



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

***Chamber of Commerce and Industry  
of Western Australia***

***Submission to Draft Report***

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# REVIEW INTO THE WORKPLACE RELATIONS FRAMEWORK

## SUBMISSION TO DRAFT REPORT

### 1. ABOUT CCIWA

- 1.1 The Chamber of Commerce and Industry of 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 and government sectors.
- 1.3 Our experiences in providing advice and assistance to our members are reflected in our policy activities. Within this submission we have drawn upon the experiences of both CCIWA members and our internal team of professional industrial relations (**IR**) practitioners to identify the practical application and effect of the current workplace relations framework.

### 2. EXECUTIVE SUMMARY

- 2.1 CCIWA welcomes the opportunity to make this submission to the draft report issued by the Productivity Commission (**Commission**) as part of its review of the workplace relations framework.
- 2.2 The Commission has identified that:

*“Contrary to perceptions, Australia’s labour market performance and flexibility is relatively good by global standards, and many of the concerns that pervaded historical arrangements have now abated.”<sup>1</sup>*

As such, they have suggested that the workplace relations system needs repair, not replacement. This is despite acknowledging that there is a “messy context” to the system and that it would be preferable to “start with a clean state”.<sup>2</sup>
- 2.3 The Commission has therefore adopted a rear view analysis of the industrial relations system to determine what has occurred and how current issues could be addressed within the established framework. This is curtailed by the aim of not “destabilising the system”.<sup>3</sup>

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<sup>1</sup> Productivity Commission Draft Report – Workplace Relations Framework, August 2015, page 3 (Draft Report).

<sup>2</sup> Draft Report, page 8.

<sup>3</sup> Draft Report, page 5.

- 2.4 The draft recommendations therefore focus on providing Australia with an industrial relations framework that is good enough for the present, concluding that “[m]any features work well – **or at least well enough**...(emphasis added)”.<sup>4</sup>
- 2.5 The majority of the recommendations provide for incremental or minor improvements to Australia’s workplace relations system. The draft report does not provide a roadmap for the establishment of an industrial relations system that will serve the Australian economy, businesses, workers and the broader community going forward.
- 2.6 This is despite Australia haven fallen considerably in the World Economic Forum’s Global Competitiveness Index in terms of the set of institutions, policies and other factors that determine a country’s level of productivity. Australia’s competitiveness ranking has fallen from fifth in 2001-02 to 22nd in 2014-15<sup>5</sup>, with it becoming increasingly difficult for Australia businesses to compete against even other advanced high cost nations in the European Union and North America.
- 2.7 In terms of overall labour market efficiency, Australia has fallen from being ranked 19th in the world in 2006-07, to 56th in 2014-15<sup>6</sup>. This is despite Australia’s rating being propped up by factors such as the share of women in the workforce, reliance on professional management to make decisions and levels of human capital. This suggests that it is our industrial relations system is what is holding the country’s competitiveness back.
- 2.8 This strong decline in labour market competitiveness has correlated with the introduction of the *Fair Work Act 2009 (Cth)* (**FW Act**). The FW Act has provided unions with an increased role in the regulation of employment matters, resulting in an increase in the distance between businesses and their workforce. Most importantly, there is now less flexibility in Australia’s labour market, reflected in our competitiveness in flexibility of wage determination slipping from 85th in 2006-07 to 132nd in 2014-15<sup>7</sup>.
- 2.9 Reduced flexibility and labour market competitiveness ultimately restricts the ability for business to be innovative. It also discourages international and domestic businesses from investing in Australia, as other countries are seen as a more attractive option. It is therefore vital that Australia’s workplace relations regulations be made more flexible and simpler, in order to foster an innovative business environment.
- 2.10 CCIWA therefore encourages the Commission to look towards future needs, rather than falling into the trap of previous industrial relation reviews which have dwelt on the perspectives of the past.

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<sup>4</sup> Draft Report, page 5.

<sup>5</sup> World Economic Forum, *The Global Competitiveness Report 2014-15* available at <http://reports.weforum.org/global-competitiveness-report-2014-2015/>.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

2.11 The Commission has rightly identified that this has been the trap which has ensnared the Fair Work Commission in its approach to creating and reviewing the modern awards, with *“an historical reliance on form and on precedent”*.<sup>8</sup>

2.12 Further, the Chair of the Commission, in his address to the Committee on Economic Development of Australia, stated that:

*“That is not to say that we would start from here, if we were designing a workplace relations system.*

*We would not”*.<sup>9</sup>

Drawing upon these comments, we would encourage the Commission to use this review to consider what should be done anew.

2.13 We commend the Commission for taking this approach in its consideration of:

2.13.1 a new form of agreement making in the form of enterprise contracts;

2.13.2 the need for modern awards to consider their impact on the unemployed and consumers;

2.13.3 the need for weekend penalty rates to reflect changing community expectations; And

2.13.4 reforming the unfair dismissal system to balance the needs of employees and employers.

These proposed changes reflect the need to consider the industrial relations framework from a new perspective.

2.14 We believe that the same approach should also be applied in with respect to enterprise bargaining, individual arrangements, industrial disputes, right of entry, and transfer of business. To help achieve this we encourage the Commission to include the following recommendations in its final report:

2.14.1 the establishment of a range of agreement making options, including union and non-union collective agreement, statutory individual agreements, and both employer and union greenfield agreement;

2.14.2 that agreements should focus on establishing appropriate terms and conditions of employment, leaving employers free to determine the best way to manage their business;

2.14.3 industrial action should only be an option of last resort after genuine negotiations on reasonable claims. Industrial action also needs to be reasonable and proportionate, with greater consideration of its impact on other third parties and the wider community;

2.14.4 unions need to be accountable for their behaviour when exercising their statutory right of entry through an enforceable code of conduct and meaningful penalties for non-compliance;

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<sup>8</sup> Draft Report, page 153.

<sup>9</sup> Peter Harris (14 August 2015) [Speech to Committee on Economic Development of Australia \(CEDA\)](#).

- 2.14.5 removing duplicate legislation such as General Protection and Anti-bullying provisions from the FW Act; and
  - 2.14.6 removing the transfer of business provisions in order to remove taking into account the negative impact that they have on protecting the jobs of existing employees.
- 2.15 We also believe that the Commission should also consider the interim findings of the Royal Commission into Trade Union Governance and Corruption as to how the industrial relations system has encouraged some parties to abuse the rights and privileges provided by the FW Act for their own gain, at the expense of employees, employers and the broader community.
- 2.16 The following sections of this submission details CCIWA's views on the findings and recommendations of the draft report in further detail.

### 3. INSTITUTIONS

#### *Structure of the FWC*

- 3.1 CCIWA supports the Commission's draft recommendation (**DR**) 3.1 that that a Minimum Standards Division (**MSD**) should be established as part of the Fair Work Commission (**FWC**), with the maintenance of a separate Tribunal Division for resolving disputes.
- 3.2 As highlighted in our initial submission and acknowledged by the Commission, the current FWC has adopted the same adversarial process as its predecessors in determining modern award terms and conditions. This has resulted in decisions being made without the FWC having heard directly from either employers or employees, with too much emphasis placed on the events of the past. We believe that the proposed MSD would go some way to addressing this problem, and would provide the opportunity for the FWC to undergo its own data collection, with the making of decisions based on *"systematic high-quality empirical research"*.
- 3.3 However, CCIWA recommends that the MSD should also be responsible for the approval of agreements.<sup>10</sup> The application of the Better Off Overall Test<sup>11</sup> requires the FWC to assess the proposed agreement against the safety net of the modern awards. The two industrial instruments are therefore inherently linked, meaning it makes sense that the MSD also be responsible for the assessment and approval of agreements. It is also important to note that the assessment of agreements is usually done after consensus has been reached between the parties involved. It therefore would not be appropriate for agreement approval to sit within the Tribunal Division, as this process is generally not adversarial in nature.

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<sup>10</sup> In regards to the current enterprise agreements, but also any other agreement making options introduced in the future.

<sup>11</sup> Or the 'No Disadvantage Test', if implemented.

