only the respective rights and obligations of parties but influencing the way in which employers and employees interact with each other.
- 2.4 Since the 1990s, federal governments have attempted IR reform to address repressed productivity and efficiency levels arising from inefficient work practices. These reforms have been highly contentious, resulting in major upheaval as successive governments implement their own view of a model IR system.
- 2.5 In order to assure Australia's full participation in the global marketplace, there is a need for bipartisan support for the development of a stable IR system that provides Australian workplaces with the flexibility to adapt to changes in businesses circumstances and take advantage of future opportunities.
- 2.6 CCIWA believes that this will be best achieved through an IR system that encourages direct engagement between employers and employees, promotes co-operation rather than disputation, and provides ongoing flexibility to allow workplaces to establish arrangements that meet their current circumstances and adapt to future change.
- 2.7 It is CCIWA's view that the key areas for future reform of the industrial relations system are:

### ***National Employment Standards (NES)***

- 2.8 The NES as it currently stands fails to achieve its purpose of a simple and flexible safety net of minimum standards. CCIWA believes the NES needs to be amended to:
  - 2.8.1 Make it simpler for small business to understand and apply;
  - 2.8.2 Provide greater flexibility in how the minimum standards are practically applied within the workplace; and
  - 2.8.3 Ensure the entitlements are adaptable to the different ways in which work is performed.

### **Modern awards**

- 2.9 The 2008/09 award modernisation process resulted in a rationalisation of the number of awards, but preserved the outdated provisions of the pre-reform awards. The modern awards need to be fundamentally reviewed with a view of providing a simple safety net of minimum terms and conditions which reflect the current circumstances of the employers and employees.
- 2.10 To do this, the FWC should directly engage with employers and employees across Australia.

### **Penalty rates**

- 2.11 Penalty rates for Sunday and public holiday work is a significant issue for employers in the retail, hospitality and other service based industries. Our submission provides direct feedback from our members on the practical implications the current penalty rates have on their decision to operate and employ staff, as well as their impact on customer service. Penalty rates in the modern awards need to be reviewed in light of changing community expectations to ensure they appropriately reward employees whilst still allowing employers to successfully operate on these days.

### **Enterprise agreements**

- 2.12 Agreement making under the *Fair Work Act 2009 (Cth)* (**FW Act**) is overly complex and offers limited opportunity for flexibility. This is further compounded by the adversarial approach adopted in union negotiated agreements which severely limits the opportunity for genuine negotiations on productivity and workplace improvements. CCIWA believes that, in order for enterprise bargaining to facilitate productivity, the following is required:
- 2.12.1 The process for making agreements to be simplified to facilitate their use by small businesses;
  - 2.12.2 Employers and employees need to be able to choose from a range of agreement making options which enable them to adopt a style of agreement suitable to their workplace; and
  - 2.12.3 Agreements should provide employers and employees with the flexibility to establish terms and conditions relevant to their workplace, with all agreements assessed against the National Employment Standards.

### **Industrial action**

- 2.13 Industrial action is not only damaging to the Australian economy, but the extensive use of the threat of industrial action during the enterprise bargaining process promotes poor bargaining outcomes. CCIWA believes that:
- 2.13.1 Industrial action should be limited to an action of last resort on reasonable claims in order to provide opportunity for genuine bargaining to occur; and

- 2.13.2 The impact of industrial action on other businesses and the wider community needs to be recognised by lowering the currently high bar on applications to suspend or terminate industrial action.

### ***Unfair dismissal***

- 2.14 The uncertainty surrounding what constitutes a fair termination discourages many employers from managing poor performance, encourages settlement of frivolous claims by the payment of 'go away' money, and for many small businesses discourages them from employing permanent staff. To address these concerns CCIWA recommends that:

- 2.14.1 The unfair dismissal system establish a clear framework for determining a fair termination which is focused on the employer having a valid reason to terminate;
- 2.14.2 The trend of 'give it a go claims' be addressed by providing the Fair Work Commission (**FWC**) with greater ability to dismiss claims that have little merit and greater access to cost orders where employees misuse the system; and
- 2.14.3 Small businesses with less than 20 employees be exempt from the unfair dismissal system.

### ***Workplace bullying and general protections***

- 2.15 The workplace bullying and general protection provisions largely duplicate existing legislative provisions, representing unnecessary red tape for employers. CCIWA submits that these provisions should be removed.

### ***Right of entry***

- 2.16 The misuse of union right of entry has been well publicised. CCIWA proposes that the behaviour of union officials on worksites should be governed by the establishment of a code of conduct backed up with strong and meaningful penalties. Access to worksites should also be limited to situations where the union is a party to the relevant enterprise agreement, with the option for the FWC to limit the frequency of visits where they are excessive.
- 2.17 Given the broad nature of this review, the following submission seeks to address the key issues which are negatively impacting upon the workplace relations framework. As such, this submission is not a full examination of all the issues arising out of the operation of the FW Act. Given the complexity of the IR system, technical issues associated with the drafting or operation of particular clauses or provisions can have substantial impact upon the employment relationship. Whilst we have included some of these by way of example, we do not believe that a detailed examination of each provision of the FW Act is appropriate in the context of this review.

### 3. WHERE ARE WE AND WHERE DO WE NEED TO GO

#### *Impact of history on the modern workplace relations system*

- 3.1 The development of our industrial relations (IR) system was viewed as a necessity after the major strikes of the 1890s which resulted in significant destruction of property and civil unrest. The damage that resulted from these strikes made it the logical decision that when employers and unions cannot resolve their differences, they should be required to submit their claims for third party arbitration. As a result, the first federal industrial tribunal was established under the *Conciliation and Arbitration Act 1904 (Cth)*.
- 3.2 This Act was premised on s 51 (xxxv) of the *Commonwealth of Australia Constitution Act (Cth)* (**the Constitution**) which allows for the Commonwealth Parliament to make laws for the “*conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State*”. Around the same time, relevant State governments were also enacting legislation to provide for the arbitration of industrial disputes.
- 3.3 The resolution of industrial disputes remained a key basis for IR regulation until the introduction of the *Workplace Relations Act 1996 (Cth)* in 2006. This Act shifted the basis for IR regulation from s 51(xxxv) of the Constitution, to s 51(xx) which provides for the making of laws regarding “*foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth*”. This is often referred to as the ‘corporations powers’. The corporations power was also used as the principal power under the Constitution for the establishment of the *Fair Work Act 2009 (Cth)* (**FW Act**).
- 3.4 Whilst the corporations power was utilised from the mid-1990s as the basis for regulation of collective and statutory individual agreements, it has been the process of conciliation and arbitration of industrial disputes that has formed the foundation of our IR system for over 100 years.
- 3.5 As a result, our IR practices and framework remain structured around a culture of conflict and adversarial behaviours. Not only is this approach still reflected in the provisions of the FW Act, but it has become engrained in the approach adopted by most industrial relations parties, including the Fair Work Commission, Fair Work Ombudsman, unions and employer associations.
- 3.6 However, the current industrial relations landscape no longer reflects the social or political landscape of the 1890s and it would be difficult to envisage a circumstance in which the strikes of the 1890s could be replicated in a modern Australian society. This is particularly so given the high level of protections offered to employees through the IR system.



### ***Need to foster direct engagement***

- 3.7 The adversarial approach to workplace relations has severely hampered efforts to foster enterprise based productivity and innovation. This is due to the entrenched view that employers and employees are combatants rather than joint stakeholders with a vested interest in the organisation being commercially viable and successful.
- 3.8 The benefit of direct engagement can be seen in the outcomes that were derived by a range of businesses during the 1990s. Significant legislative reforms were established that allowed employers for the first time to establish terms and conditions of employment directly with their workforce through statutory individual agreements and employee collective agreements. These arrangements were particularly popular in WA with the introduction of individual workplace agreements in 1993.
- 3.9 The experiences of the mining industry during this time highlight the positive outcomes generated through a system of direct engagement with employees.
- 3.10 David Peever, former Managing Director of Rio Tinto Australia, is well known for having voiced his opinion that union influence is “*the elephant in the room*” in the debate on productivity. In particular, he has commented that:
- “Direct engagement between companies and employees, flexibility and the need for improved productivity has to be at the heart of the system. Only then can productivity and innovation be liberated from the shop floor up, and without the competing agenda of a third party constantly seeking to extend its reach into areas best left to management”.*<sup>1</sup>
- 3.11 Rio Tinto enjoyed such productivity gains through the use of WA Workplace Agreements during the 1990s and the adoption of a managerial strategy focussed on direct engagement with their workforce. At their Hamersley mine site, 95 per cent of Rio Tinto’s employees adopted individual contracts.
- 3.12 The successful use of individual agreements by Rio Tinto was directly compared to the use of a union collective agreement by BHP Iron Ore (**BHP**) at their Mount Newman Mine in the case of [\*AWU v BHP Iron Ore Pty Ltd.\*](#)<sup>2</sup> BHP had sought to implement individual agreements after a due diligence analysis for a potential merger revealed that Rio Tinto’s Hamersley site was significantly outperforming their Mount Newman Mine.
- 3.13 BHP had become aware that the Hamersley mine had a 20 to 30 per cent cost advantage over the Mount Newman Mine.<sup>3</sup> The productivity advantages were said to arise from greater management flexibility at the Hamersley site, a product of the individual agreements in place.<sup>4</sup>

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<sup>1</sup> [\*Presentation to the Australian Securities Exchange – Australian Financial Review Australian Resources Conference and Trade Show, David Peever, Managing Director, Rio Tinto Australia, 13 November 2012.\*](#)

<sup>2</sup> [2001] FCA 3.

<sup>3</sup> Ibid at [95].

<sup>4</sup> Ibid at [96].

- 3.14 BHP's Vice-President of Human Resources commented that *"the lesson that [he] learnt from Hamersley was that if you could exclude the third parties, i.e. the unions, there was the prospect of getting better flexibilities and therefore greater productivity"*.<sup>5</sup> It was suggested that the introduction of individual agreements in BHP would lead to at least a 26 to 38 cent per tonne costs saving.<sup>6</sup> However, efforts to foster enterprise based productivity and innovation have been severely hampered due to the entrenched view that employers and employees are combatants rather than joint stakeholders with a vested interest in the organisation being commercially viable and successful.

### ***The need for flexibility***

- 3.15 The demographics and composition of our national economy have also changed. The growth and increasing influence of global companies have impacted national and local businesses, as they have been increasingly exposed to a highly competitive international economy.
- 3.16 As a high wage economy which affords employees the opportunity to enjoy a high standard of living, it is essential that we have a competitive business sector. Increased globalisation enhanced by the rapid development of technology means that very few sectors of the Australian economy that are not subject to international competition.
- 3.17 A key element of this is a stable IR system that provides flexibility for workplace practices to adapt to changing needs.
- 3.18 As we aim to demonstrate in these submissions, the current system restricts flexibility and adaptability, putting Australian businesses and their workers at a distinct disadvantage.
- 3.19 A stable IR platform is also essential for employers. Given the highly politicised nature of the IR system, there have been significant changes to the IR framework over the past two decades. This has not only established uncertainty for employers, but has also resulted in unnecessary compliance costs associated with changing employment arrangements to meet changing obligations. Our members frequently identify that one of the key objectives they want is a stable IR system that provides the employer with long term certainty on how they manage their workforce.

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<sup>5</sup> Ibid at [98].

<sup>6</sup> Ibid at [155].

### **Impact of Changes to Individual Agreement on WA Businesses**

In WA, a significant number of businesses adopted State Workplace Agreements which were in operation between 1993 and 2002. In 2002, as a result of a change of State Government these instruments were no longer available. This resulted in most of these employers adopting Australian Workplace Agreements (**AWAs**). Given the differences in the system, this required employers to substantially redraft their existing instruments and undertake the process of renegotiating the agreements with their employees.

The election of the Rudd Labor Government in 2007 then sparked the end of AWAs, meaning these same employers had to make a decision as to whether they moved back to the award system or utilise collective agreements. In many cases, employers elected to negotiate a collective agreement directly with their employees. This necessitated not only the establishment of a new form of agreement, but also the transitioning of employees from individual to collective negotiations. This caused uncertainty for many employees who had negotiated higher individual wages or other entitlements which needed to be preserved through separate contracts of employment.

Each of these changes resulted in additional costs to employers in introducing new industrial instruments, both in terms of the cost of engaging law firms or consultants to draft agreements and navigate the approval requirements, along with a corresponding loss of management time. However, more significant was the disruptive effect these changes had on the businesses' workforce.

## **4. MINIMUM WAGES**

- 4.1 The effect of minimum wages on employment and the broader economy needs to be considered not only in regard to the level of the federal minimum wage, but also in terms of the effect that annual wage reviews have on increasing award rates of pay. However, it is often the case that the impact of penalty rates, allowances and other award entitlements on the cost of employment is often neglected in setting the federal minimum wage.

- 4.2 Section 284 of the FW Act establishes the minimum wage objectives which require that the:

*284(1) FWA must establish and maintain a safety net of fair minimum wages, taking into account:*

- (a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and*
- (b) promoting social inclusion through increased workforce participation; and*
- (c) relative living standards and the needs of the low paid; and*
- (d) the principle of equal remuneration for work of equal or comparable value; and*

- (e) *providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.*

- 4.3 The minimum wage objectives have a significant impact upon the Fair Work Commission's (FWC) decision making process. The current objectives demonstrate a distinct lack of balance in two key areas. The first of these is with respect to the needs of the unemployed. For most people, paid employment provides the best means for improving their standard of living, which extends beyond the impact of the federal minimum wage. In gaining employment new entrants to the workforce have the opportunity to develop skills and experience which allows them to progress to higher paying and often more secure employment. It is therefore essential that the minimum wage does not act as a barrier to prevent the unemployed from entering the labour market.
- 4.4 The current objects of the FW Act have a greater focus on the living standards of those who are already employed and has diminished consideration of those who are unemployed or whose employment may be precarious. In our opinion it is necessary for the minimum wage objectives to take a balanced approach in considering the needs of the low paid, the needs of the unemployed, the impact of increases upon those businesses directly impacted by safety net increases and the state of the economy.
- 4.5 Whilst the current objects include increasing social inclusion and workforce participation, the FWC has identified that *"social inclusion encompasses both the obtaining of employment and the pay and conditions attaching to the job concerned"* and the *"promotion of social inclusion relies on the promotion of decent work, and that decent work deserves decent wages"*<sup>7</sup>. Therefore, in considering the need to promote employment the FWC is required to take into consideration relative decent wages whilst at the same time being required by other objects to take into account relative living standards. This has the effect of reducing the FWC's consideration of the capacity for the unemployed and low paid to obtain and remain employed.
- 4.6 It is widely recognised that there are particular groups of employees to whom a discounted minimum wage should apply. These include those who are disadvantaged in the labour market (e.g. juniors and people with a disability) or who are engaged in structured learning (i.e. trainees and apprentices). This distinction is important in providing job opportunities for these groups.
- 4.7 Currently, the minimum wage objectives require the consideration of *"fair minimum wages"* for such a group. This can be compared to the previous objectives in the *Workplace Relations Act 1996 (Cth)* which required consideration for *"Providing minimum wages for junior employees, employees to whom training arrangements apply and employees with a disability that ensure those employees are competitive in the labour market."*<sup>8</sup> The distinction in wording was highlighted during the 2012 Apprenticeship application in which the FWC increased the rate of pay for adult

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<sup>7</sup> [Annual Wage Review 2009–10 \[2010\] FWAFB 4000](#) at [275] and [249].

<sup>8</sup> *Workplace Relations Act 1996 (Cth)*, s 23(d).

apprentices and junior apprentices in their first and second year of employment.<sup>9</sup> The decision shows that the principal consideration was whether the minimum wage in encouraged employees to undertake apprentices and their living standards, with limited consideration on the impact on employment.

- 4.8 The economic transition underway across Australia has meant that it is not possible to determine the impact of this decision on apprentice numbers. However, anecdotally we have received feedback that increasingly employers are less willing to consider adult apprentices given the significant price differentiation between them and a junior apprentice (80 per cent of the tradesperson rate for an adult apprentice verses 50 per cent for a first year junior apprentice). The effect is to impose a significant barrier on mature age workers wishing to gain formal qualifications through an apprenticeship, thus limiting their ability to seek future higher paying work as a qualified worker.
- 4.9 Whilst it will always be a challenge for a tribunal in balancing competing criteria, it is important that the wage setting objectives are structured appropriately to ensure a balanced consideration.
- 4.10 In determining the minimum wage, consideration is given to the effect of any increase on the economy and business viability from a macro perspective. However, the effect of increases to minimum award wages has greater relevance to particular industries (e.g. retail and hospitality) or groups of employers (e.g. small business), whose business conditions may not reflect that of the broader economy.
- 4.11 The impact of a macroeconomic view in considering the minimum wage is best evidenced by considering the difference between the federal minimum wage and the state minimum wage applicable in WA.
- 4.12 WA still maintains a separate IR system for private sector employers who are not constitutional corporations. In maintaining a separate IR system, the WA Industrial Relations Commission (**WAIRC**) conducts a State Wage Case each year to consider the state minimum wage and increases to award rates of pay more generally. The WAIRC is required to take into account a range of criteria as part of this process, including the “*state of the economy of Western Australia*” and “*the capacity of employers as a whole to bear the costs of increased wages, salaries, allowances and other remuneration*”<sup>10</sup>.
- 4.13 The recent resource boom experienced in WA has meant that the overall performance of the WA economy has been significantly stronger than that experienced by the other States and Territories. The strong economic growth has been driven principally by the resource and construction industries’ involvement in the building of resource industry projects. However, the main industries covered by the WA system include: retail trade; residential construction; agriculture, forestry

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<sup>9</sup> [Modern Awards Review 2012—Apprentices, Trainees and Juniors \[2013\] FWCFB 5411](#) at [171] – [185].