- 3.4 Furthermore, the Commission has estimated that approximately 40 per cent of employees are on an enterprise agreement (EA),<sup>12</sup> with the number of EAs having *“generally increased over time and at a faster rate than numbers of employing businesses, suggesting that the prevalence of EA has risen”*.<sup>13</sup> Given that EAs are increasing in significance, it is reasonable to say that their approval by the FWC has economy and society-wide impacts. This is another reason why the MSD should be responsible for the approval of agreements, particularly as Members of that Division will possess the requisite skills and experience.<sup>14</sup>

### ***Appointment of FWC Members***

- 3.5 CCIWA also welcomes DRs 3.2 and 3.3 that the Members of the FWC be appointed for a five year term, with recommendations being made by a new Expert Appointment Panel. We agree that this could go some way to improving the diversity of FWC Members and to ensuring that their appointment is based on merit. If implemented correctly, it is hoped that a more balanced appointment structure would lead to improved consistencies in decisions of the FWC, particularly as reappointment would be subject to merit based performance reviews.
- 3.6 CCIWA supports the introduction of merit based performance reviews and believes that further consideration should be given to how it will apply to current FWC Members. As current Members will not be subject to a fixed term appointment there is little ability for the President of the FWC or Federal Government to address underperformance issues that may be identified in the review process.
- 3.7 Further, for new members appointed for a five year term, there appears to be no suggestion that performance reviews would be conducted *during* that term. Again, this means there would be minimal ability to address underperformance issues when they arise. Rather, underperformance would only be addressed when reappointment is being considered.
- 3.8 However, CCIWA does acknowledge the Commission’s comment that *“no appointment process will be perfect”*.<sup>15</sup> We believe that the draft recommendations are a step in the right direction and recognise that there does need to be some protection against the Federal Government or FWC President being able to arbitrarily remove a Member.
- 3.9 CCIWA also supports DR 3.4, which seeks to establish separate eligibility criteria for Members of the two Divisions of the FWC. We agree that *“the determination of minimum wages and conditions involves balancing social and economic objectives and the process should be informed by a detailed assessment of empirical evidence”*.<sup>16</sup> It is therefore necessary that the MSD Members responsible for making such vital decisions possess the requisite knowledge, experience and skills. As

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<sup>12</sup> Draft report, page 549.

<sup>13</sup> Draft report, page 550.

<sup>14</sup> In line with DR 3.4.

<sup>15</sup> Draft Report, page 154.

<sup>16</sup> Draft Report, page 149.

suggested by the Commission, a background in areas such as economics, social science, commerce or equivalent disciplines would seem suitable for MSD Members.

### **External Engagement and Consultation**

3.10 The Commission has commented that the FWC needs to “*seek out and engage with parties that do not typically make submissions.*”<sup>17</sup> This comment is reinforced by DR 12.1 with respect to modern award reviews, with the Commission recommending the MSD “*obtain public guidance on reform options*”. CCIWA agrees that consulting with parties affected by changes to the awards is necessary, such as the unemployed and consumers.

3.11 We believe that this approach should also be reflected in the conduct of the minimum wage review, and that the following recommendation should be considered:

*“The Australian Government should amend the Fair Work Act 2009 (Cth) to require the Minimum Standards Division to obtain public guidance when making its annual national wage decision”.*

3.12 We also reinforce the recommendation provided in our initial submission that, given the national nature of the workplace relations 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 understands the varied issues affecting workplaces across Australia*”.<sup>18</sup> We would urge the Commission to include a recommendation which would seek to ensure the MSD seeks public guidance from across Australia.

### **Key Recommendations**

3.13 CCIWA supports the recommendations proposed by the Commission as to the structure of the FWC and the need for a new approach to be adopted by the FWC in considering the establishment of minimum standards.

## **4. NATIONAL EMPLOYMENT STANDARDS**

4.1 CCIWA does not believe that the draft recommendations provided by the Commission are sufficient to address the issues associated with the National Employment Standards (NES).

4.2 As highlighted at paragraph 5.1 of our initial submission, the NES as they currently stand are failing to achieve the primary objects of the FW Act. In particular, the NES are inflexible and complex, and do not acknowledge “*the special circumstances of small and medium-sized business*”.<sup>19</sup>

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<sup>17</sup> Draft Report, page 129.

<sup>18</sup> Chamber of Commerce and Industry of Western Australia, [Submission to the Productivity Commission Review into the Workplace Relations Framework](#), 2015, paragraph 6.22.

<sup>19</sup> *Fair Work Act 2009 (Cth)*, s 3(a).



- 4.3 The Commission has observed that “*There is...considerable scope for flexibility*” in the NES, citing the ability for employees to be required to work more than the prescribed 38 maximum hours.<sup>20</sup> Unfortunately, this is not true across all of the ten standards. For example, paid no safe job leave is inflexible in its application, which has a particularly adverse impact on small to medium sized businesses.<sup>21</sup>
- 4.4 Further, our initial submission provides several examples as to the difficulties associated with the accrual and payment of annual and personal leave for employees engaged in non-standard working arrangements.<sup>22</sup> This problem arises due to the complexity and lack of flexibility in the wording of the NES.
- 4.5 This issue has been recently raised in [RACV Road Service Pty Ltd v ASU](#).<sup>23</sup> The Full Bench of the FWC was posed with the question as to how many hours of leave should be deducted for employees who work varied shift lengths. At first instance, Commissioner Roe concluded that where an employee took annual leave, 7.6 hours should be deducted from their leave accrual, regardless of the length of time they were rostered to work on the day the leave was taken. This was based on an average working week of 38 hours.
- 4.6 In considering the employer’s appeal, the Full Bench of the FWC did not agree with Roe C. They stated that the leave entitlement “*is simply reduced by the amount of leave taken*”, being a day or week, not specific working hours. While a ‘week’ meant an absence from work during the working days falling in a seven day period, and a ‘day’ of leave meant absence from working time in a 24 hour period, the Full Bench did not determine how exactly you would deduct a ‘week’ or ‘day’ of leave for the employees in this situation.
- 4.7 The question therefore remains: what amounts to a ‘day’ or a ‘week’ for employees who work varied hours? How do we pay these employees when they take a day off? How can leave accrue on an hourly basis, but not be paid as an ‘hourly’ entitlement? This issue remains uncertain for employers and employees, particularly as the FWC has not expressed a clear view. It is also important to highlight that the fact that this issue was raised in the FWC, and ultimately progressed to the Full Bench, is indicative that leave deductions under the NES are a complex and confusing concept.
- 4.8 The above difficulties could be resolved by expressing annual and personal leave entitlements in hours. Further, the NES needs to provide flexibility for non-standard working arrangements, such as fly-in-fly-out (**FIFO**) or varied shifts.

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<sup>20</sup> Draft Report, page 19.

<sup>21</sup> Chamber of Commerce and Industry of Western Australia, [Submission to the Productivity Commission Review into the Workplace Relations Framework](#), 2015, paragraphs 5.20 – 5.23.

<sup>22</sup> Chamber of Commerce and Industry of Western Australia, [Submission to the Productivity Commission Review into the Workplace Relations Framework](#), 2015, paragraphs 5.4 – 5.14.

<sup>23</sup> [RACV Road Service Pty Ltd v Australian Municipal, Administrative, Clerical and Services Union \[2015\] FWCFB 2881 \(11 May 2015\)](#)

- 4.9 We also believe that greater flexibility could be achieved out of the NES by allowing agreements to vary the NES, subject to a ‘No Disadvantage Test’. This would allow businesses and their employees to tailor the ten standards to best suit their needs and circumstances, while still ensuring that the employees are no worse off than they would be under the NES as they currently stand.

### **Public Holidays**

- 4.10 CCIWA supports DR 4.1 that all modern awards should include terms that permit an employer and employee to agree to substitute a public holiday for an alternative day. We agree that this would be an “*ultimately positive*” change for businesses and employees, as it would allow them to tailor days off to best suit their circumstances.
- 4.11 However, we do not believe that DR 4.2, which recommends preventing the recognition of newly created additional public holidays, will adequately address the issues associated with the interaction between the NES and state and territory legislation.
- 4.12 CCIWA’s initial submission highlighted the problem that arises due to the *Public and Bank Holidays Act 1972 (WA)* prescribing additional days when particular public holidays fall on a weekend.<sup>24</sup> In such instances, WA businesses are faced with a doubling of public holiday payments when they operate on both days.
- 4.13 CCIWA therefore urges the Commission to consider how the issue of double public holidays can be addressed. It is our view that businesses should not have to pay for one public holiday twice.
- 4.14 We recognised that DR 4.2 is aimed at preventing the current problems associated with additional public holidays from becoming worse. However, we would encourage the Commission to extend this recommendation to provide that the FW Act should be amended to address the current problems.

### **Annual Leave**

- 4.15 CCIWA does not believe that it is necessary for the Australian governments to “*periodically*” examine whether the annual leave entitlement should be extended, as suggested in DR 4.3.
- 4.16 In the event that an overwhelming social need emerges for an increase to annual leave, the government of the day may be prompted to reconsider the NES at that point in time. Such a need may be reflected through an increase in claims for extended annual leave during enterprise agreement bargaining or in regards to modern award reviews. It is also worth noting that employers and employees have the ability to negotiate terms and conditions that are more favourable than the NES, either through enterprise agreements or employment contracts.

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<sup>24</sup> Chamber of Commerce and Industry of Western Australia [Submission to the Productivity Commission Review into the Workplace Relations Framework](#), 2015, paragraphs 5.25 – 5.34.

- 4.17 In any case, the FWC’s consideration of the annual leave common matter, as part of the 2014 Modern Award Review, has revealed that employees overwhelmingly do not utilise the annual leave available to them. The Full Bench of the FWC noted that the evidence presented in the matter *“clearly establishes that most employees accrue a portion of their paid annual leave entitlement and that a significant proportion of employees have six weeks or more of such accrued annual leave”*.<sup>25</sup> They further commented that *“excessive annual leave accruals are a significant issue for employers”*.<sup>26</sup> As a result, the Full Bench concluded that all modern awards should include a mechanism for dealing with ‘excessive leave’, while also ordering that a model cashing out term be included in all modern awards.

### **Key Recommendations**

- 4.18 CCIWA recommends that in order to ensure the NES provides entitlements relevant to all workplaces, the NES needs to be amended so that:
- 4.18.1 the level of complexity is reduced, leaving the practical application of entitlements to employers and their employees;
  - 4.18.2 the standards allow for flexibility in their application to non-standard working arrangements; and
  - 4.18.3 current problems associated additional public holidays and double recognition of days are addressed.

## **5. REPAIRING AWARDS**

- 5.1 CCIWA agrees with the Commission’s view that awards require repair, not replacement. We broadly support the suggested changes to the process of award determination, with the Commission’s recommendations largely reflective of the issues and recommendations raised in our initial submission.
- 5.2 In particular, we welcome DR 12.1, that the four yearly review of modern awards be abolished, with the Minimum Standards Division (**MSD**) instead reviewing awards as necessary to meet the modern awards objective. We believe that this, coupled with the recommendation that the MSD focus on the use of robust analysis and public guidance, is a step in the right direction. If implemented correctly, these changes should ensure the awards are no longer focussed on the past nor determined in an adversarial nature.
- 5.3 However, CCIWA highlights its concern that DR 12.1 will not achieve its intended purpose unless accompanied by a complementary change to modern awards objective. Without this change, the MSD will be limited to considering whether the proposed variations align with the objectives currently considered by the FWC. In such an instance, it may be unlikely that awards would be adequately *“repaired”*. CCIWA therefore urges the Commission to make a recommendation that the modern

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<sup>25</sup> [4 yearly review of modern awards – annual leave \[2015\] FWCFB 3406](#), at [100].

<sup>26</sup> [4 yearly review of modern awards – annual leave \[2015\] FWCFB 3406](#), at [138].

awards objective be modified in line with its broader recommendations to take into account the needs of consumers and the unemployed.

- 5.4 Further, we support the Commission's comments that the awards need to be made easier to understand, less complex and ambiguous, and should be drafted in plain English. In our initial submission, CCIWA highlighted the issues that arise for small to medium sized businesses due to over prescriptive and complex award terms.<sup>27</sup> It is these businesses who tend to be most reliant on the modern awards.
- 5.5 However, there is a lack of any clear draft recommendation which reflects the need for simplicity and clarity in modern awards. We therefore urge the Commission to provide such a recommendation. In particular, we would be supportive of the suggestion made by the Commission that the MSD should aim to:
- 5.5.1 improve the accessibility and ease of use of all awards;
  - 5.5.2 promote interactive platforms to guide award users through award content; and
  - 5.5.3 consider other methods of providing support to users of awards.<sup>28</sup>

We believe this would be a good first step which, if accompanied by a recommendation which reflects the Commission's suggestion that the MSD initiate three streams of work to review and vary modern awards,<sup>29</sup> should result in modern awards that are easy to understand and apply for businesses and their employees.

### ***Key Recommendations***

- 5.6 CCIWA broadly supports the Commission's recommended changes to the determination of modern awards. However, we would urge the Commission to include a recommendation that the awards be made easier to understand, less complex and less ambiguous. That is, that they be drafted in plain English.

## **6. REGULATED WEEKEND PENALTY RATES**

- 6.1 CCIWA welcomes the comments raised by the Commission that weekend penalty rates within a number of industries are now out of alignment with community expectations.
- 6.2 In particular, we support the need to consider a broader range of perspectives in determining appropriate penalty rates, including how these provisions impact upon consumers, the unemployed and working proprietors. However, the modern award objectives need to be reviewed with these considerations in mind.

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<sup>27</sup> Chamber of Commerce and Industry of Western Australia, [Submission to the Productivity Commission Review into the Workplace Relations Framework](#), 2015, paragraphs 6.23 to 6.37.

<sup>28</sup> Draft Report, page 438.

<sup>29</sup> In particular, in regards to Steam 1 and 2, as discussed on page 433 of the Draft Report.

- 6.3 These comments reflect the views expressed by CCIWA members, across a range of industries, that a reduction in Sunday penalty rates would result in improved customer service, a reduction in the time that proprietors and family members spend working in the business, and an increase in the number of staff they would be able to engage on these days.<sup>30</sup>
- 6.4 The need for change is most clearly evident in the case of the hospitality, entertainment, retail, restaurants and café industries. However, it is not an issue limited solely to this group.
- 6.5 We therefore support the Commission's conclusions that the FWC also needs to consider the issue of weekend penalty rates across other industries to ensure that they remain relevant. We would expect that there will be little call to move away from existing structures within a number of industries. However, there are clear examples of some industries in which there is a demand for more flexible service delivery, which is hampered by current penalty rate structures.
- 6.6 In considering appropriate penalty rates, we note the Commission's view that "*many people treat some national public holidays as just normal days off, which throws doubt on their community function*".<sup>31</sup> We believe that that this should be reflected in lower penalty rates to be applied to those public holidays with limited community significance.

### ***Preferred Hours Clauses***

- 6.7 CCIWA welcomes the Commission's consideration of preferred hours arrangements as a means of recognising an individual employee's preference to work hours that suit them, rather than imposing perceived community standards in determining when work should be performed.
- 6.8 Whilst a number of awards are likely to benefit from such provisions, we believe that preferred hours arrangements will have greatest relevance as a means for assessing agreements against the proposed 'No Disadvantage Test' (**NDT**).
- 6.9 Assessment of agreements against an employee's preferred hours had previously been adopted by the Office of the Employment Advocate (**OEA**) in its assessment of the NDT for Australian Workplace Agreements (**AWAs**) established prior to March 2006.
- 6.10 These arrangements worked to the advantage of both the employer and employee by providing choice and flexibility regarding the structuring of work. They were instrumental in allowing small businesses in the retail industry to increase the availability of work.

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<sup>30</sup> Chamber of Commerce and Industry of Western Australia, [Submission to the Productivity Commission Review into the Workplace Relations Framework](#), 2015, paragraph 7.10-7.25.

<sup>31</sup> Draft Report, page 163.

- 6.11 Currently, many employees are denied the opportunity to work weekend shifts due to existing penalty rates structures which mean that employers either do not open on the day, reduce staffing levels, or the business owner and their family work that day themselves.
- 6.12 The negative impact of weekend penalty rates for employees was identified in our earlier submission through the comments of an agricultural business which had ceased operating on Sundays because of the high cost of labour. This was to the detriment of some of its staff who 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.”*<sup>32</sup>
- 6.13 Preferred hours operated on the basis that the relevant employee would provide their employer with a timesheet specifying the hours that they preferred to work. Where the employer rostered employees in accordance with their preferred hours, they would be paid at their ordinary rate of pay. Where the employer deviated from preferred hours, payment would be made at any applicable penalty rate prescribed by the award.
- 6.14 These arrangements were most commonly used in the retail and hospitality industries where a significant proportion of staff worked around their study or family arrangements, meaning they were frequently unable to work standard business hours. From our observations, employees were almost always rostered in accordance with their preferred hours.
- 6.15 This reflected the existing industry practice for rostering staff in which employees advised their employer on a weekly or fortnightly basis of the hours they were available to work. These hours would frequently vary depending upon changes in their commitments, such as upcoming exams or changes to caring arrangements. Employers generally rostered in accordance with those preferences and would rarely seek to direct staff to work outside of these, in appreciation that family and study commitments often take priority over work.
- 6.16 Under the previous preferred hours arrangement, a number of safeguards were built into the system to protect employees. These included:
- 6.16.1 no obligation for employees to work under a preferred hours arrangement, which meant that employees needed to be paid in accordance with the relevant award penalties. Furthermore, employees who had elected preferred hours could opt out by providing four weeks’ notice;
  - 6.16.2 employees could provide the employer with notice to change their preferred hours, with a requirement for the employer to take all reasonable steps to accommodate such requests as quickly as possible; and

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<sup>32</sup> Chamber of Commerce and Industry of Western Australia, [Submission to the Productivity Commission Review into the Workplace Relations Framework](#), 2015, paragraph 7.16.

- 6.16.3 a requirement that the parties agree to a minimum number of hours per week/fortnight. This ensured that employees were free to alter their preferred hours without the concern of having their hours of work reduced below the agreed minimum.
- 6.17 An example of a preferred hours schedule from a pre2006 AWA utilised within the retail industry is attached at Schedule A.
- 6.18 Whilst these safeguards provided protection to employees, they were generally unnecessary due to the compatibility of preferred hours arrangements with existing staffing practices.