<sup>10</sup> *Industrial Relations Act 1979 (WA)*, ss 50A(3)(b) and (d).

and fishing; and accommodation and food services,<sup>11</sup> with the employers most likely to be affected being small businesses.<sup>12</sup>

- 4.14 These employers (with the exception of residential construction) are the group least likely to have benefited from the high economic growth experienced in WA. However, because the WAIRC is required to take into account the state of the economy and the capacity of employers to pay, as a whole, the WA state minimum wage is currently \$25 per week higher than the federal minimum wage. This is notwithstanding that those businesses which enjoyed the greatest benefit from that growth were not affected by the state minimum wage, both because they are almost exclusively covered by the national IR system but also because the rates of pay to staff in those industries far exceeds the minimum wage.
- 4.15 We therefore believe that greater consideration needs to be given to the economic conditions of those employers directly affected by minimum wage increases.

***Flow on effect of minimum wage increases to award rates of pay***

- 4.16 When examining the Annual Wage Review decisions, it is evident that the principal focus of the panel is the appropriateness of the federal minimum wage and the amount by which that should be increased.
- 4.17 However, the increases to the federal minimum wage also flow on to the substantially higher award rates of pay. With the exception of the base classification, the award rates of pay are significantly higher than the federal minimum wage. Furthermore, in the case where the base award classification reflects the federal minimum wage, the awards limit the time an employee spends at that classification before automatically progressing to a higher classification (generally between three and six months). Given the broad coverage of awards, this results in the federal minimum wage applying to very few workers.
- 4.18 What may be deemed a necessary increase to the federal minimum wage does not necessarily correspond to an appropriate increase to award rates of pay. In the case of the 2013-14 annual wage review the 3 per cent increase granted resulted in an \$18.70 per week increase to the federal minimum wage. However this corresponded to a \$21.70 per week increase to the C10 (tradesperson) rate and \$29.40 increase to the C2b (Principal Technical Officer) classifications<sup>13</sup> under the *Manufacturing and Associated Industries and Occupations Award 2010 (MA 000010)*. This compounding effect is further amplified when the impact of penalty rates and allowances are also applied to these amounts.
- 4.19 In order to properly consider the impact of the minimum wage on employment, CCIWA recommends that the minimum wage objectives need to consider the impact of award rates of pay, penalty rates, allowances and other costs imposed by awards

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<sup>11</sup> [Department of Commerce, State Industrial relations coverage in WA: How many employees are covered?, page 4.](#)

<sup>12</sup> 2013 State Wage Order [2013 WAIRC 00347] at [26].

<sup>13</sup> The Annual Wage Review 2013-14 [2014] FWCFB 3500 resulted in the federal minimum wage increase from \$622.20 to \$640.90 per week. In the case of the referenced award, the rate for the C10 classification increased from \$724.50 to \$746.20 per week, C10 rates increased from \$724.50 per week and the C2b classification increase from \$979.70 to \$1009.10 per week.

on the establishment of the safety net and take these into account when increasing minimum wages.

### **Recommendations**

- 4.20 That the minimum wage objectives need to establish greater balance in the factors that are considered in establishing increases to both the federal minimum wage and award rates generally. In particular, this should include:
- 4.20.1 Greater consideration for the needs of the unemployed and the opportunity paid employment has in increasing an individual's standard of living;
  - 4.20.2 A clear focus on ensuring that minimum wages for juniors, apprentices, trainees and disabled employees keeps them competitive in the labour market;
  - 4.20.3 Focussing consideration of the economic circumstances and capacity of employers to pay increases on those employers directly affected by the minimum wage increases; and
  - 4.20.4 A requirement to consider the impact of award rates of pay, penalty rates and allowances in setting a safety net of minimum entitlements.

## **5. NATIONAL EMPLOYMENT STANDARDS**

- 5.1 CCIWA does not seek fundamental changes to the entitlements established by the National Employment Standards (NES). However, the NES as they currently stand are failing to achieve the primary objects of the FW Act. In particular, the NES fails to:
- 5.1.1 Provide *“workplace relations laws that are...flexible for business, promote productivity and economic growth”*,<sup>14</sup> and
  - 5.1.2 Acknowledge *“the special circumstances of small and medium-sized businesses”*.<sup>15</sup>
- 5.2 In 2008, the Federal Labor Government released a discussion paper on the NES exposure draft. That discussion paper commented that *“the NES are intended to be as simple as possible so that all employees and employers can understand and comply with their rights and obligations.”*<sup>16</sup> Furthermore, the NES was to only contain the *“application and machinery rules...essential to the effective operation of an entitlement, rather than lengthy, detailed and inflexible rules.”*<sup>17</sup> The resulting NES has failed to achieve this.

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<sup>14</sup> Fair Work Act 2009 (Cth), s 3(a).

<sup>15</sup> Fair Work Act 2009 (Cth), s 3(g).

<sup>16</sup> Department of Education, Employment and Workplace Relations, *Discussion Paper: National Employment Standards Exposure Draft*, 2008, page 3. Department of Education, Employment and Workplace Relations, 2008, page 3.

<sup>17</sup> Ibid.

### ***The need for simplicity***

- 5.3 CCIWA is of the opinion that in order to achieve high compliance, legislation must be drafted in a manner that business can easily understand and apply. Such drafting reduces costs (time and monetary) associated with seeking assistance from third parties in interpretation and application of provisions. This is especially true for small to medium sized businesses which may not have a dedicated human resources function.
- 5.4 The NES, however, is inherently complex to understand and apply. The annual and personal leave provisions are one example of this. CCIWA continues to receive queries from members who are unsure how to apply the accrual and payment of annual and personal leave to non-standard working arrangements, such as fly-in fly-out (**FIFO**) arrangements.
- 5.5 This complexity arises out of the wording of the NES. Section 87(1) of the FW Act provides that an employee is entitled to four weeks of paid annual leave, while s 96 provides for ten days of personal/carer's leave. However, the accrual and payment of both forms of leave is based on the employee's ordinary hours of work.
- 5.6 The concept of hours and weeks/days causes practical issues when dealing with employees who:
  - 5.6.1 Average their hours over a work cycle;
  - 5.6.2 Do not work the same number of hours each day;
  - 5.6.3 Work over more than five consecutive days; or
  - 5.6.4 Work part-time.
- 5.7 The following provides an example of the practical difficulties faced by CCIWA members in applying these NES provisions:



## CCIWA CASE EXAMPLE: ANNUAL LEAVE ACCRUAL ON NON STANDARD HOURS

### Employee's terms and conditions:

Employees work an average of 38 hours per week over a two week cycle, with Saturday & Sunday being ordinary hours. Annual leave entitlement is 4 weeks.

### Example roster:

	<b>Rostered Hours Worked Per Day: Week One</b>	<b>Rostered Hours Worked Per Day: Week Two</b>
Monday	8.75	5
Tuesday	10.75	8.75
Wednesday	8.25	8.25
Thursday		
Friday	8.25	8.25
Saturday		6.5
Sunday		3.25
<b>Total Hours</b>	<b>36</b>	<b>40</b>

### Accrual of annual leave:

The employee will accrue 4 weeks of annual leave for each year of service. Based on an average 38 hours per week, this equates to 152 hours.

### Payment of annual leave:

If the employee took annual leave during week two, they would take 40 hours of leave. If, throughout the year, the remaining 3 weeks of annual leave was taken on the second roster week, annual leave taken for the year would total 160 hours (4 x 40). However, the employee would have only accrued 152 hours of leave.

The NES requires the employee to be provided with 4 weeks annual leave. In order to comply, the employer in this example would be required to pay 8 additional hours of annual leave compared to their accrual of 152 hours.

Conversely, if the employee only took annual leave during week one of their roster, they would take 144 hours of annual leave in one year (36 x 4). However, because the employee is accruing leave on the basis of 38 hours per week, they will inevitably become entitled to more than 4 weeks annual leave. That is, they will receive an additional 8 hours (152 minus 144).

Difficulty also arises when the employee requests to take annual leave in the form of single days. If the employee requests every Monday off work, how does the employer identify when the employee has reached four weeks of annual leave?

### CCIWA CASE EXAMPLE: PERSONAL LEAVE ENTITLEMENT ON NON STANDARD HOURS

Employee's terms and conditions:

Employee works part-time, 21 hours per week

Example roster:

	Rostered Hours Worked Per Day
Monday	5.00
Tuesday	8.00
Wednesday	5.00
Thursday	
Friday	3.00
Saturday	
Sunday	
<b>Total Hours</b>	<b>21</b>

Accrual of personal leave:

As per the NES, the employee will accrue 10 days personal leave each year. Most employers would calculate the yearly accrual for this employee to be 42 hours each year. This is based on the premise that 5 days is equal to a week. Thus, 21 hours multiplied by two weeks (to reach 10 days) equals 42 hours of personal leave accrual.

If the employee were to take personal leave only on Tuesdays, by the end of one year they would have been paid 80 hours personal leave. This is because payment for personal leave is based on their ordinary hours, which equates to 8 hours on a Thursday. Clearly, the employee receives payment in excess of their accrued hours.

Conversely, if the employee was to take personal leave only on Thursdays, they would be paid 30 hours of personal leave (3 ordinary hours multiplied by 10 days).

- 5.8 The above difficulties were considered by then Fair Work Australia (**FWA**) in *Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services union of Australia v BCS Infrastructure Support Pty Ltd.*<sup>18</sup>
- 5.9 The employees in this case worked a roster comprising four shifts each of 12 hours, followed by four days off. Their weekly ordinary hours of work were 42, with an annual leave entitlement of five weeks because they were shift workers. The employer operated on the basis that they had to pay 210 hours of annual leave per year (5 weeks x 42 hours).

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<sup>18</sup> [2011] FWA 7723.

- 5.10 Difficulties arose when examining the effects of the various roster scenarios. Depending on when leave was taken in the rostering cycle, the number of hours taken off work for a five week period could be as low as 192 hours or as high as 228 hours.
- 5.11 In any scenario resulting in taken annual leave exceeding 210 hours (5 weeks x 42 hours), the employer is deemed not to be complying with the NES if it does not pay, in addition to the 210 hours accrued, those hours that would otherwise have been worked during the period.
- 5.12 As is evident, employers may be required to make leave payments in excess of accruals for employees on non-standard working arrangements. Depending on the day in which leave is taken, these employees may ultimately receive more hours of leave in one year than their colleagues who work similar shift patterns and the same total of ordinary hours.
- 5.13 Further, payroll systems cannot generally record leave taken as days or weeks, but record it by the number of hours. This creates practical difficulties for employers attempting to accrue entitlements expressed in daily or weekly figures.
- 5.14 CCIWA believes that the above difficulties may be reduced by expressing annual and personal leave entitlements in hours. Further, the NES needs to provide flexibility for non-standard working arrangements, such as FIFO work.

### ***The need for greater flexibility***

- 5.15 CCIWA is of the opinion that workplace productivity is inherently linked with making workplaces more flexible and more adaptable to change.
- 5.16 Where industrial relations rules are highly prescriptive or adopt a one size fits all approach, they ultimately inhibit the ability for employers and employees to tailor workplace arrangements to suit the needs of workplace.
- 5.17 CCIWA submits that the NES lacks flexibility. Each of the ten standards is expressed to apply to all national system employers, regardless of their industry or size. With the exception of redundancy pay obligations, no provision is made for the “*special circumstances*” of small business.
- 5.18 Further, the NES goes beyond simply establishing minimum entitlements. For example, while the NES provides for four weeks annual leave, it regulates how and when employees may cash out annual leave. Employers often become confused as to which provisions to follow, with the FW Act providing alternative approaches for employees who are award/agreement free to those covered by industrial instruments.<sup>19</sup>

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<sup>19</sup> See *Fair Work Act 2009 (Cth)*, ss 92-94.

- 5.19 Conversely, the *Minimum Conditions of Employment Act 1993 (WA)* (**MCEA**) provides an example of efficient legislative drafting. The MCEA establishes similar minimum entitlements to the NES, however leaves the practical application to be resolved at the workplace. Similar drafting would achieve the objects of the FW Act while maintaining a guaranteed safety net. Further, it would minimise regulatory burden and red tape and provide greater flexibility for businesses and their employees.

***Paid no safe job leave as an example of inflexibility***

- 5.20 The parental leave provisions are just one example of where the NES requires amendment in order to provide flexibility for the needs of small to medium sized business.
- 5.21 Where a pregnant employee eligible for parental leave is fit for work but cannot remain in their current position, the employer is required to transfer them to a safe job for the duration of the risk period.<sup>20</sup> Where no appropriate safe job is available, the employee is entitled to take “paid no safe job leave”. This is paid at the employee’s base rate of pay for their ordinary hours of work in the risk period.<sup>21</sup>

**CCIWA CASE EXAMPLE: PAID NO SAFE JOB LEAVE**

Recently, a CCIWA small business member raised concerns about the impact of the paid no safe job leave on their productivity and profitability levels.

One of the business’ four employees became pregnant and the working environment was deemed unsafe by her doctor. Because there was no safe job available, the employer was required to pay the employee no safe job leave.

Being a small business with only four employees, the member could not afford to continue paying the pregnant employee for the risk period while at the same time hiring a new employee to cover her duties. The employee’s role was vital to business operations. As a result, the member was faced with the prospect of making an employee redundant or shutting down business operations.

- 5.22 While larger businesses may be able to absorb the costs associated with paid no safe job leave and make accommodations within their existing structure, small businesses do not have this luxury. These inflexible provisions significantly impact on the productivity and profitability of small to medium sized business. In turn, this reduces the capacity of those businesses to expand and provide increased employment opportunity.

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<sup>20</sup> *Fair Work Act 2009 (Cth)*, s 81.

<sup>21</sup> *Fair Work Act 2009 (Cth)*, s 81A.

- 5.23 CCIWA submits that the NES provisions need to be drafted in a manner that establishes the minimum entitlements, but leaves the practical application to employers and employees. At the very least, the provisions need to be amended to provide flexibility in their application to small business.

### ***Inconsistencies produced by reference to state legislation***

- 5.24 Three of the NES provisions (community service leave, long service leave and public holidays) refer to state and territory based legislation to derive entitlements. This not only results in different outcomes depending upon the State in which the employee is engaged, but generates unintended consequences due to the incompatibility of the State and Federal provisions.

### ***Public Holidays***

- 5.25 Public holidays are one state based difference that has become an issue of concern for many WA businesses since the introduction of the FW Act.
- 5.26 Prior to 1 January 2010, most federal and state awards and agreements provided for the substitution of public holidays when they fell on a weekend. This was based on the 1995 'Public Holidays Test Case'<sup>22</sup> that established ten public holidays for workers per year, regardless of days or hours worked. The awards and agreements typically provided that employees should receive penalty rates for work performed on the actual public holiday or on the additional day, but not on both.
- 5.27 However, with the introduction of the FW Act, issues have arisen due to the interaction between the NES, modern awards and the *Public and Bank Holidays Act 1972 (WA) (P&BH Act)*.
- 5.28 Section 115 of the FW Act provides the meaning of a "public holiday" and creates eight national public holidays. In addition, s 115(b) gives effect to state and territory laws by stating that a public holiday also means:

*"any other day, or part-day, declared or prescribed by or under a law of a State or Territory..."*

Further, there is the ability for state or territory laws to provide for substitution of public holidays.<sup>23</sup>

- 5.29 The P&BH Act provides for additional days when a public holiday falls on a weekend. This means that WA businesses are faced with a doubling of public holiday payments where they operate on the public holiday and additional day. Those who do not operate are required to pay ordinary rates on both occasions to employees who are not required to work because it is a public holiday.

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<sup>22</sup> Re Public Holidays ('Public Holidays Test Case') (unreported, AIRC, L4534, Hancock, MacBean SDP and O'shea C, 4 August 1994).

<sup>23</sup> Fair Work Act 2009 (Cth), s 115(2).

- 5.30 In any one year, there is the potential for WA employers to be subject to up to four additional public holidays than that provided in the NES. Over the 2010-11 Christmas season, there were six public holidays for three occasions. In 2015 and 2016, WA will face 12 public holidays each year, rather than the national standard of 10.
- 5.31 In 2015, Anzac Day falls on a Saturday. The P&BH Act provides that where Anzac Day falls on a Saturday, the Monday will also be a public holiday. Thus, in 2015 WA businesses that operate on Anzac Day and Monday 27 April in 2015 will be subject to the payment of public holiday penalty rates on both days.
- 5.32 CCIWA members have indicated that the upcoming double public holiday will have a significant impact on their ability to operate on those days or maintain regular staffing levels.

#### **CCIWA CASE EXAMPLE: ANZAC DAY PUBLIC HOLIDAY**

A CCIWA member who is a not for profit aged care provider relies on Federal Government subsidies to fund their operations. The subsidy operates nationally and does not take into account the extra public holidays in WA. Under regulations that apply to aged care providers, the business must maintain minimum staffing levels at all times. With the upcoming double Anzac Day public holiday in WA, the member is also required to pay public holiday penalty rates on Anzac Day, 25<sup>th</sup> April, and Monday 27<sup>th</sup> April.

This member highlighted that they felt disadvantaged when compared to other aged care providers who do not face these additional public holidays. Further, unlike for profit organisations, they are unable to absorb the costs of the additional public holidays. This is particularly so due to their inability to reduce staffing levels on a public holiday.

The financial impact on the member means they are unable to provide continual improvements to the care provided to their clients.

- 5.33 The above concerns were raised by various employer groups in the 2012 review of the FW Act.<sup>24</sup> In their recommendations, the independent panel comprising of Professor Ron McCallum, Hon Michael Moore and Dr John Edwards (**the Expert Panel**) noted that the ACT Government had estimated that the introduction of a new public holiday would cost the local economy \$29.8 million for each public holiday introduced in 2007.<sup>25</sup> Further, they commented that *“The uncertainty with current arrangements for employees and employers and the potential additional costs for employers concerns the Panel.”*<sup>26</sup>
- 5.34 As such, the Expert Panel recommended *“that the Government consider limiting the number of public holidays under the NES on which penalty rates are payable to a nationally consistent number of 11”*<sup>27</sup>. This was because the number of public holidays can vary from jurisdiction to jurisdiction. Despite these recommendations, no amendments to the NES have been made by successive governments.