### **Key Recommendations**

- 6.19 CCIWA supports the need for modern awards to consider a broader range of perspectives in establishing weekend and other penalty rates. In order for this to be achieved, the modern award objectives need to be amended.
- 6.20 Preferred hours arrangements should be considered for inclusion into modern awards and as a mechanism for applying the No Disadvantage Test.

## **7. ENTERPRISE BARGAINING**

- 7.1 For the majority of employers, the FW Act provides for only one agreement making option, being an enterprise agreement. Consequently, if employers want to move away from the award system they are required to conform to the one size fits all option which is currently available.
- 7.2 CCIWA believes that it is necessary for employers and employees to have a range of agreement making options available to allow the parties to choose the option best suited to their needs. As the Commission has identified in their draft report, the limited alternative arrangements currently available have a range of pros and cons, with no one option being universally suitable for all circumstances.<sup>33</sup>
- 7.3 Enterprise agreements are currently structured around a framework premised on negotiations between an employer and relevant unions, with the systems and practices focused on managing those interactions. However, these structures are ill suited to the majority of workplaces in which there is no union presence. We therefore believe that there should be an option for a specific form of employee enterprise agreement which reflects the differing bargaining practices which occur in these instances.
- 7.4 The default standing of unions as a bargaining representative for all enterprise agreements provides them with significant bargaining power. As identified in our original submission,<sup>34</sup> once bargaining has commenced there is no opportunity for an employer to conclude the negotiation process other than through the finalisation of

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<sup>33</sup> Draft Report, page 616.

<sup>34</sup> Chamber of Commerce and Industry of Western Australia, [Submission to the Productivity Commission Review into the Workplace Relations Framework](#), 2015, paragraph 8.34.

an agreement. This gives unions' immense bargaining power, particularly when considered against a backdrop of compulsory bargaining initiated through a majority support determination.

- 7.5 Whilst enterprise agreements are made with the majority of employees, unions are significant influencers of employee opinion, including with non-union members. The theory that unions always act in the best interests of their members is one which is currently being called into significant question as a result of the Royal Commission into Trade Union Governance and Corruption. The interim report has identified a number of examples of unions eliciting payments from employers, for their own benefit, in order to secure an agreement.<sup>35</sup>
- 7.6 Increasing the level of union governance is unlikely to address this issue. A far more effective remedy is to provide alternative agreement making options, thus removing the unions' monopoly position.
- 7.7 The enterprise contracts suggested by the Commission are a good example of the need to provide alternative agreement making options. Enterprise contracts have the potential to provide an attractive option for some employers and employees, but as the draft report identifies, it is not an option for all. Therefore, greater choice is required.
- 7.8 As identified in paragraphs 10.13 and 10.14 of these submissions, the strong level of wage growth over the past decade, when considered against the continued decline in union membership, demonstrates a balance in the bargaining relationship between many employees and employers.
- 7.9 Employees are also protected through the safety net established by modern awards and the National Employment Standards. Consequently, where the bargaining power of employees is limited, there remains a guarantee that they will not be disadvantaged.
- 7.10 Furthermore, a range of agreement making options does not preclude unions from effectively representing their members and initiating bargaining for a union negotiated agreement. Unions have previously demonstrated that they have the necessary leverage to ensure worksites with a significant union membership continue to have union negotiated agreements, even where other choices have been available. Consequently, alternative agreement options should not be perceived as a threat to unions. If anything, it holds them accountable to their members by providing employees with alternative options where they do not believe their interests are being effectively represented.

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<sup>35</sup> A notable example is the *The Australian Workers' Union (AWU) – Workplace Reform Association*, in which a number of now former union officials established an incorporated association for the purpose of obtaining over \$400,000 from a construction company for the provision of training services in exchange for industrial harmony. These services were ultimately never provided not delivered, with the funds used for the officials own purposes, including purchasing a house and cash withdrawals.



- 7.11 We would therefore encourage the Commission to follow the lead it has set in considering enterprise contracts, by recommending the establishment of a range of agreements, including:
- 7.11.1 statutory individual agreements;
  - 7.11.2 union and non-union collective agreement (both single and multi-employer); and
  - 7.11.3 union and employer greenfield agreements.

### ***Procedure***

- 7.12 CCIWA supports DR 15.1 that the FWC<sup>36</sup> should have greater scope to approve an agreement where the procedural requirements have not been met, including issuing the notice of bargaining rights.
- 7.13 We believe that the high number of agreements which are refused because of procedural deficiencies is reflective of the complexity of the agreement making process. These requirements can be simplified, particularly in relation to the process for issuing ballot forms and notification as to when voting will commence.
- 7.14 By simplifying the process, whilst retaining necessary protections, enterprise agreements will become a more realistic proposition for smaller organisations.

### ***Content of Agreements***

- 7.15 CCIWA supports DR 15.2 that enterprise agreements should not limit the terms of an Individual Flexibility Arrangement (**IFA**), along with DR 20.1 that provisions restricting or regulate the engagement of independent contractors, labour hire or casual workers should be unlawful.
- 7.16 These draft recommendations reflect that there can be a public policy need to limit the content of enterprise agreements for the purpose of maintaining the rights of individual employees and restricting anti-competitive provisions.
- 7.17 We believe that there is also a public policy imperative in ensuring that the content of enterprise agreements does not unnecessarily impact upon the ability of employers to adapt and respond to change.
- 7.18 The coercive threat of industrial action means that employers are frequently forced to concede to demands for terms that limit future flexibility and adaptability. The inclusion of terms which restrict the use of labour hire or independent contractors are often sacrificed in response to threats of industrial action. In these instances, managers are placed in a position of having to choose between permitting industrial action, which will have an immediate impact upon an organisation, versus agreeing to clauses that may have implications for the future. Commercial realities mean that inevitably the former will prevail.

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<sup>36</sup> In line with 3.1 of this submission CCIWA has recommended that the proposed Minimum Standards Division should be responsible for the approval of agreements.

- 7.19 Of course such concessions are not limited to restrictions on labour hire or independent contractors. Other provisions include:
- 7.19.1 no forced redundancy clauses which prevent employers from making staff redundant unless they volunteer. This frequently requires the employer to offer overly generous severance pay provisions or alternatively continue to operate at existing staff levels;
  - 7.19.2 disciplinary processes which increase the obligations on employers beyond those already prescribed by the unfair dismissal system; and
  - 7.19.3 consultation provisions which require the consent of the union or employee committee prior to introducing any change. These provisions reduce flexibility and open up the opportunity for further negotiations on terms and conditions of employment in exchange for employee agreement to implement change.<sup>37</sup>
- 7.20 We therefore believe that the content of agreements should be limited to terms and conditions of employment. We do not believe that such requirements would impose an unnecessary burden on the FWC. Rather, making such determinations is a core part of the FWC's function as a tribunal and is one that they have had substantial experience in.<sup>38</sup>

### ***Duration***

- 7.21 CCIWA supports DR 15.3 to provide enterprise agreements with a nominal term of up to five years, and in the case of a greenfield project the option for an enterprise agreement to be established for the life of that project.
- 7.22 We believe that these recommendations would provide greater certainty and stability for both employers and employees. In particular, it would provide greater certainty regarding investment decisions for major projects.
- 7.23 With respect to agreements linked to the life of a greenfield project, consideration needs to be given to the potential for delays to result in a project running behind schedule. We would therefore recommend that the term not state a specified date, but accommodate delayed or early completion by defining what constitutes project completion.

### ***Better Off Overall Test***

- 7.24 CCIWA agrees with the views expressed by the Commission that the existing Better Off Overall Test (**BOOT**) has limited flexibilities regarding non monetary entitlements, encourages a legalistic approach and the potential for an almost line by line assessment.

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<sup>37</sup> See 9.4.3 – Consultation Arrangements of the [GM Holden Ltd Enterprise Agreement 2014](#) (AG2014/9734).

<sup>38</sup> As a result of the decision of the High Court in [Electrolux Home Products Pty Limited v The Australian Workers' Union & Ors \[2004\] HCA 40](#) it was determined that the then Australian Industrial Relations Commission (AIRC) could not certify agreements that included matters not pertaining to the employment relationship. This decision led to the AIRC, through a number of decisions, quickly establish a set of fairly consistently applied criteria in determining whether particular clauses fell within the scope of a matter pertaining.