### **Long Service Leave**

- 5.35 Long service leave entitlements are another example of the NES deferring to state and territory legislation. By doing so, s 113 of the FW Act creates inconsistencies between the long service leave entitlements of employees in different states/territories. Further, understanding the long service leave entitlements of employees can be complex for businesses that operate nationally. Issues also arise where an employee is transferred between states.
- 5.36 CCIWA submits that in order to establish a fair and productive national system of workplace relations, the Government must look to removing stated based inconsistencies.

### **Recommendations**

- 5.37 CCIWA recommends that in order to ensure the NES provides entitlements that are flexible for business, promote productivity and acknowledge the *“special circumstances”* of small to medium sized business, the following changes should be made to the NES:
- 5.37.1 Reduce their complexity, leaving the practical application of entitlements to employers and their employees;
  - 5.37.2 Provide flexibility in their application to small business and non-standard working arrangements; and
  - 5.37.3 Remove references to state based legislation, particularly where inconsistencies arise out of such reference.

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<sup>24</sup> R. McCallum, M. Moore & J. Edwards, [Towards more Productive and Equitable Workplaces: an evaluation of the Fair Work legislation](#) (2012), page 102.

<sup>25</sup> *The economic impact of declaring a new public holiday on Melbourne Cup Day*, Econtech Pty Ltd, 18 April 2007.

<sup>26</sup> R. McCallum, M. Moore & J. Edwards: *Towards more Productive and Equitable Workplaces: an evaluation of the Fair Work legislation* (2012), page 103.

<sup>27</sup> Ibid.

## 6. MODERN AWARDS

### *Modern awards – A reflection of the past*

- 6.1 Modern awards are a significant feature of the Australian industrial relations (IR) system. They set the foundation for terms and conditions of employment for a substantial proportion of workers by either:
- 6.1.1 Directly regulating terms and conditions of employment;
  - 6.1.2 Acting as the benchmark for enterprise agreements through the Better Off Overall Test and/or acting as a template for the drafting of enterprise agreements; or
  - 6.1.3 Underpinning common law contracts of employment.
- 6.2 Awards have historically acted as the primary mechanism for regulating terms and conditions of employment for particular industries and occupations. Consequently, the unions and industry associations relevant to that industry have become vested in the development of these awards.
- 6.3 In the case of unions, the awards have become a legacy of their efforts to improve the terms and conditions of employees and have therefore obtained almost religious sanctity in their eyes. This is reflected in the approach adopted by most unions to enterprise bargaining negotiations in which they refuse to consider trading off award conditions for improved benefits in other areas. This is reflected in the Australian Manufacturing Workers Union's (AMWU) delegate handbook in which they state that:
- "The award should be incorporated as an entire instrument into your agreement, rather than just picking and choosing clauses. Awards should be thought of as the minimum industrial standard: they provide a solid platform for bargaining. It is essential that employers know that the union and its members will not agree anywhere to an award being written out of an agreement."*<sup>28</sup>
- 6.4 This approach was reflected in the award modernisation process that occurred during 2008 and 2009, in which the dominant pre-reform federal awards formed the basis for the new modern awards. The approach was promoted by relevant unions to protect the existing award terms and conditions of employment, and was taken up by the then Australian Industrial Relations Commission (AIRC) as the most expedient means of completing the award modernisation process within the short timeframe allocated to it.
- 6.5 The AIRC were only provided 18 months to review the several thousand preserved state and federal awards and form the resulting 123 current modern awards. This meant that the number of awards were largely rationalised not modernised.

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<sup>28</sup> Australian Manufacturing Workers Union (2009), *Delegate Handbook*, page 8.



- 6.6 The *Hydrocarbons Industry (Upstream) Award 2010* [MA000062] and the *Mining Industry Award 2010* [MA000011] are two exceptions to this approach. In the case of these industries, there was no dominant pre-reform federal award on which to base the modern awards. Because the parties were essentially working with a blank canvass unhindered by the arrangements of the past, it was possible to establish a modern award that better reflects the current circumstances of the industry. This is particularly so with respect to the Hydrocarbons Industry award which facilitates the 12 hour shifts commonly associated with the fly-in fly-out nature of that industry.
- 6.7 In this way, these awards were better able to meet one of the key award objectives of *"promoting flexible modern work practices and the efficient and productive performance of work"*<sup>29</sup>.
- 6.8 In the case of the other awards, this objective has been subservient to the maintenance of the status quo.
- 6.9 The current process of four yearly reviews has exacerbated this effect with the Fair Work Commission (FWC) being inundated with applications to vary the now 124 modern awards. This process does not encourage a considered approach to the review of each award given the pressure applied by the FWC to complete the process within a relatively short timeframe, given the volume of applications made. This stretches the resources of not only the FWC but also the relevant employer associations and unions, resulting in a frenzied rather than considered process.
- 6.10 It is important that awards are reviewed on a regular basis but this should be an ongoing obligation of the FWC to ensure awards are kept rather than assigned as a four yearly activity.

#### ***Arbitration as the foundation for determining modern awards***

- 6.11 Prior to the introduction of the FW Act, federal awards were established on the basis of resolving an interstate industrial dispute. However, these disputes did not need to be actual disputes, with paper disputes becoming the dominant trigger for exercising this power.
- 6.12 Paper disputes were initiated by the relevant unions serving an ambit log of claims on a large numbers of employers seeking excessive new conditions of employment. In the employer refusing to grant the ambit claim, a dispute was then created which could be resolved by the Commission.<sup>30</sup>
- 6.13 The process of resolving the dispute would involve the unions and employer associations advocating on their members' behalf by running extensive argument before the Commission to either support or challenge the claim. In this process, submissions and evidence was put before the Commission and the role of the other party was to seek to discredit it.

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<sup>29</sup> *Fair Work Act 2009 (Cth)*, s 134(1)(d).

<sup>30</sup> In this context Commission refers to a predecessor of the Fair Work Commission, including the Australian Industrial Relations Commission and Commonwealth Court of Conciliation and Arbitration.

- 6.14 Given the general preference by the Commission for probative evidence, the best evidence was that provided directly by affected employers and employees. This generally involved the witness being required to provide oral evidence before the Commission as part of a public hearing in which they were subject to cross examination by the opposing side, as well as direct question from the members of the Commission. Given the adversarial nature of the process, the purpose of cross examination is to discredit the witness, and as such they were subject to extensive, challenging and frequently hostile questioning.
- 6.15 As a result, both employers and individual employees are generally reluctant to provide evidence to the Commission (or other bodies) in these matters.
- 6.16 Employers are also reluctant to give direct evidence due to concerns that by taking a public stance on a matter in dispute they would be targeted by the relevant unions as part of future industrial campaigns. This is not an unfounded fear given the nature of the IR system.
- 6.17 Given the public nature of these matters, employers also need to be concerned about the public relations impact of expressing their views on IRs matters.
- 6.18 This was the unfortunate experience of a Perth based restaurateur who was quoted in a newspaper article stating that their business would struggle to break even when it opened on the Australia Day public holiday and that the impact of penalty rates on small business owners should be considered as part of this review.<sup>31</sup> This public comment sparked an avalanche of negative comments on the businesses Facebook page including:
- “Will never dine here!! Doesnt (sic) care about its employees and wants all the profit for themselves. Consider yourself lucky you even have employees working this australia (sic) day!!”*
- “Attempting to axe penalty rates make me want to never eat here ever again.”*
- “The only upside to this place is the service - delivered by staff who deserve their penalty rates. Other than that: no stars.”*
- “\$16.00 for a bowl of soup but they cant (sic) afford to pay their staff on Sundays. What garbage.”*
- “A place that was on my radar to visit, no longer. My money will go to places who support their workers!”*
- “Up until reading what I just did, I was a regular customer. Greedy, deceitful, caniving (sic) and underhanded. I hope the staff employed here all realise that both themselves and their time is far more valuable and they'll be better off with a more reputable employer.”*
- “As a local resident, thank you for letting me know where I should avoid taking my business in future. Personally, I prefer to support businesses that pay their workers fair wages.”*

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<sup>31</sup> MacDonald, K and Parker, G, *Owners call time on Penalty Rates*, 26 January 2014, The West Australian.

The emotive nature of IR issues frequently results in reactions which are out of proportion to the issues raised by an employer. Comments such as these has a detrimental impact on the business, particularly in the case of local businesses that rely on residents in the surrounding suburbs to support them, thus discouraging them from raising their concerns in a public forum.

- 6.19 Because the FWC has adopted the same adversarial process as its predecessors in creating and varying modern awards, its decisions are generally made without having directly heard from either employers or employees regarding the impact of the award provisions.
- 6.20 However, the shift in the constitutional basis of the national IR legislation means that the FWC no longer needs to be restrained by the traditional approach of conciliation and arbitration. It is our view that modern awards are more likely to achieve their objectives if the FWC directly engaged with employers and employees through private or town hall style meetings. This would provide a greater opportunity for those directly affected by the modern award system to be heard, as distinct from the current system which relies on third party representation.
- 6.21 An example of the benefits of a non adversarial approach to the establishment of awards can be seen in through the *Real Estate Industry Award 2010 [MA 000106]*. This is a very rare example of a consent award between the relevant employer associations and unions which reflects the close alignment between the interests of employers and employees in that industry. Sales representatives in that industry are generally paid on commission only arrangements in which they receive a substantial proportion (frequently between 40 per cent and 60 per cent) of the fee received by the employer for the sale of a property. This structure has been reflected in the award which facilitates employees being engaged on a commission only structure on the recognition that employees in this industry prefer the opportunity to earn a high commission at the expense of an extensive safety net.
- 6.22 A criticism of the current structure of the FWC is that it is highly centralised, with award reviews being driven exclusively from its Melbourne and Sydney offices. There is an expectation that employers or parties that wish to be heard on these matters need to attend these offices in person. Given the national nature of the IR system, there is a need for the FWC to utilise its offices in other States and Territories to engage in direct discussions with employers and employees so that in establishing minimum standards it understand the varied issues affecting workplaces across Australia.

### ***Role of awards as a safety net***

- 6.23 It is our experience that small to medium sized businesses are those which are most reliant upon modern awards to regulate terms and conditions of employment. It is also our experience that it is this group who have the greatest difficulty understanding and complying with them.

- 6.24 Modern awards are intended to provide a minimum safety net of terms and conditions of employment.<sup>32</sup> Whilst this may be true with respect to minimum wage rates, it is not so for the other award provisions.
- 6.25 This is because the modern awards seek to direct the way in which work is to be performed or arranged.
- 6.26 An example of this can be found by looking at the part time provisions of the *Manufacturing and Associated Industries and Occupations Award 2010 [MA000010] (the Manufacturing Award)*, which provides:

**13. Part-time employment**

- 13.1** *An employee may be engaged to work on a part-time basis involving a regular pattern of hours which average less than 38 ordinary hours per week.*
- 13.2** *A part-time employee must be engaged for a minimum of three consecutive hours a shift. In order to meet their personal circumstances, a part-time employee may request and the employer may agree to an engagement for less than the minimum of three hours.*
- 13.3** *Before commencing part-time employment, the employee and employer must agree in writing:*
- (a)** *on the hours to be worked by the employee, the days on which they will be worked and the commencing and finishing times for the work; and*
- (b)** *on the classification applying to the work to be performed in accordance with Schedule B.*
- 13.4** *The terms of the agreement in clause 13.3 may be varied by consent in writing.*
- 13.5** *The agreement under clause 13.3 or any variation to it under clause 13.4 must be retained by the employer and a copy of the agreement and any variation to it must be provided to the employee by the employer.*
- 13.6** *Except as otherwise provided in this award, a part-time employee must be paid for the hours agreed on in accordance with clauses 13.3 and 13.4.*
- 13.7** *The terms of this award will apply pro rata to part-time employees on the basis that ordinary weekly hours for full-time employees are 38.*
- 13.8** *A part-time employee who is required by the employer to work in excess of the hours agreed under clauses 13.3 and 13.4 must be paid overtime in accordance with clause 40—Overtime.*

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<sup>32</sup> *Fair Work Act 2009 (Cth)*, s 134(1).

### **13.9 Public holidays**

- (a) Where the part-time employee's normal paid hours fall on a public holiday prescribed in the NES and work is not performed by the employee, such employee must not lose pay for the day.*
- (b) Where the part-time employee works on the public holiday, the part-time employee must be paid in accordance with clauses 32.4(e), 36.2(f), 37.5 and 40.9.*

- 6.27 This clause dictates the way in which the part time arrangement must work and provides limited flexibility to allow the employer and employee to determine the manner in which the relationship will work.
- 6.28 In particular, prior to the employee's commencement agreement must be made as to the hours to be worked, the days worked and start and finish times. Once established, this agreement can only be varied in writing. The purpose of this clause is to dictate the way in which part time employment must operate, in this case as a fixed hours arrangement. In doing so it removes the ability for the parties to agree to a flexible part time arrangement, which is commonly sought where the circumstances facing the employee (such as study commitments or family caring responsibilities) or the employer (such as fluctuations in demand) mean that either party may seek to alter the hours of work. Consequently, where flexibility is sought the parties are restricted to casual employment options, which results in the employee's employment being more precarious.
- 6.29 The part time clause in the Manufacturing Award is similar to that prescribed in most other awards. It is also worth noting that the Manufacturing Award does not require the employer to fix the working days or the start and finish times for full time employees, nor does it require their written consent to change working hour arrangements. It therefore establishes less flexibility for part time compared to full time employees.
- 6.30 In our view, this is an example of awards seeking to over-regulate terms and conditions of employment. An example of the approach that should be taken to regulating such matters can be found the *Real Estate Industry Award 2010 [MA 000106]* which provides that:

### **10.3 Part-time employment**

- (a) A part-time employee is an employee who works less than an average 38 hours per week.*
- (b) Payment for part-time employment*
  - (i) Part-time employees will be entitled to the same entitlements as full-time employees on a proportionate basis.*
  - (ii) Part-time employees who are not commission-only employees will be paid no less than 1/38th of the minimum weekly rate of pay for their relevant classification for each ordinary hour worked.*

- 6.31 In our view, the above clause demonstrates an appropriate approach to the establishment of minimum terms and conditions of employment. It clarifies that part time employees have the same entitlements as a full time employee, but on a proportionate basis. The way in which the part time arrangement is to operate is left to the employer and employee to determine. In taking this approach, the award not only provides greater flexibility to the employer and employee to structure working arrangements to suit the needs of the workplace and the individual; it also means that the award is more adaptive to changing work arrangements without the need for the award to be amended.
- 6.32 The over-regulation of awards not only reduces flexibility, but also frequently establishes provisions that are overly onerous or difficult for an employer to comply with.
- 6.33 By way of example, the *Building and Construction General On-site Award 2010 [MA000020]* (**Building Industry Award**) provides for 69 separate allowances that may apply to an employee. Frequently, these allowances are payable based on the nature of work or the type of equipment that they are using for all or part of that day.
- 6.34 These provisions require employers to maintain exceptionally complex records in order to be able to identify when allowances are payable. For example, clause 22.2(o) of the Building Industry Award provides that:

**(o) Heavy blocks—employees laying other than standard bricks**

**(i)** *Employees employed laying blocks (other than concrete blocks for plugging purposes) must be paid the following additional rates:*

- *where the blocks weigh over 5.5 kg and under 9 kg—3.2% of the hourly standard rate per hour;*
- *where the blocks weigh 9 kg to 18 kg—5.8% of the hourly standard rate per hour;*
- *where the blocks weigh over 18 kg—8.2% of the hourly standard rate per hour.*

In order to comply with this provision, the employer's payroll function needs to know not only when the employee commenced and finished work that day, but also what work has been performed (in this case laying blocks), the nature of the that work (in this case how heavy the blocks are) and for how long the employee was engaged in that activity.

- 6.35 As outlined in paragraph 7.3 of these submissions, the establishment of penalty provisions in awards is designed to discourage employers from directing employees to engage in particular work practices, including the performance of unsafe work. The basis for many allowances in awards is that they act as a disincentive for what might be considered dangerous work. This notion belongs to a time in which the occupational safety and health provisions did not operate to the extent they do so today.

- 6.36 Provisions of this nature establish a significant regulatory burden on employers, particularly in the case of small businesses. Compliance with awards poses a significant issue for most small businesses and is reflected in the nature of the calls CCIWA receives from our members. In the 12 months to 1 March 2015, our Employee Relations Advice Centre received 30,196 calls from members seeking advice on employee relations matters. Of those calls 8,805 (29 per cent) were with respect to queries about award provisions. Questions regarding award matters not only represent the biggest issue for our members, but are also the most complex to address, representing 45 per cent of the total time spent by this team in providing advice to members.<sup>33</sup> Employers frequently contact the Employee Relations Advice Centre to seek assistance in interpreting the relevant award and applying it against the pattern of work performed by their employees. The most complex queries in this regard are in respect to determining an employee's entitlement to wages where they are required to work overtime or perform shift work. These issues frequently require employers to consider the application of multiple clauses which are not only difficult for small business to interpret but also frequently baffle experienced IR and HR practitioners.
- 6.37 However, given the complexity and cost associated with enterprise agreements, small businesses are effectively locked into the award system.

***Impact of award provisions on bargaining outcomes***

- 6.38 Modern awards provide unions with a platform that allows them to establish new claims within enterprise agreements.
- 6.39 A common feature of many union negotiated enterprise agreements is the inclusion of a provision which provides that the agreement will be read in conjunction with the relevant award. The effect of this clause is that any changes to the award will automatically be incorporated into the agreement, unless the matter is already prescribed by the agreement. However, even where agreements replace the award, new award provisions affect the better off overall test (**BOOT**) for the approval of future enterprise agreements, which often compels an employer to incorporate specific award provisions.
- 6.40 This provides unions with the opportunity to use the modern awards to establish provisions into an agreement that an employer may otherwise never agree to. This includes award provisions such as dispute resolution procedure, training leave and casual conversion. This is also demonstrated in a number of the common clauses that the Australian Council of Trade Unions (**ACTU**) and other unions are seeking to incorporate across most awards as part of the 2014 modern award review. A number of these award claims have featured strongly in union enterprise bargaining claims but in most cases the unions have been unsuccessful in securing agreement of these provisions. However, this outcome will change significantly to the extent that they are successful in their award claims.