- 7.25 We therefore support DR 15.4 for the development of a new No Disadvantage Test **(NDT)** to be assessed against a class of employees.
- 7.26 In considering a suitable framework, we would recommend that the Commission give consideration to the NDT adopted by the Office of the Employment Advocate **(OEA)** in assessing Australian Workplace Agreements **(AWAs)** between 1997 and 2006.
- 7.27 The model adopted by the OEA during this period is informative in that it was flexible enough to take into account non-monetary provisions and was adapted over time to accommodate new trends. In administering the NDT, the OEA developed a written policy which provided internal consistency in the application of the test, but was also publically available to assist those seeking to develop an AWA.
- 7.28 In developing a NDT, we believe that the test should:
- 7.28.1 simplify the assessment of the NDT against key provisions of the modern awards that provide direct and calculable entitlements relevant to employees engaged at that workplace. Currently, the BOOT is frequently applied in a manner in which monetary consideration needs to be given for the removal of allowances, loadings, or other provisions that do not apply to the relevant employees;
  - 7.28.2 not include the consideration of machinery or ancillary provisions within a modern award. For example, many agreements seek to include flexibility for part time staff in the arrangement of working hours which are restricted due to modern award provisions that require part time hours to be fixed;
  - 7.28.3 recognise the non-monetary benefit of provisions that provide for flexibility, including arrangement such as preferred hours; and
  - 7.28.4 provide for flexibility in the application of the NES.
- 7.29 One of the concerns that CCIWA raised in its initial submission regarding the NES is that it lacks flexibility, making it difficult to apply many provisions into working environments which fall outside of a traditional 9am to 5pm Monday to Friday framework.<sup>39</sup> This is particularly true with respect to annual leave and personal/carer's leave.
- 7.30 The Commission has also identified a number of examples where alternative arrangements could be established in lieu of the existing standards, including additional annual leave in lieu of long service leave<sup>40</sup> or the swapping out of public holidays in exchange for additional annual leave.<sup>41</sup>

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<sup>39</sup> Chamber of Commerce and Industry of Western Australia, [Submission to the Productivity Commission Review into the Workplace Relations Framework](#), 2015, paragraph 5.6-5.14.

<sup>40</sup> Draft Report, page 178.

<sup>41</sup> Draft Report, pages 184-185.

- 7.31 Whilst the Commission has identified that such alternative arrangements “*would not benefit everyone*”,<sup>42</sup> for some these alternative arrangements may provide a more valuable entitlement compared to the current standards. Allowing agreements to vary the operation of the NES, on the basis that the employee is not disadvantaged, will allow employers and employees the flexibility to agree to alternative arrangements.

### **Who Can Bargain**

- 7.32 Having to manage a large number of bargaining representatives can be a significant challenge for employers, particularly where it is unclear who and how many employees they represent. It can also result in skewed representation with the loudest voice at the bargaining table not necessarily representing the views of the majority of the workforce.
- 7.33 CCIWA therefore supports establishing a minimum threshold for bargaining representatives. We believe that the level of minimum representation should apply to both union and non-union bargaining representatives. The concerns that the Commission has raised regarding individual bargaining representatives making claims that are often particular to the circumstances of a very small number of employees<sup>43</sup> also holds true for unions representing less than five per cent of the workforce. This is particularly the case where a union representing only a few workers is seeking to be seen as the toughest negotiator in order to win over membership from the more established union.<sup>44</sup>
- 7.34 CCIWA would therefore encourage the Commission to extend the effect of DR 15.5 to provide that a person or organisation can only be a bargaining representative if they are able to indicate that they represent at least five per cent of the employees to be covered by the agreement.
- 7.35 We also support the draft recommendation that a reasonable period be established for the nomination of bargaining representatives. In the experience of a number of our members, the late identification of a party as a bargaining representative has significantly delayed a negotiated agreement, with good faith bargaining requirements resulting in the parties renegotiating settled matters in order to address new bargaining claims.
- 7.36 We believe that the time period should be 14 days from the notification of bargaining rights is issued. This timeframe is consistent with the 14 day time requirements established by s 173 of the FW Act in relation to issuing notification of bargaining rights and s 185 for the lodgement of enterprise agreements with the FWC.

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<sup>42</sup> Draft Report, page 185.

<sup>43</sup> Draft Report, page 577.

<sup>44</sup> This is achieved by unjustly criticising any concessions made by the established union as a normal part of the negotiation process, as signs of a weak negotiator.

## **Greenfield agreements**

- 7.37 CCIWA believes that employer greenfield agreements should be available as a direct alternative to union greenfield agreements. As the Commission has identified, unions wield excessive bargaining power under the current arrangements.<sup>45</sup> Further, the nature of most greenfield projects means that employees will be paid marketable terms and conditions of employment due to the need for these projects to be competitive in securing appropriately skilled labour.
- 7.38 CCIWA welcomes the view of the Commission that there is a need to limit the current monopoly position that unions have with respect to greenfield agreements. We believe that a parallel system of employer greenfield is the best means for achieving this.
- 7.39 While the alternative arrangements that the Commission has proposed in the event that negotiations for a greenfield agreement fail are theoretically sound, they may not work in practice. In order for such strategies to be successful in correcting bargaining imbalance they must be viable alternatives.
- 7.40 Final offer arbitration is unproven in the Australian context. It has most commonly been used in North American public sector negotiations. There is a significant difference between private and public sector negotiations, with a US study identifying that *“public sector labour negotiators are less affected by external economic constraints than their private sector counterpart”*, whereas in the private sector *“collective bargaining is shaped by external economic forces, especially domestic and foreign competition.”*<sup>46</sup> This difference makes final offer arbitration a more viable option in the case of public sector negotiations, given its greater insulation from external economic factors.
- 7.41 This is not so in the case of the private sector, particularly where large investment decisions are at stake. Unions are unlikely to perceive that employers will be prepared to place the viability of these projects on the line by relying on the FWC to arbitrate the outcome.
- 7.42 Likewise, employer greenfield agreements limited to a period of 12 months do not deliver the certainty that is required for such projects. Consequently, unions will also consider this not to be a viable alternative for employers.
- 7.43 In the clear absence of any viable alternative options, unions are unlikely to perceive that their bargaining power has altered and as such the current problems will continue.

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<sup>45</sup> Draft Report, page 579.

<sup>46</sup> Carrell, M & Bale, R (2012) *Considering Final Offer Arbitration to Resolve Public Sector Impasses in Times of Concession Bargaining*. Ohio State Journal on Dispute Resolution 28(1) pp 6-7.

## ***Key Recommendations***

- 7.44 CCIWA encourages the Commission to recommend the establishment of a range of agreement options, including:
  - 7.44.1 statutory individual agreements;
  - 7.44.2 union and non-union collective agreement (both single and multi-employer); and
  - 7.44.3 union and employer greenfield agreements.
- 7.45 With respect to the draft recommendation proposed by the Commission we:
  - 7.45.1 support greater scope for approving agreements with minor procedural defects, but also recommend the procedure could be simplified;
  - 7.45.2 support limiting the content of agreements to ensure that IFA provisions do not prevent individual choice, and that the engagement of independent contractors, labour hire and casual workers are not restricted. We also encourage the Commission to extend these recommendations to provide that the terms of enterprise agreements should be limited to terms and conditions of employment.
  - 7.45.3 support the proposed extension to the duration of enterprise agreements to five years or the life of a greenfield project.
  - 7.45.4 support the development of a new No Disadvantage Test, which should be applied against both the modern award and the National Employment Standards.
  - 7.45.5 believe that a 14 day period should be established for the nomination of bargaining representatives, and that both union and non-union bargaining representative should represent at least five per cent of relevant employees.
  - 7.45.6 encourage the Commission to recommend the establishment of employer greenfield agreements to provide a viable alternative to existing greenfield agreements.

## **8. INDIVIDUAL ARRANGEMENTS**

- 8.1 As outlined in the proceeding section, CCIWA believes that there is a need for a range of agreement making options to be made available to employers and employees, including the option of registered individual agreements.
- 8.2 The Commission has identified many of the employers' key concerns regarding the operation of Individual Flexibility Arrangement (**IFAs**) and we would encourage it to revisit its recommendations to provide a system of individual agreements that would be effectively utilised by employers and employees.

- 8.3 In order for IFAs to become an effective alternative to modern awards, we believe that there needs to be:
- 8.3.1 a simple process for establishing IFAs;
  - 8.3.2 certainty for the parties entering into an IFA that the arrangement can only be terminated or varied by mutual consent;
  - 8.3.3 certainty in ensuring that IFAs pass the NDT;
  - 8.3.4 the ability for an IFA to operate to the exclusion of the relevant award or enterprise agreement; and
  - 8.3.5 options for IFAs to be made a condition of employment.
- 8.4 Without fundamental changes to the way in which IFAs operative we believe that they will continue to be a poorly utilised alternative.
- 8.5 The increased promotion of IFAs is unlikely to address this. In our experience there was substantial awareness of IFAs when the FW Act first commenced operation. However, they were quickly dismissed as a poor agreement making option. CCIWA recognises that the Commission's recommendations seek to address some of concerns outlined by employer groups, but we believe that they may not be sufficient to make IFAs an attractive alternative.