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<sup>33</sup> The total duration of calls received by the Employee Relations Advice Centre was 241,543 minutes for the period 1/03/2014 to 28/02/2015. Calls on award related matters constituted 108,948 minutes during that period.

- 6.41 In our opinion, this is an inappropriate use of the modern awards in its role as a set of minimum standards. In setting minimum standards it is necessary for the role of awards to be clearly identified in respect to what matters should be included. We believe that this should be restricted to minimum wages, allowances, hours of work, loadings for overtime or shift work, penalty rates and rest breaks.

### **Recommendations**

- 6.42 That the award modernisation process need to be finalised, with awards assessed against current industry standards and needs and without regards to the historical provisions currently reflected in modern awards.
- 6.43 In reviewing and setting the modern awards, the FWC should engage directly with employers and employees through private or town hall style meetings, using its offices across Australia to develop a national picture of the issues directly impacting upon these groups. The obligation on the FWC to ensure awards are modern should be an ongoing one, and not limited to a four yearly review cycle, with it being able to consider changing circumstances, on application or of its own motion, at any time. To ensure this is done, the FWC should be required to report against how many awards have been reviewed each year.
- 6.44 Modern awards should act only in the capacity of a minimum safety net by:
- 6.44.1 Limiting the matters that can be curtailed in an award to safety net terms and conditions of employment;
  - 6.44.2 Reducing the current level of regulation to provide flexibility to employers and employees in the practical application of award standards; and
  - 6.44.3 Ensuring that modern awards meet the needs of small businesses by providing that provisions are easy to understand and apply.

## **7. PENALTY RATES**

- 7.1 The issue of penalty rates provides a clear example of the failure of the award system to adapt to changes in community expectations.
- 7.2 It is evident from early tribunal decisions that the intention of penalty rates within our award system has more to do with discouraging work from being performed on certain days than it has for compensating employees for that work.
- 7.3 In relation to penalty rates, Justice Drake-Brockman in the 1935 *South Australian Railways Case*<sup>34</sup> stated that:

*They are not imposed for the purpose of increasing the rates of pay. They are imposed for the purpose of discouraging employers from employing men under conditions likely to impair their health, or for the purpose of discouraging certain kinds of work, or working under particular conditions. A good example of that, perhaps, is the penal rate ordinarily imposed for overtime. The court does not give extra pay for overtime work because it wants to*

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<sup>34</sup> *South Australian Railways Case* [1935] 35 CAR 370, 372.



*increase the amount of pay to the man, but for the purpose of discouraging employers from working overtime where it possibly can be eliminated.*

- 7.4 Whilst the above statement considers in detail the role of overtime penalty rates, the perceived need to consider penalties for working on Sundays was identified in other early decisions. In the 1919 *Gas Employees Case*<sup>35</sup> Justice Higgins stated that:

*The true position seems to be that extra rate for all Sunday work is given on quite different grounds for an extra rate for work on the seventh day. The former is given because of the grievance of losing Sunday itself – the day for family and social and religious reunions, the day on which one's friends are free, the day which is most valuable for rest and amenity under our social habits; whereas the latter rate is given because seven days per week for work are too many.*

Likewise, Commissioner Blackburn in the 1948/49 *Tramway and Gas Employees Case*<sup>36</sup> observed that:

*It is undeniable that, in our civilisation, Sunday, above all other days, is the recognised and accepted day of rest from labour. From the earliest Christian teaching to refrain from all unnecessary work and labour on Sundays, that day has been treated as a day apart and of different import from Saturday.*

- 7.5 It is clear from the above that the consideration for additional penalties on weekends and public holidays are derived from the community norms of the time. It therefore follows that the issue of penalty rates should be subject to ongoing review and considered according to changes in community expectations and competitive pressures.
- 7.6 The penalty rate structures applicable across a range of industries clearly no longer reflect community expectations. Whilst for many people weekends still represent a time for relaxation and socialisation, the nature of modern society is such that people increasingly wish to spend that time engaging in activities such as shopping, visiting local tourist or entertainment activities, going to a restaurants, or meeting friends at a pub or nightclub. These changes in the way in which people wish to spend their free time require that businesses are able to operate at the times that consumers want them to be opened and that they not be discouraged from trading at those times due to penalty structures based on out-dated community views.
- 7.7 In the same way that community expectations have changed regarding the use of leisure time, so too has the needs of the workforce, with weekend work providing opportunities for many who are not able to work 'standard' hours, such as students and those with caring responsibilities.

### ***Impact of weekend penalties on business and customer service***

- 7.8 CCIWA members in the hospitality, tourism, retail and other service based industries frequently raise with us their concerns regarding penalty rates on Sundays and public holidays.

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<sup>35</sup> *Gas Employees Case* [1919] 13 CAR 437, 469.

<sup>36</sup> *Tram and Gas Employees Case* [1948 – 1949] 62 CAR 558, 564.

- 7.9 For a number of businesses, the impact of Sunday and public holiday penalty rates affects their decision to operate. This is frequently identified by the number of small businesses in retail complexes who do not open on Sundays, and an even larger proportion closed on public holidays.
- 7.10 An independent grocery retailer operating out of a small suburban shopping centre identified that:
- “The penalty rate is absolutely killing us in our case due to the fact that the penalty rates are so high that all businesses [except] us in the shopping centre close on Sunday and public holidays because they can’t afford to open. That affects us so much on our sales because people don’t want to come to the centre with only us open. But the sad fact is that we can’t afford to close either because the rent and other expenses are so high that we don’t want to lose customers in the long run so we have to keep open however making no money at all sometimes even losing money on those specific days due to the penalty rates”.*
- 7.11 A similar sentiment was shared by a small hairdressing business operating out of a suburban shopping centre who stated that it chose not to open on a Sunday due to expensive penalty rates which make it not financially viable to open. Likewise, the owner of a regional tavern stated that he generally closed on Sundays and public holidays and that *“I only open for my clients when I open on public holidays, as we run at a loss at least 90 per cent of the time”.*
- 7.12 Businesses that operate on Sundays and public holidays may not always provide a full range of services. A number of small accommodation providers identified to us that they do not engage their cleaning staff on either Sundays or public holidays due to the higher penalty rates. Therefore, accommodation is not cleaned if customers end their stay on these days, meaning that rooms are not prepared for new customers until the following day. These businesses identified that if penalty rates were reduced they would engage their cleaning staff on these days. Not only would this provide additional work for their staff, but it would also mean increasing room availability and better returns for the business.
- 7.13 The significantly higher penalty rates (generally double time and a half) that apply on public holidays have a correspondingly greater impact on the decision of a business to trade. A small retail fast food outlet identified that *“I don’t operate on all public holidays. Of the 7 public holidays we are able to trade, I will only trade on approximately 50 per cent of these days. In particular, if they fell during a school holiday. I don’t always trade because the cost of wages outweighs the volume of customers that shop on these days.” “The unpredictability of customers shopping on Sundays and public holidays means that these days are run a lot leaner and with more involvement from the owners. However customer traffic is generally lower (volume and spend) yet there is an additional cost of doing business on these day ie wages, when compared to doing business on another day”.*
- 7.14 The issue is not one that is limited only to the retail and hospitality industries. An agricultural business identified that on Sundays they *“have to run at a loss as many of our customers are 7 days a week and cannot hold enough stock to get through the weekend without a Sunday delivery.”* However, due to the low margins running on

the product, the double time penalty rate along with fuel and other running costs *“wipes out all profitability, but we have to offer this service to look after our large customers.”* The businesses noted that they *“find employees really take their time on a Sunday”* but that they *“cannot also afford to pay for a senior supervisor”*.

- 7.15 This employer is not the only one to express concern over employees adjusting their work behaviour in order to gain a benefit from penalty rates. A retail employer expressed concern that *“work rates are slowed, or low to ensure”* that employees *“have to work overtime to get the job done”*. These concerns have also been raised to CCIWA by many manufacturing businesses over the years. However, many of these manufacturing employers have had the resources and ability to establish enterprise agreements directly with their workforces. This results in increases to employees’ ordinary rates of pay and a drop in the level of penalty rates, leading to a reduction of the number of overtime hours worked.

### **Impact upon employment**

- 7.16 The agricultural business identified in paragraph 7.14 also stated that they used to maintain production over seven days, but they *“found they were losing money producing on Sundays....and found a way to cram the volume back over the 6 days...”*. Whilst not ideal for their business, it also negatively impacted on their staff as many of their employees were *“keen to work on Sundays as they had a partner at home with their children and it was a chance to get a good shift in.”*
- 7.17 Management of costs is an important factor for the successful operation of all businesses. In the case of retail, hospitality and other service based industries, wages is one of the most significant costs.
- 7.18 A local suburban grocery retailer identified that *“industry benchmarks suggest that our wages as a percentage of turnover should be around 9-10 per cent, on public holidays this can increase to 12-13 per cent simply because of the higher penalties”*.
- 7.19 This experience was reinforced by another grocery retailer who identified the following ratio of wages to total income:

	Mon 26/1/15 (Australia Day)	Tues 27/1/15	Wed 28/1/15	Thurs 29/1/15	Fri 30/1/15	Sat 31/1/15	Sun 1/2/15	Mon 2/2/15
Wages to turnover	15%	12%	11%	10%	11%	8%	11%	12%
Staff	19	49	43	43	51	30	20	43

The above table clearly demonstrates that the ratio of wages to turnover is substantially higher on the public holiday, but the level of staff is dramatically lower. In the case of Sunday, the wage to turnover is 11 per cent, equal to that of Thursday. However, the number of staff engaged on a Sunday is dramatically lower, with 20 staff engaged on Sunday compared to 43 on Thursday.

- 7.20 In the case of a small retail fast food business, they identified that not only was their wages to turnover ratio substantially higher on a Sunday, the number of staff employed was far lower:

	Mon 26/1/15	Tues 27/1/15	Wed 28/1/15	Thurs 29/1/15	Fri 30/1/15	Sat 31/1/15	Sun 1/2/15	Mon 2/2/15
Wages to turnover	Closed	23%	23%	23%	23%	23%	36%	23%
Staff	-	4	4	7	4	5	3	3

On Australia Day this business choose not to operate, however it did trade on New Year's day and in doing so their wages to turnover ratio was 40 per cent.

- 7.21 For some employers, they are able to maintain a consistent ratio between wages and turnover. However, in the case of a café operator the following table clearly identifies a fall in employment levels, particularly in the case of a Monday public holiday:

	Mon 26/1/15	Tues 27/1/15	Wed 28/1/15	Thurs 29/1/15	Fri 30/1/15	Sat 31/1/15	Sun 1/2/15	Mon 2/2/15
Wages to turnover	35%	40%	35%	35%	35%	35%	35%	35%
Staff	3	8	3	7	7	9	6	6

- 7.22 Almost universally the employers we have spoken with have identified that they would either engage more staff on Sundays or public holidays and/or increase the number of hours worked by staff.

- 7.23 When asked what the impact would be of reducing Sunday and public holiday penalty rates to the existing level of Saturday penalty rates:

7.23.1 A suburban independent grocery store indicated that they would increase total rostered hours by a minimum of 30 on that day;

7.23.2 A rural independent grocery store advised that they would *"extend their operating hours by at least 4 hours a day"* and would extend the average duration of an employee's shift from 4-5 hours to 6-7 hours. They also stated that *"we have a high number of casual employees mainly due to penalty rates. Without penalty rates we would have more full time jobs than casual"*.

7.23.3 A retail fast food store identified that they normally employ 3 staff on these days working an average shift of 4.5 hours and that they would increase this to 4-5 staff working an average shift of 5-6 hours. They also stated that as *"a franchisee with a business in a shopping centre means competition is fierce and often competing against larger branded franchises who can (a) afford to absorb the additional cost of doing business on these days (b) have collective agreements which mean there is very little to no penalty rates on a Sunday is no/little different to other days"*. With respect to who they employ, the business stated that *"we have little control over many factors including costs and wages which are continually increasing by CPI each year. Each year this happens, cost cutting exercises occur which involves hiring younger juniors...Reducing the penalty rates will allow me to: (a) employ more people (b) be more inclined to use employees over 18 years old"*.

- 7.23.4 A nursery/garden centre identified that on public holidays *“only permanent staff work”* and that the *“business owners work to make up the shortfall”,* meaning *“casuals are not offered shift[s]”*.
- 7.23.5 A winery identified that on public holidays they operate on skeleton staff, reducing their staff by 50 per cent. However, given their location in a popular tourist precinct, they indicated they should be putting on additional staff to capture the Perth tourists enjoying a long weekend break. They identified that *“if penalty rates were not so high the business would look at opening for a special event to cater for tourists travelling to the area”,* such as bringing in a musician to perform.
- 7.23.6 An amusement operator identified that it chooses to give public holiday shifts to juniors instead of regular staff, resulting in a drop in service. They *“would prefer to put on more experienced staff but simply cannot afford to.”*
- 7.24 The need to consider the appropriateness of penalty rates has often been demonised as an attempt by employers to increase their profit at the expense of employees. The above comments indicate that this is not the case.

### ***Impact on customer service***

- 7.25 In reducing the number of staff engaged on a Sunday or public holiday, there is an inevitable impact upon customer service, as is shown by the following comments:

*“Sunday is slightly busier than Saturday so more staff are needed...On Sundays we roster less staff because of penalty rates and that leads to a lower level of service and less availability of product for our customers.”* Suburban independent grocery retailer.

*“Our retail standards drop as we don’t give full service or our shelves are not kept as full as we would normally have. We operate on skeleton staffing.”* Rural independent grocery retailer.

*“Because the hourly rate is so high we can’t afford to employ enough people as weekdays to service customers therefore the customer service is lower and a lot of jobs that should be done can’t be done...We are basically not making money and sometimes losing money on Sunday and public holidays...all due to high expense on labour.”* Suburban independent grocery retailer.

*“We keep staffing levels to a minimum which can cause a severe stress if someone doesn’t turn up for work and being a Sunday or Public holiday increases the likelihood of absences...Because of penalty rates we operate with as low as possible staffing which we would increase if Sunday became a time and a half rate. This would have the effect to reduce our staff stress levels and increase customer service. At the moment the day with the highest error rate for order fulfilment is Sunday...We would increase our number of staff... we would not have to run with skeleton shifts.”* Agriculture and wholesale business.

- 7.26 It is our view that the establishment of penalty rates should remain an award matter, with the appropriateness of any penalties to be considered based on the circumstances affecting the relevant industry or occupation. However, as we have identified the Part 6 of this submission, the current structure for reviewing awards does not facilitate the establishment of truly modern awards and as such reform at this level is necessary.
- 7.27 We therefore are of the view that greater flexibility needs to be established within the agreement making system to provide employers with the ability to establish terms and conditions that not only allow their businesses to operate profitably on weekends and public holidays, but also increase employment opportunities and quality of service.

### ***Recommendations***

- 7.28 Modern awards should be varied to establish a penalty rates system that reflects the need of the industry and takes into consideration changing community expectations.
- 7.29 Agreement options should provide greater flexibility to allow employers to increase employment opportunities and customer service when establishing appropriate penalty rates for their business.

## **8. ENTERPRISE BARGAINING**

### ***Accessibility of agreement making***

- 8.1 The requirements for making an enterprise agreement under the FW Act are unnecessarily complex, locking many small businesses out of the agreement making option. Where the modern awards do not reflect the current industry needs, this places these small businesses at a disadvantage to their larger competitors who are able to access enterprise agreements to establish some limited flexibilities.
- 8.2 This concern has been highlighted by a small restaurant located in a regional city. They are competing against two large chain restaurants that have enterprise agreements that absorb weekend and public holiday penalty rates into higher base rates of pay. For the chain restaurants, this means that they are able to trade on Sundays and public holidays without the impact of higher penalty rates on those days. However, the smaller business is hampered by the high penalty rates, meaning trading on that day is less viable, but necessary in order to maintain its customer base. The owner identified that establishing an agreement was too costly an exercise for him as a small business.
- 8.3 The difficulty associated with enterprise bargaining is easily identified when the process for making an agreement is expressed diagrammatically. Appendix A provides a diagrammatic overview of the process for making a single enterprise agreement. It is obvious from this diagram that the process is complex and beyond the ability for a business (irrespective of size) to navigate without specialised assistance. Therefore, unless the business has an in-house industrial relations

specialist, they inevitably need to engage the services of an external service provider, such as an employer association or law firm.

- 8.4 The complexity of enterprise agreements can be seen when each step is contemplated in detail. Section 180 of the FW Act provides a seven day access period by which employees must be notified of the vote and provided a final copy of the agreement. However, the Fair Work Commission (**FWC**) has interpreted the legislation to require the provision of seven clear days, which means the agreement cannot be voted on until the eighth day. Employers frequently conclude from a plain reading of the requirements that the vote can be conducted on the seventh day. Because the vote is then conducted a day early, the agreement does not meet the approval process and cannot be approved by the FWC. This means the employer is compelled to start the process again.
- 8.5 Suffice to say, in situations where unions seek to oppose the registration of an agreement, the first line of attack is to challenge the employer's compliance with each of the required pre-approval steps given the inherent complexities.
- 8.6 The failure to comply with process can be trivial; however there is no discretion on the FWC to ignore even the most minor of breach. A member of CCIWA recently approached us with correspondence from the FWC that their enterprise agreement would not be approved because the information sheet required to be given to employees at the commencement of bargaining had the company logo on top of the document and as such ran afoul of previous decisions of the FWC that an employer must not make any alterations to the document (other than where directed by the document), irrespective of how small.
- 8.7 One of the key reasons why the take up of enterprise agreements has been so low is the increasing complexity and centralised regulation of enterprise bargaining.
- 8.8 In order for registered agreements to be accessible to all workplaces, the requirements need to be simple, with a focus on outcomes rather than process. The system of registered individual and collective workplace agreements established in WA through the *Workplace Agreements Act 1993 (WA)* (**WPA Act**) provides a good example of a system of agreement making that could be readily used by businesses of all sizes.
- 8.9 The WPA Act established a simple plain English set of criteria with respect to the content of an agreement and the approval steps required. This meant that it could be easily applied by employers (including small business) without any external assistance. The simplicity of the system contributed to the high uptake of these agreements. During the 2000-2001 financial year, the body responsible for registration of these agreements received 82,331 applications for a WA workplace agreement to prevail over a state award. Of those applications, 76,082 were for individual workplace agreements.<sup>37</sup>

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<sup>37</sup> Commissioner of Workplace Agreements, [Annual Report for the Year Ended 30 June 2001](#), page 6.