### ***Complexity and Lack of Flexibility***

- 8.6 IFAs have the greatest potential within small to medium sized enterprises that are covered by the relevant modern award.
- 8.7 For these organisations, a significant barrier to their uptake is the complexity of establishing an IFA. As the Productivity Commission has identified, *"there is often good reason for imposing procedural requirements", however "substance rather than form should prevail"*.<sup>47</sup>
- 8.8 CCIWA agrees with this statement and believes that this view should be adopted for the process of establishing an IFA. The draft report proposes retaining a number of safeguards<sup>48</sup> and we would recommend that these be established in simple terms that are easily applied by small businesses.

### ***Period for Termination***

- 8.9 A significant concern for CCIWA members in considering the use of IFAs has been the uncertainty created by either party being able to terminate the arrangement by giving a relatively short period of notice.
- 8.10 In order to protect the interests of both employers and employees, we believe that there should be an opportunity for the parties to agree that the arrangement will continue to operate unless mutually varied or terminated by the parties.

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<sup>47</sup> Draft Report, page 552

<sup>48</sup> Draft Report, pages 611-612

- 8.11 In these instances, the ongoing nature of the proposed No Disadvantage Test (**NDT**) will provide protection to employees to ensure that their terms remain equal to or better than the award provisions.

### ***No Disadvantage Test***

- 8.12 In line with our comments at 7.25, CCIWA supports the principal outlined in DR 15.4 for establishing a new NDT in relation to enterprise agreements, IFAs and enterprise contracts.
- 8.13 For most employers, a key concern regarding IFAs is the uncertainty about whether the arrangement meets the Better Off Overall Test, particularly where non-monetary benefits are provided.
- 8.14 CCIWA supports the establishment of clearer guidelines to assist parties when establishing the arrangement and the development of an online assessment tool as proposed in DR 16.2. However, such tools have their limitations and we would recommend that parties also have the option to request a formal assessment to be conducted by the Fair Work Ombudsman (**FWO**), particularly where the arrangements that they are seeking do not conform to pre-considered scenarios.
- 8.15 Whilst the proposed tools will provide some surety to the parties, in the absence of any formal assessment, employers will still be exposed to future claims that the arrangement did not actually pass the test. This is a real concern, given that such determinations are made by the Federal Court or Federal Circuit Court, who may not hold the same opinion as the FWO.<sup>49</sup> We therefore believe that the FW Act should be amended to provide that where an employer has in good faith completed an online assessment, the arrangement is deemed to have complied with the NDT at the time the assessment was made.<sup>50</sup>
- 8.16 The NDT provides a significant safeguard for employees, reducing the need to establish other measures aimed at protecting employees. The restriction on making an IFA a condition of employment has been raised as a measure to protect employees; however it is not a measure that is replicated within other industrial instruments. In particular, enterprise agreements are approved on majority agreement with new employees compelled to accept those arrangements. Whilst there should always be the option for parties to agree to alternative arrangements, employers should have the ability to determine conditions of employment at the commencement of employment.

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<sup>49</sup> There are a number of significant decisions which highlight a significant divergence in decision making outcomes between the Federal Court and the Fair Work Commission and its predecessors.

<sup>50</sup> In establishing a baseline, if the online assessment showed the arrangement passed the NDT at the time it was established, to determine the current standing of the arrangement against the NDT consideration would be given to increases to rates of pay and allowances under the award or enterprise agreement since that time.



### ***Relationship with Awards and Agreements***

- 8.17 A significant limitation of IFAs is that they only allow for the limited modification of awards and agreements, with no opportunity for the IFA to replace these instruments in their entirety.
- 8.18 This would appear to be at odds with the Commission's proposed interaction between enterprise contracts, IFAs, awards and enterprise agreements,<sup>51</sup> which place the primary focus on individual arrangements.
- 8.19 An employer and an individual employee should also have the opportunity to opt out of an award or enterprise agreement to establish alternative arrangements that suit the individual employee. IFAs do not meet this purpose given the award or enterprise agreement remains central to the arrangement.
- 8.20 We therefore believe that any revised IFA structure should establish a default position that an IFA should operate to the exclusion of the award/agreement to the extent of any inconsistency. This would provide individual employees with greater opportunity to opt out of awards or agreements that do not reflect their personal circumstances or needs.
- 8.21 This would also address the difficulties faced by many employers when drafting IFAs in identifying how the arrangement interacts with the awards and which provisions are superseded.

### ***Key Recommendation***

- 8.22 CCIWA recommends that the national industrial relations framework should provide for a form of statutory individual agreements that allows an employer and individual employee to establish terms and conditions of employment that replace the relevant award and/or enterprise agreement.

## **9. ENTERPRISE CONTRACT**

- 9.1 As identified at 7.2 of this submission, CCIWA believes that it is necessary for employers and employees to have a range of agreement making options available to allow the parties to choose the option best suited to their needs.
- 9.2 We believe that enterprise contracts could provide a suitable alternative agreement making option for many small to medium sized employers, and would be a valuable contribution amongst a range of agreement making options.

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<sup>51</sup> Draft Report, page 624

### ***Who is Likely to Use Enterprise Contracts?***

- 9.3 We see that enterprise contracts would be most useful for small to medium sized businesses with distinct groups of workers performing trade based, semi-skilled or unskilled work, where there is consistency in the way work is performed and the method of remunerating staff. Industries in which enterprise contracts are likely to be used by small to medium sized employers include:
- 9.3.1 manufacturing;
  - 9.3.2 retail and wholesale;
  - 9.3.3 hospitality industry, for employees other than managers and chefs;
  - 9.3.4 service based industries, including cleaning and security; and
  - 9.3.5 contractors providing commercial or residential trades based services, including electrical contractors, plumbers and maintenance contractors.
- 9.4 In these environments, the terms and conditions of employment between classes of employees will generally be the same, although the rate of pay will often vary between individual employees based on their skill, experience and work performance, particularly in the case of trades based employees. We therefore believe that enterprise contracts need to be flexible enough to accommodate the inclusion of individualised wage rates.
- 9.5 We would not anticipate that enterprise contracts would be widely used in the case of professional employees or salespersons. These employees have a strong preference for individual employment contracts which reflect the specialised nature of their skills or personalised performance based remuneration systems.
- 9.6 Enterprise contracts are also unlikely to be used by micro businesses with less than five employees, who are less likely to have a distinct class of employees and likely to struggle with the procedural requirements.

### ***Process for Making an Enterprise Contract***

- 9.7 For enterprise contracts to be a viable alternative, the process for making them needs to be simple and easy for the employer to undertake with limited internal or external assistance.
- 9.8 For a number of businesses, the provision of template agreements will be an attractive option. When considering template documents it is also important to consider some of the downfalls, which include:
- 9.8.1 template documents developed by either the Fair Work Ombudsman (**FWO**) or Fair Work Commission (**FWC**) with limited understanding of the circumstances applicable to small/medium sized private sector enterprises;
  - 9.8.2 employers not being aware that they have the alternative to develop their own enterprise contract and feeling compelled to utilise a template document not suited to their enterprise; and

- 9.8.3 employers modifying the template contract without understanding the impact of the changes made.
- 9.9 The content requirements for enterprise contracts also needs to be kept to a minimum, focused on key requirements, being:
- 9.9.1 specifying the name of the employee and employing entity;
  - 9.9.2 signed by both parties;
  - 9.9.3 written in English; and
  - 9.9.4 an appropriate individual flexibility provision.
- 9.10 The requirements for making and lodging the agreement should be kept as simple as possible. This requires using a light hand when drafting the relevant legislative provisions.
- 9.11 In providing either new or existing employees an enterprise contract, we believe that employers should be required to provide employees with sufficient time to consider the agreement before being required to sign it. In the case of new employees, this should be limited to a day, which is in line with the time frequently taken to consider a job offer. For existing employees, a seven day period, in line with the timeframe for voting on an enterprise agreement, would be appropriate. However, employees should also have the option to sign an agreement early if they so choose.
- 9.12 The amount of time an employee needs to consider an agreement varies depending on the individual and the nature of the agreement. Being forced to wait a prescribed number of days causes frustration to both the employee and the employer. In the case of existing employees, because they have the choice to sign or not sign, they are free to take whatever time they deem necessary to consider the document.
- 9.13 We support the proposition that an enterprise contract should be able to be made a condition of employment. This is in line with the application of enterprise agreements and awards, with the No Disadvantage Test (**NDT**) ensuring that they are protected.
- 9.14 The requirement to offer the enterprise contract to a class of workers also means new employees will benefit from the bargaining position of existing employees. In implementing enterprise contracts, employers will seek to encourage all relevant employees to agree to the new arrangement. Because existing employees have the option to sign or not sign the agreement, their bargaining power is improved. This will influence the level of entitlement contained in the enterprise contract.
- 9.15 We support the lodgement of the employer's template or framework enterprise contract with the FWC. However, we believe that as part of this process the agreement should be assessed for compliance against the NDT and the National Employment Standards (**NES**). On the basis that it is the framework agreement that is assessed, this is unlikely to place excessive demand on the resources of the FWC,

particularly if there was the option for the approval process to be delegated to the Registry staff.<sup>52</sup>

- 9.16 However, ongoing lodgement of each enterprise contract signed by an individual employee will result in significant administrative burden, not only on the employer but also the FWC. To address this there should be an obligation for the employer to retain each individually signed enterprise contract, with a copy to be provided to the employee. In line with its existing compliance powers, the FWO would have access to the enterprise contract as part of the employer's employment records.