## ***Types of agreements***

8.10 Under the FW Act, agreement making options are essentially limited to:

8.10.1 Single enterprise agreements;

8.10.2 Multi-employer agreements; and

8.10.3 Union greenfields agreements.

The dominant form is the single enterprise agreement creating a one size fits all approach to agreement making<sup>38</sup>.

8.11 It is necessary to have a range of agreement making options in order to provide employers and employees with the opportunity to adopt a style of agreement suitable to the workplace or type of employment. This would include:

8.11.1 Statutory individual agreements;

8.11.2 Union and non-union collective agreement (both single and multi-employer); and

8.11.3 Union and non-union greenfield agreements.

8.12 A simplified agreement making system would enable employers and employees to reach agreement at the enterprise level according to business and employee needs and circumstances, with an emphasis on decision making being undertaken at the enterprise level rather than being imposed by a third party.

8.13 Once an agreement has been reached, primacy needs to be given to the view of the parties to the agreement. Under the FW Act, third parties are all too often given an opportunity to intervene in the registration of agreements even where they were not involved in the bargaining process. This is compounded by individual members of the FWC having their own views regarding what is appropriate content within an agreement and compelling employers to make undertakings in order for an agreement to be approved.

8.14 Consideration of what may or may not be approved by the FWC has a considerable impact on establishing agreements that seek to improve flexibility or productivity. Seeking approval of agreements which significantly deviate from the standard pattern of regulation established through awards is a chancy proposition. We are frequently put in the unfortunate position of having to moderate our members' expectations of what can be achieved through agreements by considering whether or not alternative arrangements are likely to be accepted by the FWC.

8.15 This assessment is made all the more difficult due to the significant level of inconsistency in the approach taken by individual members of the FWC in applying the Better off Overall Test (**BOOT**).

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<sup>38</sup> The FW Act limits the application of multi-employer and greenfield agreements and as such for most enterprises these are not a valid consideration.



- 8.16 Given the remote nature of work often conducted in WA, it has been important for many of our members to establish flexible provisions within agreements that accommodate a wide range of working patterns. These flexibilities pose significant challenges in the approval process as it makes it difficult to assess the agreement against the provisions of the awards. Frequently, individual members of the FWC will seek complex undertakings to guarantee that the employees are better off overall. Whilst these safeguards are then reflected in future agreements, a different member of the FWC may have a different perspective, resulting in a different set of undertakings or the agreement not being approved. Consistency in the approach of the same member of the FWC is also not guaranteed, with many shifting their expectations over time.
- 8.17 Flexibility in agreement outcomes is further hampered by the modern awards themselves. As identified earlier in this submission, modern awards are complex and highly prescriptive documents, which have not been modernised to reflect current work practices. Therefore they do not provide an effective platform for the approval of agreements.
- 8.18 Since 2006, the role of the award system in establishing a safety net of minimum employment standards has largely been replaced through the creation of legislative minima. This was first through the Australian Fair Pay and Conditions Standard and currently through the National Employment Standards (**NES**).
- 8.19 We therefore believe that the NES should be established as the basis for assessing agreements, which would be in line with the intention of establishing statutory minima. In terms of enterprise agreement outcomes, this would provide a simple test that encourages workplaces to actively consider alternative means of regulating terms and conditions of employment.
- 8.20 Having a no disadvantage test against the NES would also allow for the speedy approval of agreements<sup>39</sup> that could be administratively applied, without the cost associated with approval by members of the FWC.
- 8.21 The approval process should also recognise that the NES adopts a one size fits all approach to the application of minimum standards. In framing these entitlements, the legislators have approached them from a traditional model of employment. As such, the NES may not always be relevant to a particular workplace or category of employment. Agreements should therefore have the option of being able to modify the application of the NES, subject to a no disadvantage test.
- 8.22 This is a concept which is not without precedent. The *Real Estate Industry Award 2010 [MA 000106]* provides a clear example of this, with its inclusion of a provision allowing for employers and commission only employees to agree for annual leave and personal leave to be paid in advance as part of the commission structure.<sup>40</sup> This

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<sup>39</sup> Currently enterprise agreements can take several months to approve. Because agreements do not take effect until after they are approved this delay the application of its provisions to the workplace.

<sup>40</sup> *Real Estate Industry Award 2010 [MA 000106]*, cl 17.5(a). Payment of annual leave in advance was also adopted in a number of enterprise agreements. However, a full Bench of the FWC handed down a decision in 2014 concluding that these provisions breached the NES [*Canavan Building Pty Ltd* [2014] FWCFB 3202], notwithstanding an earlier full bench decision that concluded that they complied with legislative requirements [*Hull-Moody Finishes Pty Ltd* [2011] FWAFFB 6709].

flexibility was also available in federal agreements made prior to 2006, due to the current NES standards being award provisions and as such subject to the no disadvantage test.

***Productivity and enterprise bargaining***

- 8.23 A key promise of enterprise bargaining was that it would help improve workplace productivity. Whether this goal is achieved or not is principally determined by the objectives and views of the parties involved in the bargaining process.
- 8.24 Most productivity improvements are derived by the employer and their employees working collaboratively to respond to external challenges and opportunities, as well as identifying options for improving efficiencies, output or quality.
- 8.25 Productivity outcomes are therefore best achieved by fostering direct engagement between employers and employees.
- 8.26 For most employers, the way in which agreements can best contribute to workforce productivity is by reducing the level of over-regulation, increasing the level of flexibility in how work can be performed and establishing appropriate remuneration structures.
- 8.27 It has been our experience that these objectives are more likely to be achieved in the context of enterprise agreements negotiated directly with employees. In this context, agreement on terms and conditions of employment is reached through a consultative approach where the employer directly discusses the proposed agreement with its employees in a non-adversarial environment. Whilst these agreements rarely refer to productivity in their terms, they frequently achieve this objective through the establishment of terms and conditions relevant to that organisation. In these discussions, the focus is on what is relevant to that workplace, meaning that:
- 8.27.1 Provisions of the award that are irrelevant to the workplace are generally removed;
- 8.27.2 Clauses are written simply so that all parties clearly understand their rights and obligations;
- 8.27.3 Flexibilities in the way in which work can be performed are established; and
- 8.27.4 Remuneration structures focus on recognising performance as the basis for determining wage increases.
- The resulting agreements are considerably shorter (on average 20-40 pages), easier to understand and easier to apply than the awards they replace.
- 8.28 However, these outcomes are rarely achieved in the context of union negotiated agreements.
- 8.29 Most unions promote membership on the basis that the union will be able to achieve better outcomes than employees could achieve through direct discussions with their employer. In order to deliver on this promise it is therefore necessary for unions to

achieve a wages outcome greater than what the employer would otherwise be prepared to offer, thus establishing a framework for an adversarial approach to bargaining.

- 8.30 As a result, the parties become engaged in a distributive (win/lose) approach to bargaining. This is not conducive to genuine negotiations about how an agreement can meet the needs of both the employer and its employees.
- 8.31 As identified in 6.3, the approach taken by most unions in enterprise bargaining negotiations is to not entertain trading off award conditions for improved benefits in other areas. This is succinctly expressed in the Australian Manufacturing Workers Union's (**AMWU**) delegate handbook which states:
- "The award should be incorporated as an entire instrument into your agreement, rather than just picking and choosing clauses. Awards should be thought of as the minimum industrial standard: they provide a solid platform for bargaining. It is essential that employers know that the union and its members will not agree anywhere to an award being written out of an agreement."*<sup>41</sup>
- 8.32 Consequently, discussion regarding the removal or variation of award provisions results in a predictable response from the union representatives. This occurs irrespective as to the impact of the proposed variation on the employees at that workplace. Even where the change would be positive for that group of employees, the union normally gives greater consideration as to whether any concessions could act as a precedent for future negotiations in other workplaces.
- 8.33 This makes it difficult for employers to successfully negotiate positive changes into the agreement. This is aggravated by the poor bargaining position created for employers by the legislation.
- 8.34 The first contributor to poor bargaining outcomes is the lack of alternatives to an enterprise agreement. This is compounded by the option for unions to seek a majority support determination which compels the employer to commence bargaining irrespective of its wishes. Once bargaining has commenced, there is no opportunity for the employer to withdraw from the process, other than by the finalisation of an agreement. Consequently, employers do not have an alternative to a negotiated outcome.
- 8.35 Negotiating theory considers the need for bargaining party to have an identified 'best alternative to a negotiated outcome' (**BATNA**) which provides them with a measure to gauge whether a bargaining outcome will result in a positive outcome. In the case of employees and unions, their BATNAs may include the option of taking industrial action to compel an employer to agree to their terms or withdrawing from the negotiations, thus maintaining the status quo. For employers there are no equivalent alternatives.
- 8.36 The other contributor is protected industrial action. Be it implicitly or explicitly stated, all enterprise agreement negotiations with unions are conducted under the potential threat of industrial action. This provides unions with an upper hand in the

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<sup>41</sup> Australian Manufacturing Workers Union (2009) *Delegate Handbook*, page 8.

negotiating process as there is no countervailing threat that can be raised by the employer.<sup>42</sup>

- 8.37 It is the risk of industrial action that frequently leads employers to agree to provisions within their enterprise agreement that have a detrimental effect on their business. Often, these provisions may not have an immediate impact on the business but prove problematic in later years. Enhanced redundancy schemes are an example of this. Frequently, at the time they are agreed to the provisions may be viewed as a low cost trade off to avoid threatened industrial action, notwithstanding the longer term impact on the business.
- 8.38 As a result of the above, there is generally no focus on productivity in negotiations; rather it is an exercise in managing the extent of employee/union claims.
- 8.39 For this circumstance to change there is a need to limit the potential for protected industrial action. Genuine negotiations are only likely to take place where the parties are able to bargain in an environment free of the threat of industrial action. We therefore believe that industrial action should only be an option of last resort.
- 8.40 Furthermore, successful outcomes in agreement negotiations are only likely to occur where both parties genuinely wish to enter into an enterprise agreement. This is at odds with the notion of compulsory bargaining and as such we believe that these provisions should be removed.
- 8.41 As part of the services provided by CCIWA, we are frequently called upon by our members to assist them in the negotiations of their agreements. Under the FW Act we have seen the standard time taken to negotiate an agreement substantially increase. Under the *Workplace Relations Act 1993* (Cth), most parties allowed themselves three months to negotiate a union collective agreement. Currently, most union negotiated agreements take a minimum of six months to complete negotiations, with 12 to 18 month negotiations not being uncommon. This is a significant drain on the resources of all of the bargaining parties.
- 8.42 A significant factor in prolonging enterprise agreement negotiations is the broadening of the matters that can be included within an agreement. In particular, substantial time is frequently spent negotiating provisions which do not directly impact upon employee terms and conditions of employment (such as limitation on the use of labour hire employees) or relate to the relationship between the employer and union (e.g. paid union meetings). In order to regain efficiencies within the bargaining process, we believe that the content of agreements should be limited to the terms and conditions of employment.

### ***Individual agreements***

- 8.43 The current system of Individual Flexibility Agreements (**IFAs**) promises the option of flexibility, but at the expense of complexity and uncertainty. This makes them a poor alternative to previous systems of registered individual agreements.

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<sup>42</sup> Employers are only able to lock out an employee in response to industrial action taken by employees.

- 8.44 Our members have expressed a reluctance to use IFAs for the following reasons:
- 8.44.1 Either party can end the IFA by giving 4 or 13 weeks' notice, providing neither party with certainty;<sup>43</sup>
  - 8.44.2 The establishment of an IFA requires a complex agreement which clearly articulates which provisions of the award or agreement are being varied and to what extent;
  - 8.44.3 Uncertainty in regard to the application of the "better of overall test", especially where an employee foregoes a monetary entitlement but gains a non-monetary entitlement such as more flexible start and finish times to undertake family responsibilities; and
  - 8.44.4 Employers fear prosecution for underpayment, such as over a foregone monetary entitlement (as above) where an employee changes their mind even though the employee originally requested the arrangement.
- 8.45 This result is unsurprising given the previous Labor Government's stated views regarding collective bargaining and the use of registered individual agreements.
- 8.46 The lack of workable alternatives under the FW Act has not reduced the demand for individual agreement options; rather it has forced employers to look at alternatives which sit outside of the legislative framework. This includes offset (sometimes referred to as set-off) contracts which rely upon principles established at common law allowing for the non-payment of award provisions to be offset against other over award payments. One example of this is a higher rate of pay offsetting non-payment of penalty rates or allowances.
- 8.47 In our experience, a significant number of employers have opted to use these offset contracts in preference to IFAs because they are simple to establish, can be made a condition of employment and can only be varied by mutual agreement. However, this is far from an ideal solution. These employers also face uncertainty as to whether the arrangements ensure employees are not disadvantaged, the potential for legal challenge of the arrangements and the risk of penalties for breaching the award, even where the employee is better off.
- 8.48 As a result CCIWA believes that a simple system of statutory individual agreements should be made available which addresses the obvious need for employers and individual employees to be able to negotiate terms and conditions of employment outside of the award structure.

### ***Greenfields agreements***

- 8.49 In WA, greenfields agreements have most frequently been utilised during the construction phase of large resource projects. They have the benefit of providing a level of certainty as to the labour cost component of the project and limiting the potential for industrial action.

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<sup>43</sup> The period depends on whether the IFA is derived from an enterprise agreement (to which 4 weeks apply) or a modern award (to which 13 weeks applies).

- 8.50 However, under the current structure the ability to establish terms and conditions of employment prior to work beginning is limited to union greenfields agreements. This places the unions in a strong bargaining position, given the lack of viable alternative arrangements. Under the *Workplace Relations Act 1996 (Cth)* (**WR Act**), where agreement on terms could not be reached with a union, the employer could utilise employer greenfields agreements or Australian Workplace Agreements. The availability of alternative options is essential in successful bargaining outcome. The lack of alternatives to a negotiated agreement inevitably leads to poorer bargaining outcomes, as is the case with the current system. Under the WR Act, unions were also encouraged to work with employers to reach a greenfields agreement, because being a named party to the agreement was essential for exercising right of entry. Currently, there is no clear incentive for unions to enter into a greenfields agreement.
- 8.51 It therefore necessary for the FW Act to provide alternative agreement making options in order to remove the artificially inflated bargaining power conveyed upon unions. To achieve this we would recommend the re-establishment of employer greenfields agreements, along with registered individual agreements. A key provision of employer greenfields agreements was their limited operation to 12 months, meaning they only operated as an interim measure. Therefore, employers needed to negotiate for a replacement agreement directly with the workforce and/or their union representative. The main advantage is that employers were able to do this in an environment where there was not the coercive threat of industrial action.
- 8.52 The limited duration of employer greenfields agreements also meant that they were not an ideal option for employers. Therefore, whilst they improved the employer's bargaining position, it did not fundamentally shift it so as to remove the union's bargaining power.
- 8.53 Major resource projects require substantial levels of investment. To achieve a financial investment decision, a project owner needs to establish, amongst a number of financial outcomes, the cost of constructing the plant. This includes the labour cost input for the duration of the construction phase. The establishment and maintenance of labour cost for the duration of a construction project provides certainty and surety for a project owner.
- 8.54 Generally speaking, the construction of a multi-contractor resources project requires the management and co-ordination of many activities and issues. One of these is the workforce engaged to construct the project, notwithstanding that this workforce will be directly employed by contractors or subcontractors.
- 8.55 On distant resource construction projects, these employees will have to be flown in and out, as well as be accommodated and transported to and from accommodation to the workplace. These logistical issues will often impact upon conditions of employment, for example the fly-in fly-out roster. Having the workforce on the same fly-in fly-out roster enables easier management of accommodation, charter flights and other such like logistics.

- 8.56 A project owner also seeks surety that a skilled and experienced workforce is available for its project. Should labour resources be scarce or in demand, the owner will want to ensure that conditions of employment are such that labour will choose the owner's project to work on. Typically, when there are multiple projects under way at the same time, the conditions of employment offered will reflect this market. Project owners will therefore generally set conditions of employment.
- 8.57 These contractors often employ labour in the same classifications, doing the same work as other contractors on the same project. So as to avoid a "bidding war" for labour between contractors, site applicable conditions will not only have a floor but also a ceiling. It has previously been raised that site terms disadvantage smaller contractors who may not be able to compete on the basis of lower cost of labour. This argument ignores the effect of market forces on these sites in which there is often a strong demand for labour. Employers who pay below the rates paid by other contractors on site not only risk losing their workforce to better paying employers, but also face a strong risk of triggering industrial disputation (either lawful or unlawful).
- 8.58 Uniform escalations of conditions of employment are also a feature of projects during a boom phase. This in order to avoid employees moving between projects to find the highest or best conditions of employment.
- 8.59 Project owners are therefore able to predict with some certainty the labour component cost of their project. They will be able to attract and retain the best available labour. Disharmony and poor morale will be mitigated on their projects because employees are generally satisfied with their employment conditions and unlikely to search for better conditions.
- 8.60 Given the above, in seeking to achieve certainty and surety of their project labour costs, project owners will:
- 8.60.1 Arrange for a single set of wages and conditions to apply to all craft employees engaged on the project;
  - 8.60.2 Have these project conditions contain escalation mechanisms so that conditions remain competitive for the duration of the project; and
  - 8.60.3 Prefer that the conditions are enshrined in industrial agreements applicable for the duration of the project to reduce the risk of protected industrial action.
- 8.61 Whilst the arrangements are far from perfect they do characterise how the industry operates. Planning and executing major resource projects is a significant exercise of management and co-ordination. Clarity and certainty of inputs, including labour cost for the duration of the project, is preferable to uncertainty. The approach adopted is also reflective of the impact that industrial action and other disputes can have on productivity.
- 8.62 Currently, an area of uncertainty is the limited duration of greenfields and other forms of agreements. For longer projects this means agreements many need to be

renegotiated mid-way through the project, creating further risk and impacting upon the investment decision. To alleviate this issue, CCIWA recommends that greenfields agreements should be able to be established for the life of the project.

### ***Recommendations***

- 8.63 Many businesses are locked out of registered agreements because of the cost and complexity of the system. Content and approval requirements need to be simplified to ensure that they are accessible to all workplaces.
- 8.64 A full range of agreement options needs to be made available, including statutory individual agreements, union and non-union collective agreements, and union and employer greenfields agreements. Greenfields agreements should facilitate an option to operate for the duration of a project.
- 8.65 The approval process of agreements should give primacy to the views of the parties to the agreement. Agreements should be subject to a no disadvantage test applied against the NES.
- 8.66 To encourage efficiency in bargaining, the range of matters that can be included in agreements should be limited to terms and conditions of employment.
- 8.67 The current system of compulsory bargaining encourages poor bargaining outcomes. The current system should be amended to remove the compulsory bargaining obligations on employers.

## **9. INDUSTRIAL ACTION**

### ***Role of industrial action in shaping bargaining outcomes***

- 9.1 As identified in paragraph 8.35 of these submissions, the threat of industrial action has a significant impact on enterprise bargaining outcomes. Whilst the statistics show that the days lost due to industrial action has fallen considerably over the past two decades, they fail to show the impact that industrial action taken by even a small group of employees can have on the broader economy.
- 9.2 The flow on effect of industrial action was demonstrated last year with the Maritime Union of Australia's (**MUA**) proposed strike involving tug boat deckhands in Port Hedland. There had been stalled negotiations between the MUA and tugboat operator Teekay Shipping. The proposed action by only a handful of workers threatened to close down one of Australia's busiest ports, which would effectively halt iron ore exports out of WA. The MUA had been demanding a 31 per cent increase in pay and conditions for deckhands for doing less work with no productivity trade-off. The deckhands were demanding a salary twice as high as a graduate doctor and a reduction in working hours from six months in a year to 4.5 months in a year.
- 9.3 The proposed industrial action not only affected the employer, but would have had a significant direct impact on other businesses, workers and the wider community. This included:



- 9.3.1 Projected losses of over \$100 million a day in lost production by the mining operators and other businesses reliant on the port for exports;
  - 9.3.2 Lost wages for the employees employed by these businesses due to their employer being unable to use them because of the dispute; and
  - 9.3.3 WA taxpayers being at risk of losing approximately \$7 million a day in iron ore royalty revenue.<sup>44</sup>
- 9.4 Such disputes also damage our international reputation, having a direct impact on future decisions by overseas investors to invest in Australia. CCIWA has experienced this concern first hand in discussions with a foreign capital investment firm during this dispute, who was concerned about the potential impact of MUA claims and activities on their investment decisions.
- 9.5 Given the integrated nature of the economy, industrial action may have a significantly greater impact on third parties than it has on the employer who is subject to the industrial action. The impact on the employer's clients and other stakeholders is well understood by the relevant unions, with linchpin<sup>45</sup> operations frequently targeted because the impact on third parties puts increased pressure on the employer to agree to excessive claims. The resulting agreements then become the benchmark for other negotiations in that industry.
- 9.6 Industrial action does not need to be taken in order to be effective. It is the threat of industrial action that is the most effective bargaining tool that the union has. Employers are well aware of the impact that industrial action may have on their business and the business of their clients. Therefore, unions are able to shape the outcome of negotiations by ensuring that threat is constantly reinforced during the bargaining process.
- 9.7 This is reflected in the increase in the number of protected action ballot applications made by unions, which are votes by union members to support the taking of industrial action. These have increased significantly from 271 applications in 2006-07 to a high of 1011 in 2011-12.<sup>46</sup>

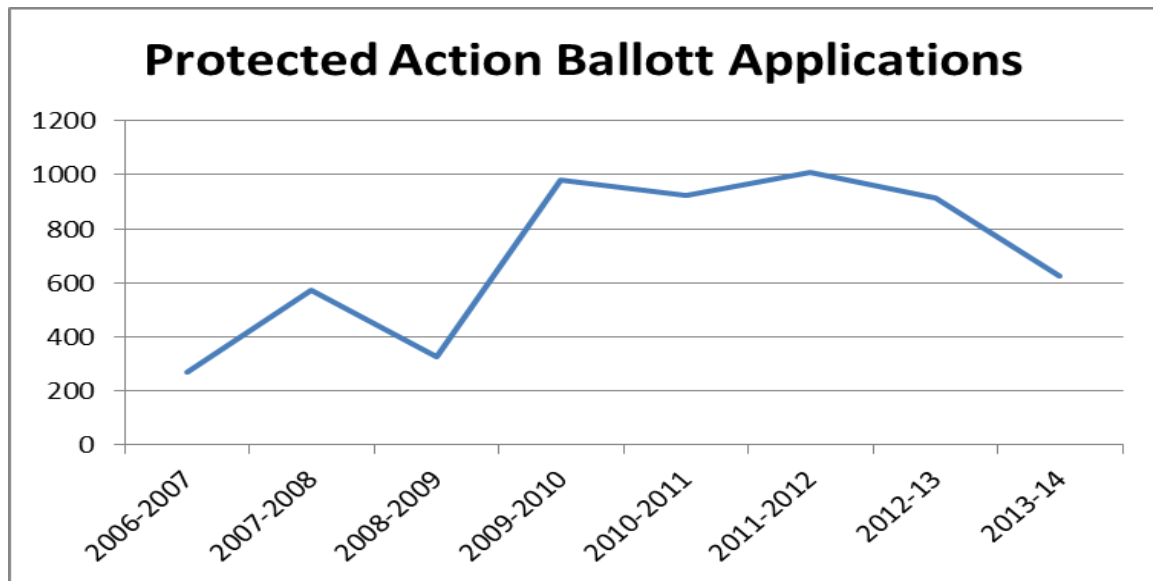
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<sup>44</sup> See BHP Billiton news release, 21 May 2014 at

<http://www.bhpbilliton.com/home/investors/news/Pages/Articles/Update-on-Towage-Services-at-Port-Hedland.aspx>.

<sup>45</sup> Linchpin refers to an operation that is critical in order for other work to continue. In this case the operation of tug boats is critical in the operation of a port.

<sup>46</sup> Statistics derived from the annual reports of the Fair Work Commission, Fair Work Australia and the Australian Industrial Relations Commission for the respective years identified in the table.



- 9.8 Under the current provisions of the FW Act, the requirements to take industrial action are limited and establish a very low threshold.
- 9.9 By contrast, industrial action is very difficult to stop. The FW Act only allows for protected industrial action to be suspended or terminated where it is:
- 9.9.1 Causing (or threatening to cause) significant economic harm to the employers and employees covered by the agreement;
  - 9.9.2 Threatening the life, safety or welfare of the population or part of it;
  - 9.9.3 Threatening to cause significant economic harm to the Australian economy; or
  - 9.9.4 Causing (or threatening to cause) significant economic harm to a third party.
- 9.10 This difficulty associated with obtaining these orders is well demonstrated in the 2010 Pluto Dispute, which had an estimated cost of \$3.5 million per day. During the dispute, nearly \$1.5 billion was wiped off the value of Woodside, amounting to a decrease of 3.8 per cent in its share price.<sup>47</sup> Further, the total cost of the Pluto project increased by \$900 million from January 2010's costing to approximately \$14.9 billion.<sup>48</sup> The dispute also added a seven month delay in beginning shipments of LNG out of the project.<sup>49</sup> This resulted in the whole project being significantly over schedule and affected Woodside's reputation on a world scale.<sup>50</sup> Notwithstanding this, the industrial action was not considered by the Fair Work Commission (**FWC**) to have caused significant economic harm.
- 9.11 The 2011 Qantas dispute identified the extent of economic harm that is needed to stop industrial action.<sup>51</sup>

<sup>47</sup> Ross Kelly, Dow Jones Newswires, 'Woodside loses \$1.5bn as shares tumble on delay to Pluto LNG cargo', 17 June 2011.

<sup>48</sup> Sydney Morning Herald, 'Woodside workers end strike at Pluto', 30 January 2010.

<sup>49</sup> Above, n 45.

<sup>50</sup> Woodside Burrup Pty Ltd & Kentz E & C Pty Ltd v Construction, Forestry, Mining and Energy Union [2010] FWA 4880.

<sup>51</sup> Minister for Tertiary Educations, Skills, Jobs and Workplace Relations [2011] FWA 7444.

- 9.12 Qantas had been subject to prolonged industrial action by three unions which had *“affected 70,000 passengers, led to the cancellation of 600 flights, the grounding of 7 aircraft, \$70 million in damage.”*<sup>52</sup> The Commission concluded that this action was *“unlikely”* to cause significant damage to the economy, even when taken together.<sup>53</sup> It took Qantas shutting down its entire operations, costing Qantas alone \$20 million per day<sup>54</sup> and threatening to cause significant damage to the tourism and air transport industries, for the Commission to consider that there was significant economic harm. Only then would the Commission terminate the industrial action.
- 9.13 This clearly fails the ‘average person in the street test’ and reflects the ability of the industrial relations system to significantly skew the bargaining position of the union. The situation of the employer in this regard is best likened to stepping into a boxing ring with both hands tied behind their back. Their opponent is free to land substantial blows but there is little they can do to defend themselves.
- 9.14 The high threshold established by the FW Act, and the FWC in its application of these provisions, effectively means that industrial action is only resolved when one of the parties backs down. In the case of employers, this is akin to throwing in the towel and negotiating the terms of their surrender. Invariably, this results in poor bargaining outcomes.
- 9.15 It is the view of CCIWA that industrial action should only be an option of last resort after genuine negotiations on reasonable claims. It is our view that good bargaining outcomes are more likely to be achieved in an environment free from the threat of coercive action. Only where that process has failed, and subject to the union’s claims being reasonable, should the option of industrial action become available. We recommend that in addition to the current requirements, that the party initiating industrial action needs to demonstrate:
- 9.15.1 That they have engaged in genuine negotiations with the other party and have genuinely considered and responded to their claims;
  - 9.15.2 That the claims being perused are reasonable when compared to the terms and conditions of employment applicable to that industry, or the circumstances of that enterprise; and
  - 9.15.3 The proposed protected industrial action is objectively reasonable and proportionate having regard to the matters in dispute and the likely effect the proposed industrial action on the employees, the employer and other persons.
- 9.16 It is also the opinion of CCIWA that viable options for terminating and suspending protected industrial action should be available. We propose that the definition of *“significant economic harm”* under s 423 of the FW Act should be replaced with a new test to assess whether industrial action is causing unreasonable economic harm or has a serious adverse impact on the employer or other affected party (e.g. another

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<sup>52</sup> Ibid, at [7].

<sup>53</sup> Ibid, at [10].

<sup>54</sup> Ibid, at [10].

business, person or sector of the community). These changes would help address the current problem where industrial action is targeted to cause significant disruption to parties outside of the dispute in order to place external pressure on the employer to agree to the proposed claims.

## **10. UNFAIR DISMISSAL**

### ***Lack of clarity***

- 10.1 The unfair dismissal system is intended to protect employees from an unreasonable (unfair) decision to terminate their employment. Unfair dismissal laws require that the employer has a valid reason to terminate and that procedural fairness has been followed.
- 10.2 In advising and representing members in termination matters, it is clear to CCIWA that the need to have a valid reason based on an employee's capacity to perform the job or their conduct is well understood. So too is the notion that the punishment must fit the crime. That is, the action must be serious enough to warrant termination and not some lesser course of action.
- 10.3 However, it is the concept of procedural fairness that causes the greatest level of concern for employers. It has been the observation of CCIWA that in the majority of successful unfair dismissal claims, the employer was found to have had a valid reason to terminate, but that the termination was deemed unfair because procedural fairness had not been followed.
- 10.4 The notion of procedural fairness is a subjective one that is determined on a case by case basis. This creates substantial uncertainty for employers in seeking to manage the performance of their employees because there is no objective basis for employers to assess whether or not they are in a position to terminate an underperforming employee.
- 10.5 This uncertainty causes many employers to defer decisions to terminate or manage staff performance for fear of being found to have terminated an employee unfairly. In other words, they put up with an underperforming employee.
- 10.6 A decision not to manage staff performance has an impact beyond the employee in question, affecting the performance of other staff through:
  - 10.6.1 Other employees picking up the slack caused by an underperforming employee;
  - 10.6.2 Inappropriate conduct affecting the wellbeing of other employees which may impact on their performance or decision to remain with the organisation; and
  - 10.6.3 Lowering the overall performance of the team by lowering the expectations of other staff as to what constitutes acceptable performance standards.

- 10.7 When addressing poor performance, employers seek certainty in understanding what their obligations are, as well as expediency in dealing with the issue. It is the view of CCIWA that there is a need to simplify the unfair dismissal system by requiring principal consideration to be given to whether there is a valid reason to terminate. Alternatively, there is a need to establish a simple and objective set of criteria for assessing procedural fairness.
- 10.8 A common complaint received by CCIWA from its members is that they feel that the unfair dismissal system does not take into consideration the employee's common law obligations to their employer, particularly due care, fidelity and good faith.
- 10.9 This is of particular concern with respect to the employer's obligation to maintain a safe workplace, where an employer may be found responsible for the conduct of their employee, but unable to hold the employee accountable for their own actions. This quandary is demonstrated by the following case law:
- 10.9.1 In *South Pacific Resort Hotels Pty Ltd v Trainor*<sup>55</sup> an employer was held to be vicariously liable for the sexual harassment that occurred as a result of sexual advances made by a colleague outside of working hours. Because the incident occurred in accommodation provided by the employer for its resort workers and that the employer had established policies regarding the use of this accommodation, there was a connection to the workplace and from this the liability arose.
- 10.9.2 Conversely, in *Streeter v Telstra Corp*,<sup>56</sup> an employee was terminated due to her sexual escapades after a work party. Her actions had been witnessed by several colleagues who subsequently made complaints of sexual harassment. These colleagues commented that they "*felt really disrespected*" by her, and that they were "*repulsed*" by her actions. Despite acknowledging the employer's vicarious liability arising from her actions, Fair Work Australia (FWA)<sup>57</sup> found the employee's behaviour did not constitute sexual harassment and that the dismissal was unfair.<sup>58</sup> In this case FWA did not recognise that the incident was connected to the workplace due the after hours nature of the event and hence they were not able to take disciplinary action.
- 10.10 The different approaches adopted in these examples can place employers between a rock and a hard place in the management of their employees.

### ***Give it a go claims***

- 10.11 Of particular concern to employers is the ease by which employees can access the unfair dismissal system.

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<sup>55</sup> [2005] FCAFC 130

<sup>56</sup> [2007] AIRC 679.

<sup>57</sup> The predecessor to the Fair Work Commission.

<sup>58</sup> The decision was appealed, with the FWA Full Bench upholding the dismissal. However, this was because the employee's dishonesty during the investigation provided a valid reason for dismissal.

- 10.12 To make an unfair dismissal claim, an employee needs to complete a simple application form and provide payment of a small \$67.20 application fee (which is refunded if the matter is settled at conciliation). Because the FWC is a lay jurisdiction, there is no requirement for representation and increasingly most applicants are self-represented, particularly at conciliation.
- 10.13 Once a claim has been made, all matters are allocated for conciliation without regard to whether there is a valid claim before the FWC.
- 10.14 The focus of conciliation is to encourage the parties to settle the application. It has been the experience of CCIWA in representing members in these matters that, at conciliation, very little regard is had to the merits of the claim. The allocated time (generally one to two hours) is principally focused on identifying what the employee is seeking, with the conciliator engaging in shuttle negotiations between the parties to encourage settlement and convey settlement offers. In these private discussions, the conciliator will actively encourage the employer to settle the claim by focusing on the costs of defending an application and the merits of making a commercial decision to settle. This is irrespective of the strengths of the employer's case or the presence of clear jurisdictional hurdles for the applicant.
- 10.15 This is less a criticism of the role played by the conciliators and more a reflection of the realities of the system. Once a claim has been made, there is limited ability for the FWC to dismiss an application other than by determining the matter. Whilst some claims can be dealt with 'on the papers', in most cases this involves a full hearing.
- 10.16 This means that it is the applicant who is in control of the process in determining whether or not a matter goes to arbitration, not the FWC.
- 10.17 If a matter is not settled, the process of arbitration normally involves the following steps:
- 10.17.1 The employee provides written submissions outlining their claim in full and providing written statements from any witnesses;
  - 10.17.2 The employer is then provided an opportunity to provide a written submission in reply and to file their own witness statements; and
  - 10.17.3 A formal hearing is then conducted over a one or two day period during which the witnesses are examined and cross examined. The parties put oral arguments to the FWC to supplement their written submissions and address witness evidence.
- 10.18 As is clearly evident, this is a complex process and involves a significant cost to employer, not only in representation fees but also the time lost in determining how the claim will be addressed, providing witness statements and attending hearings. In considering the impact of an unfair dismissal claim, a not for profit organisation identified that the time involved in dealing with an application:
- "had a big impact on the Executive Manager Operations and I (HR Manager) as we were the people handling this. We felt it was a waste of our time as we were confident in our decision"*

*making and the process we had followed.... We wasted a lot of time meeting, phoning, writing, rewriting and discussing. I call it "waste of time" because our decision was sound and the matter should never have gone that far at all, however, we had to follow a process. At this time we were also embarking on a significant restructure and this matter averted our attention from other important operational issues."*

- 10.19 However, because the FWC is a no cost jurisdiction there is no real prospect for the employer to recover this expense. Furthermore, there is essentially no risk to the employee that they will be forced to bear the other party's costs. Consequently, the employee is only responsible for their own costs. Frequently, applicants will minimise this by representing themselves.
- 10.20 In short, the cost of defending an unfair dismissal application for an employer is high, however the cost and risk to the applicant is low. This encourages the making of commercial settlements, frequently referred to as 'go away money'.
- 10.21 With respect to the unfair dismissal and general protection claims in which CCIWA has represented employers, the average sum paid to settle a claim is \$6,300, with the majority of settlements falling between \$1,000 and \$6,000.<sup>59</sup> This is significantly cheaper than the cost of defending the application.
- 10.22 For the applicant, this means that for the want of a \$67.20 filing fee (which is reimbursed) and two hours at conciliation, they are likely to walk away with a settlement of several thousand dollars. Furthermore, settlements are made subject to a written deed which includes confidentiality provisions applicable to both parties, thus minimising the risk to the employee's reputation. The potential gain in comparison to the limited costs encourages the notion of 'give it a go' claims.
- 10.23 In order to address this, CCIWA recommends that the FWC should be given greater ability to dismiss applications without a formal hearing or determination where there is no valid claim and/or there is little prospect of success.
- 10.24 In addition, it is our view that there needs to be greater access to cost orders. Currently, costs can only be sought where the claim is vexatious, without reasonable cause, or there was no reasonable prospect of success. In considering this matter the FWC has established a very high bar. In *Timmins v Compass Security*<sup>60</sup> a full bench determined that:
- "It seems to me that one way of testing whether a proceeding is instituted 'without reasonable cause' is to ask whether, upon the facts apparent to the applicant at the time of instituting the proceeding, there was no substantial prospect of success. If success depends upon the resolution in the applicant's favour of one or more arguable points of law, it is inappropriate to stigmatise the proceeding as being 'without reasonable cause'. But where it appears that, on the applicant's own version of the facts, it is clear that the proceeding must fail, it may properly be said that the proceeding lacks a reasonable cause."*
- 10.25 In other words, costs are only accessible where no argument is available, irrespective of how speculative that argument may be. To discourage speculative claims, this bar

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<sup>59</sup> Statistics based on 269 unfair dismissal and general protection claims where CCI represented the employer between the period of April 2012 to February 2015.