### ***Enterprise Contract to Replace Other Agreements***

- 9.17 CCIWA believes that preference should be given to individual arrangements over collective forms of agreements. This allows employees with the opportunity to, with the consent of their employer, opt into the arrangement that best suits their circumstances.
- 9.18 We therefore support the Commission's view that an enterprise contract would replace the terms of an award or enterprise agreement, but would be subservient to the provisions of an IFA or other form of registered individual agreement.
- 9.19 Enterprise contracts are unlikely to be regularly used where an enterprise agreement is in place. However, they may be used to address changing arrangements applicable to a group of employees that were not considered at the time the enterprise agreement was negotiated. For example, where work for a particular contract needs to be performed in a different manner to that allowed by the enterprise agreement (e.g. a fly in fly out arrangement), an enterprise contract could be sought to cover that work with the employees directly affected, rather than seeking to vary the enterprise agreement with all employees.

### ***Operating for a Specified Period***

- 9.20 In line with the DR 15.3, an enterprise contract should provide a nominal expiry date of five years. In line with our recommendation at 9.15, the specified duration should apply to the template or framework enterprise contract lodged with the FWC.
- 9.21 Like their larger counterparts, small and medium sized employers also need certainty regarding their terms and conditions of employment. The ability for employees to opt out of the enterprise contract after 12 months is likely to discourage employers considering this option.
- 9.22 Given that enterprise contracts will be underpinned by the modern awards and NES through the NDT, there is little need for employees to have the option to opt out after 12 months.
- 9.23 However, it should be open to the employer and the employee to mutually agree to terminate the enterprise contract at any time.

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<sup>52</sup> We believe that Registry staff would be capable of performing the assessment function in accordance with NDT guidelines, with the option for either Registry staff or the employer to refer determination to a member of the FWC in the event there is a question to the application of the NDT.

- 9.24 Once the specified term has ended we believe that the enterprise contract should continue to operate until terminated or replaced. This allows for the maintenance of the status quo absent any action by either party. Where either party wishes to terminate the enterprise contract after the nominal expiry date, this should occur by providing written notification to the other party in a prescribed period of notice (e.g. 14 days).

### ***Key Recommendation***

- 9.25 CCIWA would encourage the Commission to recommend the provisions of enterprise contracts as an alternative form of agreement making process characterised by:
- 9.25.1 a simple and easy process for making an enterprise contract which limits the need for specialised internal or external assistance;
  - 9.25.2 formal assessment of an employer's framework enterprise contract against the NDT and NES;
  - 9.25.3 existing employees having the choice to sign or not sign the enterprise contract, but the option of making it a condition of employment for new employees;
  - 9.25.4 a nominal expiry date of up to five years with no option to unilaterally terminate the agreement prior; and
  - 9.25.5 enterprise contracts to continue to operate after the nominal expiry date unless replaced or terminated.

## **10. INDUSTRIAL DISPUTES**

### ***Impact of Industrial Action***

- 10.1 As the Commission has identified, the number of days lost due to industrial action has declined substantially since the 1990's, however this statistic masks the true impact of industrial action upon the Australian economy.
- 10.2 Consideration also needs to be given to the long term impact that industrial action, and threatened industrial action, has on the decision of both domestic and international companies to invest in Australia. This ultimately harms economic growth and job creation. The recent threatened industrial action involving the Gorgon LNG project is a clear example of the harm that threatened industrial action can have upon Australia's reputation, with the dispute gaining international media coverage.<sup>53</sup> The New York Times has succinctly summarised Australia's competitive position in the following quote:

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<sup>53</sup> Treadgold, T. (4 September 2015) [Chevron Pays To Keep Workers Quiet At Its Gorgon LNG Project](#). Forbes Asia  
Offshore Energy Today (25 August 2015) [Chevron's Gorgon project under strike threat](#)  
Offshore Post Strike (25 August 2015) [Strike Threatens Chevron Offshore Gorgon LNG Project](#)  
Oil and Gas People (25 August 2015) [Chevron's \\$55bln Gorgon Project Under Strike Threat](#)  
Energy Intelligence (31 August 2015) [Gorgon Workers Strike Vote Hits Chevron's Plan](#)

*“Chevron's \$54 billion Gorgon liquefied natural gas (LNG) project in Western Australia is tens of billions of dollars over budget and two years behind schedule as it battles red tape and trade unions.*

*In contrast, an Exxon Mobil-led LNG project in nearby Papua New Guinea, one of the world's least developed countries, came in largely on budget and ahead of schedule.”<sup>54</sup>*

- 10.3 The Gorgon project is the largest resource project to have been undertaken in Australia and is one of the largest internationally. With the project almost 90 per cent complete, the industrial action threatened over demands for new shift rosters will leave a lasting legacy on a project that has otherwise avoided significant industrial disputation.
- 10.4 CCIWA has experienced investors' concerns over Australia's reputation regarding industrial action first hand. During 2014 we had discussions with foreign capital investment firms who were concerned about the impact of the impending Teekay dispute which threatened to close down Port Headland shipping operations.
- 10.5 These concerns are also reflected domestically, with local businesses considering the impact of our industrial relations system on their decision to provide employment opportunities in Australia. The potential impact of industrial action remains a significant influencer in that decision.
- 10.6 This is particularly true when consideration is given to the impact of threatened industrial action on bargaining outcomes. The potential for industrial action to create significant harm to an employer's business, and the flow on effect that this has on clients and/or the broader community, makes threatened industrial action a significant bargaining tool which encourages poor bargaining outcomes. Frequently, the threat of industrial action encourages employers to capitulate to demands because the cost of the threatened industrial action is far higher than the claims being sought. The aforementioned Teekay dispute highlights the ability for protected industrial action to significantly distort bargaining power. In that dispute, a handful of were pursuing a 31 per cent increase in pay and conditions by threatening to shut down the world's largest bulk export port. This would have resulted in lost productivity of \$100 million dollars a day, with cost of \$7 million dollars a day to WA residents through lost royalties.<sup>55</sup>

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<sup>54</sup> Reuters, (15 September 2015) [Australian Business Wants Political Merry-Go-Round to Stop](#), New York Times.

<sup>55</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>.

- 10.7 As a coercive bargaining tool, industrial action also encourages corrupt or questionable behaviour in some unions. Such unions may threaten protected or unlawful industrial action in order to secure favourable outcomes for the union's or organiser's direct benefit. The key to unions being able to engage in such activities are the powers provided to unions under the FW Act, as identified by the Council Assisting the Royal Commission:

*"Conduct of this kind operates to increase costs of business and involves the risk, or threat, of a union exercising statutory or other rights otherwise than in an appropriate way. As noted in the report of the Cole Royal Commission, there can be no justification for demanding that payments be made for industrial peace; industrial peace should be the norm, not a commodity capable of being purchased at a price".<sup>56</sup>*

- 10.8 The lack of significant penalties for unlawful industrial action and the ease in which protected industrial action can occur encourages such behaviours. These issues will only be addressed by curtailing these powers.

### ***Do Employees Lack Bargaining Power?***

- 10.9 A common theme in the draft report is that industrial action provides a counterbalance to *"reduce asymmetries in information and bargaining power between parties"*.<sup>57</sup>
- 10.10 Whilst this is reflective of the traditional view of the master and servant relationship which resulted in the development of Australia's industrial relations system during the 1890's and 1900's, it does not reflect the current relationship between employees and employers.
- 10.11 With the growth in company reporting requirements and the high levels of online information, employees now have far greater access to information about their employer than has previously been the case. This has largely negated the imbalance of information, with many employees having as much information on company performance as the management team responsible for negotiating the agreement on behalf of the employer.
- 10.12 Furthermore, Australian employees are increasingly working in skilled jobs, providing them with substantially greater bargaining power to negotiate (either individually or collectively) improved terms and conditions of employment without the need to resort to industrial action.

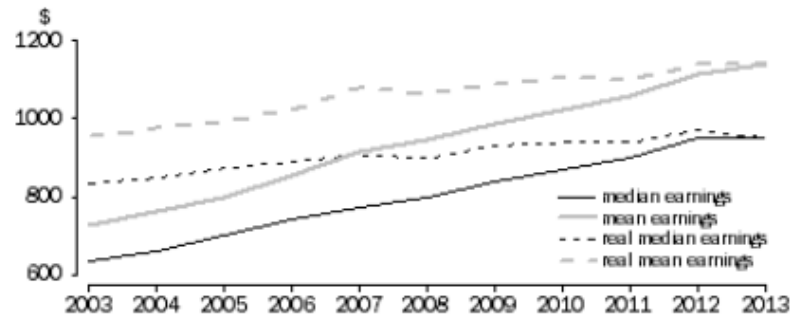
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<sup>56</sup> [Counsel Assisting Submissions](#) to the Royal Commission into Trade Union Governance and Corruption (31 October 2014) Chapter 1.1, paragraph 19.