<sup>60</sup> *Ben Timmins v Compass Security t/a Compass Integrated Security Solutions* [2012] FWA 1093.

needs to be lowered to increase the potential for costs in the event of claims where there is little prospect for success. Whilst still maintaining an essentially no cost jurisdiction, the increased opportunity for costs encourages greater consideration by the applicant as to the merits of the claim they are seeking.

### ***Small business***

- 10.26 The impact of the unfair dismissal system is greatest upon small businesses (i.e. less than 20 employees). This is not only with respect to the costs associated with defending a claim being much higher, but also the impact that an underperforming employee has on the performance of their business and the resources available to dedicate to the ongoing management of poor performance.
- 10.27 The Small Business Fair Dismissal Code (**the Code**), and the 12 month qualifying period before employees can claim unfair dismissal, were established in recognition of the issues faced by small business in this regard.
- 10.28 Whilst the Code is designed to make the process simpler for small business, the Code itself has been subject to complex legal debate. The FWC have even identified that the checklist which forms part of the Code is of “*dubious value*”, in that it does not accurately reflect the steps required to ensure strict compliance with the Code when dismissing an employee<sup>61</sup>.
- 10.29 In the case of small businesses, concern over the unfair dismissal laws affects their preparedness to employ staff, or results in them seeking to limit their exposure to the provisions through the engagement of casual or labour hire employees. This is particularly the case amongst those businesses which have had to deal with an unfair dismissal application.
- 10.30 Small businesses need to be encouraged to invest and grow their businesses by building up their workforce. It is the view of CCIWA that the unfair dismissal system discourages this investment and as such it is appropriate to exempt small business from these provisions.

### ***Recommendations***

- 10.31 Uncertainty about what constitutes procedural fairness negatively impacts upon an employer’s management of poor performance. The unfair dismissal system should assess the fairness of termination by reference to whether the employer has a valid reason. Alternatively, the legislation needs to establish a simple and objective set of criteria to assess procedural fairness.
- 10.32 Give is a go claims represent a costly abuse of the unfair dismissal system. The FWC needs to be provided with greater scope to dismiss matters early on the basis of no valid claim or little prospects of success, without need for a formal hearing. The bar for parties to seek cost orders also needs to be lowered to act as a disincentive for applicants to file claims with little prospect of success.

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<sup>61</sup> N v The Bakery [2010] FWA 3096



- 10.33 The unfair dismissal system has a significant impact on small businesses and their preparedness to employ. Small businesses of less than 20 employees should be exempt from the unfair dismissal system.

## 11. WORKPLACE BULLYING

- 11.1 In 2013, the Federal Labor Government introduced anti-bullying measures into the FW Act through the *Fair Work Amendment Bill 2013 (Cth)* (**the Bill**). Having taken effect from 1 January 2014, s 789FC of the FW Act allows a worker who reasonably believes they have been bullied to apply to the Fair Work Commission (**FWC**) for an order to stop bullying.
- 11.2 CCIWA is of the opinion that the anti-bullying provisions represent unnecessary duplication and red tape. Further, the provisions remain underutilised by employees, supporting the conclusion that the regulation is unnecessary.

### ***Unnecessary duplication and red tape***

- 11.3 At the time of the proposed anti-bullying provisions, CCIWA raised concerns that the provisions provide individuals with the ability to pursue multiple claims for bullying related matters. These include:
- 11.3.1 An application to the FWC to stop bullying;
  - 11.3.2 An adverse action/general protections claim in the FWC or Federal Court;
  - 11.3.3 A discrimination claim in the Australian Human Rights Commission, WA Equal Opportunity Commission or Federal Court;
  - 11.3.4 In the event of dismissal, an unfair dismissal or general protections claim;
  - 11.3.5 A complaint to Worksafe; and
  - 11.3.6 A workers' compensation (i.e. stress) related claim in accordance with the relevant State and Territory requirements.
- 11.4 The Explanatory Memorandum to the Bill clarified that the anti-bullying measures *"are not intended to preclude investigation and prosecutions under WHS and criminal law"*.<sup>62</sup> Section 789FB of the FW Act expressly allows an individual to pursue claims under work health and safety laws, even where they have made a claim under the FW Act.
- 11.5 The Bill was inevitably passed, despite these concerns and the fact that that, during the 2012 review of the FW Act, the Expert Panel did not make any recommendations with respect to implementing anti-bullying measures in the FW Act.
- 11.6 The punitive action which can arise from a bullying incident conflicts with the well understood common law concept of double jeopardy. It also results in two regulators

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<sup>62</sup> See [92] of Explanatory Memorandum, Fair Work Amendment Bill 2014 (Cth).

(namely, the Fair Work Ombudsman and the WHS inspectors) and is an example of unnecessary duplication and red tape.

### ***Significantly underutilised by employees***

- 11.7 Employees have made little use of the anti-bullying provisions since their commencement. From 1 January 2014 to 31 December 2014, the FWC received only 701 applications for an order to stop bullying.<sup>63</sup> This is significantly low when compared to 14,266 applications received for unfair dismissal remedies in the same time period.<sup>64</sup>
- 11.8 It is frequently the case that bullying is found not to have occurred, with the majority of anti-bullying applications being withdrawn prior to hearing. Of the bullying applications received in 2014, 56 were finalised by decision. 79 per cent of the applications finalised by decision were dismissed pursuant to s 587 of the FW Act on the basis that the application was not made in accordance with the FW Act, is frivolous or vexatious, or has no reasonable prospect of success. Four were dismissed on jurisdictional objection and in seven instances the FWC found there was no bullying at work and/or there was no risk of the bullying continuing.<sup>65</sup>
- 11.9 Of the 701 anti-bullying applications, the FWC has only made one stop bullying order since its anti-bullying jurisdiction commenced.<sup>66</sup> This order has since been revoked by the FWC on 16 December 2014.<sup>67</sup> The evidence therefore shows that the anti-bullying provisions are just another example of unnecessary regulation which employers are required to understand and apply, despite the significant underutilisation of the provisions by employees.

### ***Impact on managerial prerogative***

- 11.10 Of relevance, the majority of anti-bullying applications have been made against the employee's manager.<sup>68</sup> The FW Act provides some protection for managers, with reasonable management action carried out in a reasonable manner not considered to amount to bullying at work under the FW Act.<sup>69</sup>
- 11.11 However, it is the experience of CCIWA that many of its members are faced with internal claims of bullying where the employer attempts to performance manage an employee. Even where performance management is reasonable and based on objective grounds, it is increasingly becoming the case that employees claim their manager is bullying them. This is further complicated by the employee taking personal leave and/or pursuing a workers' compensation claim.
- 11.12 The combination of bullying allegations and workers' compensation claims are an increasingly common response to employers' attempts to manage employee

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<sup>63</sup> Statistics taken from Fair Work Commission Quarterly Reports: Anti-bullying Reports 2014.

<sup>64</sup> Statistics taken from Fair Work Commission Quarterly Reports: Unfair Dismissal Reports 2014.

<sup>65</sup> Above, n 60.

<sup>66</sup> [Applicant v Respondent, PR548852 \(21 March 2014\)](#).

<sup>67</sup> [s.789FC – Application for an order to stop bullying \[2014\] FWC 9184](#).

<sup>68</sup> Above, n 60.

<sup>69</sup> *Fair Work Act 2009 (Cth)*, s 789FD(2).

performance. The combination of such claims is clearly used as a strategy to disrupt the performance management process.

- 11.13 Employers are then faced with the prospect of an anti-bullying application under the FW Act, and potentially other adverse action or discrimination based claims should the performance management process continue. Furthermore, these claims are not restricted to situation of termination, but can be used to challenge employer decisions such as the issuance of warnings. The obvious intent is either to discourage employers from addressing performance issue or to facilitate the termination of the employment arrangement under favourable terms for the employee.

### **Recommendations**

- 11.14 CCIWA recommends that the anti-bullying provisions be removed from the FW Act. There is sufficient protection for employees in the existing occupational health and safety legislation. Further, the costs associated with operating a duplicate system could be better used to assist employers in proactively addressing the issue of workplace bullying.

## **12. GENERAL PROTECTIONS**

- 12.1 CCIWA has continually raised issue with the overwhelming emphasis placed on employee and/or union rights, particularly in regards to the general protections provisions of the FW Act. Such imbalance goes against the object of the FW Act to *“provide a balanced framework for cooperative and productive workplace relations”*.<sup>70</sup>
- 12.2 Part 3-1 of the FW Act establishes that an employee may bring a general protections claim against an employer where the employer takes adverse action against the employee for a prohibited reason. Such reasons include the exercise of a workplace right,<sup>71</sup> industrial activities<sup>72</sup> and other discriminatory grounds.<sup>73</sup>
- 12.3 CCIWA submits that the general protections provisions of the FW Act represents unnecessary duplication of regulation and red tape, placing an overwhelming emphasis on employee rights to the disadvantage of employers.

### **Unnecessary duplication and red tape**

- 12.4 The introduction of the general protections provisions of the FW Act saw an unnecessary increase in the regulation of discriminatory matters. In particular, s 351 of the FW Act provides that an employer must not take adverse action against an employee because of the employee’s *“race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin.”*

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<sup>70</sup> Fair Work Act 2009 (Cth), s 3.

<sup>71</sup> Fair Work Act 2009 (Cth), s 340.

<sup>72</sup> Fair Work Act 2009 (Cth), s 346.

<sup>73</sup> Fair Work Act 2009 (Cth), s 351.

- 12.5 An examination of the anti-discrimination laws will reveal that the vast majority of these discriminatory grounds are already protected through other federal and state Acts.
- 12.6 Employers in WA are subject to several pieces of anti-discrimination legislation. This includes the *Equal Opportunity Act 1984 (WA)*, *Spent Convictions Act 1988 (WA)*, *Industrial Relations Act 1979 (WA)* and the following federal Acts:
- 12.6.1 *Australian Human Rights Commission Act 1986*;
- 12.6.2 *Racial Discrimination Act 1975*;
- 12.6.3 *Sex Discrimination Act 1984*;
- 12.6.4 *Disability Discrimination Act 1992*;
- 12.6.5 *Age Discrimination Act 2004*; and
- 12.6.6 *Workplace Gender Equality Act 2012*.
- The *Occupational Safety and Health Act 1984 (WA)* also contains prohibitions against discrimination based on an employee's role as a safety and health representative or because they have made a complaint in relation to safety or health.<sup>74</sup>
- Of note, most other states and territories are also faced with dual federal/state jurisdiction when it comes to anti-discrimination legislation.
- 12.7 Employees in WA may bring a discrimination claim through either the Australian Human Rights Commission or the WA Equal Opportunity Commission. Several remedies are available through these tribunals, including declarations that the employer has committed unlawful discrimination, employment/re-employment, damages (capped at \$40,000 under WA laws) and injunctions.
- 12.8 As is evident, employers are required to understand and comply with a continually increasing raft of anti-discrimination legislation. This often involves significant investment of time and money, particularly for small businesses which may not possess a human resources function. This duplicate regulation also provides employees with the opportunity to "jurisdiction hop", selecting the jurisdiction that best suits their claim.
- 12.9 CCIWA submits that the adverse action provisions of the FW Act are therefore another example of red tape and place an unnecessary regulatory burden on employers. State and federal anti-discriminations laws provide sufficient protection for employees and the adverse action provisions should therefore be removed from the FW Act.

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<sup>74</sup> See for example *Occupational Safety and Health Act 1984 (WA)*, s 56.

### ***Reverse onus of proof***

- 12.10 In order to defend an adverse action claim, an employer is faced with a reverse onus of proof. That is, if it is alleged that an employer took, or is taking, action for a particular reason, it is *presumed* that the action was, or is being, taken for that reason, unless the employer proves otherwise.<sup>75</sup> Further, even where a prohibited reason forms a small and not substantial part of the employer's reason for adverse action, they will be found to fall foul of the general protections provisions.<sup>76</sup>
- 12.11 Due to this reverse onus of proof, employers are required to maintain sufficient records of performance management issues in order to defend an adverse action claim. Further, an employer will be best positioned to defend such a claim where the primary decision maker is able to take the stand and provide evidence that the prohibited reason did not form *any part* of the reason for the adverse action.<sup>77</sup>
- 12.12 Complying with these requirements can be onerous for small business, particularly where they lack a dedicated human resources function. Further, it is often the case that by the time a general protections matter proceeds to hearing, the primary decision maker is no longer available to take the stand (e.g. they have left the business).
- 12.13 The reverse onus or proof becomes an issue where employees pursue a claim that has no reasonable prospect of success. The time and money spent in defending such a claim can be significant for employers, particularly given the fact that the FW Act provides a no costs jurisdiction. Further, these matters may proceed to the Federal Circuit Court and/or Federal Court, leading to significant legal fees.

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<sup>75</sup> *Fair Work Act 2009 (Cth)*, s 361.

<sup>76</sup> *Fair Work Act 2009 (Cth)*, s 360.

<sup>77</sup> See for example [\*Board of Bendigo Regional Institute of Technical and Further Education v Barclay\* \[2012\] HCA 32.](#)

### **CCIWA MEMBER EXAMPLE: THE COSTS OF AN ADVERSE ACTION CLAIM**

Recently, a CCIWA small business member was faced with an adverse action claim in which the employee had no reasonable prospect of success. The employer had clearly terminated the employee for poor performance and serious misconduct, with a prohibited reason forming no part of their decision to terminate.

However, the employee claimed that a prohibited ground contributed to at least part of the reason to terminate. Due to the reverse onus of proof, the employer faced defending a claim for which they were at no fault. There was a clear, valid reason for termination which was unrelated to a prohibited ground.

Conciliation before the FWC failed and the employee chose to pursue the matter in the Federal Circuit Court. Despite the conciliator commenting that the employee had a weak case, the Federal Circuit Court again directed the parties back to mediation. The employer was now faced with the choice of offering a monetary sum to the employee to settle or the payment of upwards of \$30,000 in legal fees to defend the case.

This was all despite the employee having no case. The cost to the employer was significant in terms of lost time and resources.

- 12.14 The other issue that arises for employers is that a prohibited reason must not form any part of the reason for adverse action.<sup>78</sup> Even where employers have a clear and valid reason for termination, such as serious misconduct (e.g. theft), if they cannot show that their reason for taking action against the employee was not contaminated by a prohibited reason, they will be held liable. Where an employee is successful in a claim in these circumstances, they ultimately receive compensation despite the fact that the termination of their employment may otherwise have been justified.
- 12.15 CCIWA submits that by requiring a prohibited reason to form a significant or substantial part of the reason to terminate, the opportunity for employees to receive compensation where they have been dismissed on clear and valid grounds will be minimised.

### **Recommendations**

- 12.16 For the reasons above, CCIWA recommends that the adverse action provisions of the FW Act be removed. In the alternative:

12.16.1 The reverse onus of proof should be removed, in order to ensure employees who do not have a reasonable case cannot succeed; and

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<sup>78</sup> *Fair Work Act 2009 (Cth)*, s 360.

12.16.2 The FW Act should be amended to provide that the prohibited ground must form a *significant* or *substantial* part of the reason to terminate.

### 13. COMPETITION LAW

- 13.1 Secondary boycott is an attempt by unions and their employee members to influence the actions of one business by exerting pressure on another business. Such actions are generally held to fall foul of competition law, namely the *Competition and Consumer Act 2010 (Cth)*.<sup>79</sup>
- 13.2 CCIWA submits that secondary boycotts should continue to be prohibited through competition legislation. Remedies available under such legislation are likely to contribute to lower levels of industrial dispute and therefore minimise negative impact on productivity.
- 13.3 However, the current secondary boycott provisions are overly complex, with little guidance available for parties in understanding and utilising the provisions. Further, since the inception of secondary boycott provisions in the former *Trade Practice Act 1974 (Cth)*, the Australian Competition and Consumer Commission (ACCC), and its predecessor the Trade Practice Commission, have litigated very few secondary boycott matters. In particular, the ACCC has failed to provide any sound basis to justify their inaction.
- 13.4 CCIWA refers to and supports ACCI's *Submission to the Competition Policy Review, June 2014*.<sup>80</sup> In doing so, CCIWA recommends that:
- 13.4.1 The legislative framework for the secondary boycott provisions be simplified, or failing that, the Federal Government should give consideration to providing the ACCC with funding to formulate information tools and/or educate individuals, particularly small business, about relevant provisions;
  - 13.4.2 In the interest of small business, a separate procedure for small business claims should be considered;
  - 13.4.3 There should be a positive obligation to report secondary boycott behaviour;
  - 13.4.4 The ACCC be required to provide transparent and consistent reporting with respect to its enforcement activities involving secondary boycott;
  - 13.4.5 The ACCC be mandated to give a firm commitment to enforcing the secondary boycott provisions; and
  - 13.4.6 The Federal Government should give consideration to providing the ACCC with an additional budget apportionment for the purposes of enforcing the secondary boycott provisions. In the alternative, a separate enforcement

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<sup>79</sup> See *Competition and Consumer Act 2010 (Cth)*, ss 45D & 45DA.

<sup>80</sup> Available: <http://acsi.asn.au/getattachment/df134033-34a0-4b93-bd1e-f3449070d9d9/ACCI-Submission---Competition-Policy-Review.aspx>

agency should be established to ensure secondary boycott provisions are consistently and effectively enforced.

## **14. ALTERNATIVE FORMS OF WORK**

- 14.1 Alternative methods of engaging labour are an essential part of the labour market. Not all forms of work suit a traditional employment arrangement, and likewise not all workers wish to be engaged under this structure. Arrangements such as independent contracting allow employers to purchase specialised skills and expertise as needed. They also provide the independent contractor with the opportunity to profit from this expertise, as distinct from receiving a wage or salary.
- 14.2 The current distinction between employee arrangements and other forms of work is often unclear, with different definitions being applied for different purposes. This causes significant problems for employers when considering alternative forms of work.
- 14.3 The subjective nature of the criteria applied in the common law distinction between employee and independent contractor creates uncertainty as to which arrangement is appropriate at the time the arrangement is entered into. This persists throughout the lifespan of the arrangement, through the risk of claims. CCIWA has assisted a number of members in claims by workers who have challenged their classification as a subcontractor, notwithstanding the fact the worker actively promoted the arrangement in the first place.
- 14.4 This uncertainty is further compounded through the use of different definitions for the purpose of various legislative or administrative provisions. In particular, the definition of employee (worker) for the purpose of superannuation, workers' compensation and taxation all differ, not only with the common law definition but also between each of these provisions.
- 14.5 There is therefore a need for the establishment of a common definition for what constitutes an 'employee' versus an 'independent contractor'. Alternatively, clarity is required as to how the definitions differ.

### ***Recommendation***

- 14.6 That a consistent and clear definition of independent contractor be established to aid business distinguish between different types of work.

## **15. RIGHT OF ENTRY**

### ***How right of entry is used***

- 15.1 The FW Act provides unions with a right to enter a workplace on three key grounds: (1) for the purpose of holding discussions with employees; (2) investigating a suspected breach of a fair work instrument; or (3) under a state or territory occupational health and safety right.



- 15.2 From our interaction in providing assistance to members in managing right of entry, as well as through our role in overseeing right of entry on particular projects, the overwhelming majority of right of entry visits are exercised on the basis of holding discussions with employees.
- 15.3 Based on these experiences, it has become evident that the principal purpose of these discussions is to recruit new members and reinforce the membership of existing members. It is only where an enterprise agreement is in operation that the focus of the discussion with employees will generally include other matters. Such other matters most frequently include upcoming enterprise agreement negotiations or other workforce issues. However, CCIWA frequently receives comments from our members that the union only visits their business in the lead up to enterprise agreement negotiations. After this, they union official is often not seen again until the next agreement is negotiated in three years' time.
- 15.4 Under the *Workplace Relations Act 1996 (Cth)*, right of entry for the purpose of holding discussions with employees was limited to situations where the union was a party to an industrial instrument which applied to employees engaged in that workplace. The expansion of right of entry under the FW Act has allowed for discussions to be held with any employee eligible to join that union, regardless of the relevant industrial instrument. This has encouraged unions to prospect for new members in workplaces which have not previously had a union presence.
- 15.5 It appears to be a perverse outcome that the legislation should allow an organisation to the exercise of a statutory right for the purpose of selling its services. Given the proliferation of the internet and social media, it is no longer valid to claim that right of entry is the only means that unions have for communicating with members or potential members.
- 15.6 It is therefore our view that right of entry for holding discussions should be restricted to where the union is a party to an enterprise agreement.

### ***Frequency of visits***

- 15.7 It has been the experience of many CCIWA members that unions are seeking entry to the same workplace/site several times a week so as to hold discussions. This is particularly so in the resources, mining and construction sectors.
- 15.8 CCIWA believes that it is fair and reasonable to prevent the misuse of the right of entry provisions (e.g. through fishing expeditions and recruitment activities) and minimise unnecessary disruption to workplaces. This can be done by amending the right of entry provisions and establishing a mechanism which allows a limit to be imposed by the Fair Work Commission (**FWC**), or another body, on the number of right of entry visits exercised on a worksite.
- 15.9 CCIWA's Construction Services unit has employee relations advisers on the majority of 'on shore' resource construction projects in WA. The unit has held a central position in advising the resources industry in WA with respect to on site construction employee relations matters for around 25 years.

- 15.10 In providing assistance to these projects, it has been our experience that the average time taken by projects to deal with each right of entry visit is between 60 and 90 minutes. On some of the more remote projects, the time taken to deal with a right of entry visit can be as high as 3.5 hours per visit.
- 15.11 Projects typically need to provide two personnel to deal with each right of entry visit: one to escort the official from the gate to the meeting place, and one to organise and marshal the relevant employees to and from the meeting place. Other site personnel are also involved during the visit in relation to site security, site induction activities and any mandatory drug and alcohol testing requirements.
- 15.12 Therefore, each right of entry visit imposes a cost on the employer. This cost can become significant where unions exercise multiple right of entry visits. In our submission to the Fair Work Act Review Panel,<sup>81</sup> we identified that with respect to the eight construction projects where Construction Services had a full-time presence on site, there was almost 20 right of entry visits per month. At the high end of the scale, one project had an average of 56 visits per month and nearly 700 visits for the year. On one day alone, 17 visits to the site were recorded.
- 15.13 In light of the above example provided by CCIWA as part of that review, and the submissions of others identifying similar experiences, the Fair Work Act Review Panel recommended that FW Act should provide the FWC with greater discretion to deal with this issue, including by making orders that restrict excessive workplace visits.<sup>82</sup>
- 15.14 In 2013 the *Fair Work Amendment Bill 2013 (Cth)*, introduced by the then Labor Federal Government, amended the FW Act to allow the FWC to deal with a dispute about the frequency of entry visits where it would require an unreasonable diversion of the occupier's critical resources.
- 15.15 This amendment has failed to alleviate the burden and costs associated with excessive right of entry because the test of an "*unreasonable diversion of the occupier's critical resources*" is a remarkably high and unattainable bar. Therefore, this issue is yet to be addressed.

### ***Misuse of right of entry***

- 15.16 The current Royal Commission into Trade Union Governance and Corruption has highlighted a number of examples of abuse of right of entry provisions. In particular, it has highlighted some of the behaviours that are frequently demonstrated by trade union officials whilst purporting to exercise a statutory right.
- 15.17 The extent of this behaviour was recently highlighted in *Director of the Fair Work Building Industry Inspectorate v Stephenson*<sup>83</sup> in which the CFMEU and ten of its officials were fined a total of \$180,000 for breaches of the right of entry provisions in unlawfully accessing a number of construction sites in Adelaide. In one of these incidents six organisers unlawfully entered a site and spent almost two hours holding

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<sup>81</sup> [Review of the Fair Work Act, Submission by the Chamber of Commerce and Industry - 17 February 2012](#)

<sup>82</sup> Above, n 24, page 194.

<sup>83</sup> [2014] FCA 1432.

discussions with employees. During this time, requests by site management to leave were responded to by the officials in highly offensive terms. This culminated in an ugly confrontation with a Fair Work Building Commission inspector in which one of the officials approached the inspector and got so close that “ their stomachs were almost touching, if not touching and, at least five times, shouted at Mr Flynn, referring to him as “you piece of s\*\*t”, “you f\*\*king piece of s\*\*t” and as a “c\*\*t””<sup>84</sup>. The incident was caught on video showing that the officials stance and manner was provocative, bullying and intimidating.

- 15.18 However, notwithstanding the extent of these breaches, all but one of the officials in question still retain the statutory privilege to enter worksites.
- 15.19 The CFMEU and other unions have a long history of significant fines arising from breaches of these provisions. However, these fines have clearly not acted as a deterrent from maintaining this behaviour. In the case of the CFMEU, the Fair Work Building Commission identified that the CFMEU had been subject to 105 reported decisions involving contraventions of right of entry provisions, yet its officials continue to abuse these rights.
- 15.20 Whilst not always to the same extent as identified in the above decision, bullying and intimidation of management and non-union employees is frequently identified by our members as an ongoing issue. In particular, many employers have highlighted that employees will complain to them of having their lunch breaks interrupted by union officials who seek to bully them into joining the union. This behaviour has ongoing implications for the business, as the tactics utilised often seek to establish a divide between union and non-union employees. This ultimately affects the ability for the two groups to work effectively together.
- 15.21 This is most frequently demonstrated through the use of emotive terms such as ‘scabs’ and ‘freeloaders’ to describe non-union employees. In 2014, the Maritime Union of Australia (MUA) was found by the Federal Court to have taken adverse action against a group of five employees.<sup>85</sup> The MUA had distributed posters publically naming port workers as scabs, and included a statement that “*No-one has the right to scab, as long as there is a pool of water deep enough to drown their body, or a rope long enough to hang their carcass with*”. Understandably, the employees in question feared that the poster would encourage co-workers to incite violence upon them, their family or property.
- 15.22 The right of entry provisions under the FW Act are unusual in that they provide a statutory right to enter private property to persons whose behaviour is not governed under the relevant legislation or other regulatory instruments. Such statutory rights are usually reserved for government appointed inspectors and police officers. In the case of the industrial relations system, the right is given to a group whose behaviour is not subject to Government control.
- 15.23 With the exception of senior union officials, a union organiser is reliant on his/her ability to exercise right of entry in order to maintain their effectiveness, and hence

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<sup>84</sup> Above, n 80, at [56].

<sup>85</sup> *Fair Work Ombudsman v Maritime Union of Australia* [2014] FCA 440.

employment, with the union. Whilst the FW Act allows for a union official's right of entry permit to be suspended or terminated, the FWC (and other tribunals) have generally been reluctant to utilise these provisions because of this reason. However, given the ineffectiveness of financial penalties, there is a need for these provisions to be applied. Likewise, this applies to the granting of right of entry permits.

- 15.24 To ensure that this occurs, CCIWA recommends that right of entry permit holders should be subject to a Code of Conduct, with the establishment of clear minimum penalties should these provisions be breached.

### ***Recommendation***

- 15.25 That right of entry for the purpose of discussions should be limited to situations where the union is a party to an enterprise agreement.
- 15.26 The FWC should be provided with the ability to restrict right of entry where the frequency of visits causes an unnecessary hardship on employers.
- 15.27 That union officials should be subject to a code of conduct when exercising right of entry to ensure that this right is exercised in an appropriate manner. Further, clear penalties should apply and be enforced where these provisions are breached. This should include the suspension or cancellation of right of entry permit.

## **16. TRANSFER OF BUSINESS**

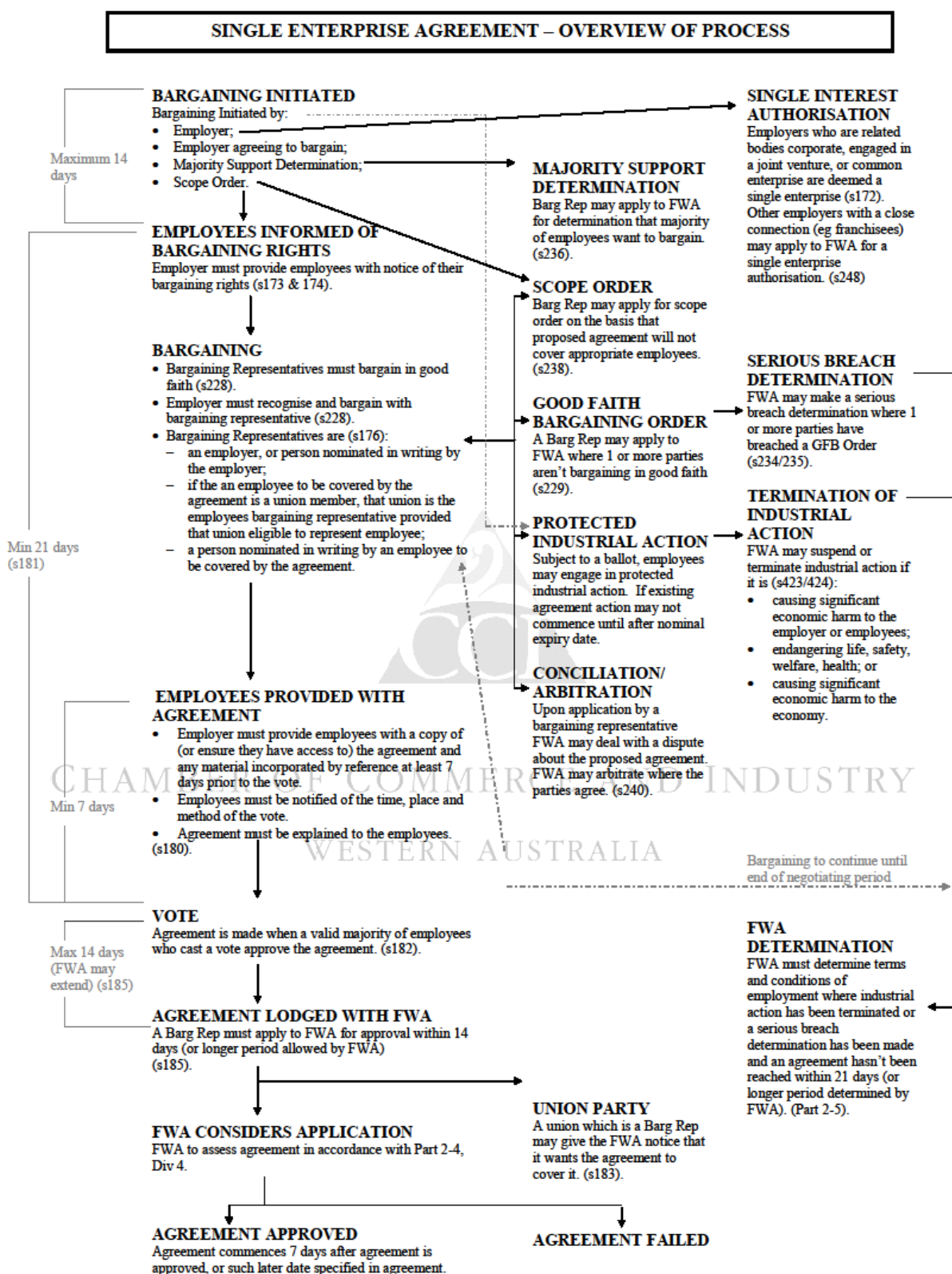
- 16.1 The FW Act has significantly increased the complexity surrounding the sale and purchase of businesses, as well as the outsourcing or insourcing of services. Previously, transfer of business provisions applied where there was a purchase of an existing business or the business was otherwise taken over by a new incoming employer. The FW Act has introduced a far broader range of activities that will be captured by the transfer of business provisions.
- 16.2 Further, whilst the intention of these provisions is to protect the entitlement of transferring employees, they are increasingly harming the employment prospects of the very same employees.
- 16.3 As economic conditions change, greater scrutiny will be given to the potential purchase or acquisition of businesses that are struggling financially. In these circumstances, analysis is usually undertaken as to why the relevant business is underperforming. This will invariably involve consideration of the industrial instrument applicable to the employees because it will usually transfer across to the new employer. The instrument may establish terms and conditions that are not suited to the employer or that are not suitable for the operation of a viable business. From our discussion with employers, where the existing industrial instruments are not conducive to the successful operation of the business, their decision to acquire the business may be impacted. Alternatively, the purchaser may be reluctant to employ any existing employees.

- 16.4 This is particularly the case where public sector instruments transfer. As part of amendments to the FW Act in 2013, the transmission of business provisions were extended to provide that state instruments transfer where government services are outsourced. Our discussion with employers affected by these provisions has revealed that they have a very clear policy of not engaging any existing employees. This is due to the incompatibility between public sector agreements and the operation of private sector organisations. This inevitably means loss of employment for these workers. Furthermore, because of the broad application of the transfer of business provisions, these employees will generally be precluded from employment in any other part of the incoming employers operation. This is because of the potential for the public sector agreement to apply if there is a similarity in the work being performed.
- 16.5 Given the limited opportunities to seek an order of the Fair Work Commission to set aside the transferring instrument, these provisions have the effect of diminishing the employment opportunities of the existing workforce rather than protecting it.
- 16.6 Limited protection may be necessary to avoid the possibility that an employer could evade employment obligations by moving one part of its business and those employees to another employing entity. However, the extensive provisions currently in operation are unnecessary, with accrued entitlements to annual leave and long service leave being suitably protected.
- 16.7 Transfer of business provisions have not been a feature of the WA industrial relations system and there is no evidence to suggest that the absence of these provisions have resulted in an overall detrimental impact upon employees.
- 16.8 For any incoming employer, it is important for them to ensure that staff remain productive and engaged. Given the uncertainty felt by most employees where there is a change of employer, significant planning is undertaken to develop strategies to alleviate any concerns or misgivings employees may have. This is done in order to minimise the negative impact on performance.

### ***Recommendation***

- 16.9 Given the negative impact upon the employment opportunities for transferring employees, the existing transfer of business provisions should be removed or amended to reflect to previous provisions of the *Workplace Relations Act 1996 (Cth)*.

## APPENDIX A – OUTLINE OF PROCESS FOR A SINGLE ENTERPRISE AGREEMENT



CHAMBER OF COMMERCE AND INDUSTRY OF WA 1300 4 CCIWA (1300 4 22492)

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