<sup>57</sup> Draft Report, page 652.

- 10.13 The following graph shows that over the 10 years to 2013, Australian workers have enjoyed strong growth in wages, both in nominal and real terms. Even during the Global Financial Crisis, workers were able to secure growth in wages at least equal to the rate of inflation.

**Nominal and real (a) weekly earnings in main job (b)**



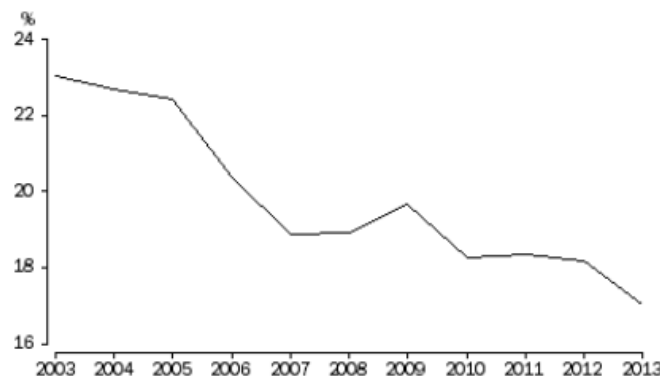
(a) Real earnings are adjusted by the Consumer Price Index (of September each year), based at September 2013.

(b) For more information, see paragraphs 17-19 and 31-36 of the Explanatory Notes, regarding the calculation of mean weekly earnings and factors affecting the comparability between surveys.

*Australian Bureau of Statistics (2014) Employee Earnings, Benefits and Trade Union Membership, Australia, August 2013, Cat 6310.0*

- 10.14 The strong growth in wages is also set against a backdrop of significant decline in union members (as shown in the graph below), as well as the decline in industrial action already noted by the Commission.

**Proportion of employees with trade union membership in main job**



*Australian Bureau of Statistics (2014) Employee Earnings, Benefits and Trade Union Membership, Australia, August 2013, Cat 6310.0*

- 10.15 This trend indicates that, even in an environment of low union density and challenging economic conditions, the majority of employees have appropriate bargaining power to negotiate a high level of wage growth. This suggests that the preconceived notion of disparity in bargaining power no longer holds true.



- 10.16 In the draft report the Commission has stated that where *“used rationally and sensibly, industrial action can be an important bargaining tool.”*<sup>58</sup>
- 10.17 Under the current system there is no effective means for ensuring that industrial action is used rationally or sensibly. We would therefore encourage the Commission to consider the establishment of protections to ensure that the party initiating industrial action can demonstrate:
- 10.17.1 that they have engaged in genuine negotiations with the other party and have genuinely considered and responded to their claims;
  - 10.17.2 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
  - 10.17.3 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.

### ***Excessive Claims***

- 10.18 The Commission has raised concern with respect to the difficulties that may be faced by the FWC in assessing whether claims are excessive. These concerns can be addressed by establishing guidelines for the application of the test, which can also limit the matters that are considered and the level of analysis required. It is CCIWA’s view that a test can be established in a framework that ensures it is not used as a tool to delay or restrict the reasonable taking of industrial action.
- 10.19 We believe that a requirement of this nature is not a focus on process but rather a consideration of behaviours and consequences. The concerns raised by the Australian Council of Trade Unions regarding additional approval requirements appears to be borne out of concern over recent examples of threatened industrial action to pursue claims that the average person on the street would perceive as unreasonable.
- 10.20 Furthermore, it is not unreasonable to assume that the FWC is well equipped to address questions of this nature, as is appropriate given its standing as a tribunal.
- 10.21 By considering the reasonableness of the proposed industrial action, it also reduces the need for applications seeking the suspension or termination of industrial action at a later stage.
- 10.22 We also believe that consideration should be given to excluding high income earners from taking industrial action. Employees earning above the high income threshold (currently \$136,700 per year) have already demonstrated the strength of their bargaining position and are not in need of additional assistance. For these employees, market forces and scarcity of labour ensure that they have a strong bargaining position which matches or exceeds that of their employer.

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<sup>58</sup> Draft Report, page 652

### ***Requiring Bargaining to Commence Before Authorising Industrial Action***

- 10.23 CCIWA supports DR 19.1 that protected industrial action should only be available where bargaining has commenced, which will remove the current option for pre-emptive industrial action.

### ***Simplifying Protected Action Ballot Order Procedures***

- 10.24 It has been the experience of CCIWA that the vast majority of protected action ballot applications are not challenged given the limited requirements currently imposed on the seeking of such action.
- 10.25 Further, protected action ballot order applications are almost exclusively made by unions who are well versed in the requirements for taking industrial action and are suitably capable of defending the limited challenges made by employers. Ultimately it is the union, and not employees, who are making these applications.
- 10.26 Given these factors, we do not believe that the limited requirements should be further watered down. Rather, we believe that the threshold for seeking a protected action ballot order is too low and if simplified further would further encourage the threat of industrial action.
- 10.27 The requirement for the protected action ballot to identify the types of industrial action that the employees are prepared to take is an important one. It allows the employer to consider what alternative arrangements it may need to implement in order to minimise the damage that certain forms of action may cause the employer or its clients. In most circumstances, the notification period for the taking of industrial action is insufficient for employers to implement alternative arrangements.
- 10.28 We also believe that the requirement that industrial action commence within 30 days of the protected action ballot order being issued is an important one in determining when the overt threat of industrial action is raised. The current requirement means that applications are generally made toward the end of the bargaining process when the parties become deadlocked over key issues. The current 30 day requirement means that the overt threat of industrial action occurring is only likely to arise when the employees are actually prepared to take industrial action.
- 10.29 If this requirement is removed, it will encourage unions to seek protected action ballot orders earlier in the bargaining process. Consequently, this will further encourage an adversarial approach to enterprise bargaining.
- 10.30 This is significant, given that enterprise bargaining practices in Australia are commonly criticised for lacking in maturity and focussing on positional based (win-lose) negotiation techniques. The threat of industrial action further promotes this positional based bargaining, rather than encouraging parties to adopt interest based bargaining which focuses on developing mutually beneficial agreements based on the interests of the parties. In order to promote more mature forms of bargaining, the industrial relations framework needs to influence how and when the threat is made in order to encourage the parties to reach mutual agreement.

- 10.31 In considering the current quorum requirements for the taking of industrial action, we do not believe that there is any need to alter these provisions. Unions are well versed in the requirements and are generally effective in encouraging employees to vote, with most ballots easily fulfilling the quota requirements. This is further facilitated by the balloting process adopted by the Australian Electoral Commission which provides substantial opportunity for all relevant employees to easily cast their vote. Furthermore, an employee's decision not to vote in a protected action ballot order is likely to indicate that they do not want to take industrial action.

### ***Grounds for Terminating Industrial Action***

- 10.32 CCIWA agrees with the Commission's conclusion that *"the prevailing definition of significant harm sets the bar for FWC intervention too high"*.<sup>59</sup>
- 10.33 In considering an alternative definition of industrial action, it is important to consider that the problems associated with the current test do not substantially arise out of the definition adopted by the FW Act, but by the way in which it has been applied by the FWC. Rather than giving the term 'significant' its ordinary meaning, the FWC has reinterpreted it with a view of protecting the perceived right to strike.
- 10.34 CCIWA therefore recommends that in redefining the term 'significant harm', consideration should also be given to redefining s 423(4) of the FW Act to:
- 10.34.1 require the FWC to consider the impact that the industrial action is having on third parties, including other businesses, individuals or sectors of the community; and
  - 10.34.2 remove subsection (g) which requires the FWC to consider the object of promoting and facilitating bargaining. This provision provides licence for the FWC to allow industrial action to occur even where it is resulting in significant economic harm.
- 10.35 In terms of the impact that industrial action can have on third parties, consideration also needs to be given to other affected parties, with greater scope and ability to seek orders to suspend industrial action.
- 10.36 CCIWA would caution the Commission in amending the provisions for terminating or suspending industrial action under s 424 of the FW Act to allow for the balancing of the risks to life, safety or welfare against the associated benefits in allowing bargaining to continue, even where such risk is deemed low. We believe that:
- 10.36.1 it would be contrary to the employer's obligations to provide a safe workplace under the relevant work, health and safety laws, which places safety above economic considerations;
  - 10.36.2 even where the risk is low, should the industrial action result in a foreseeable loss of life or personal injury it is likely to have a significant personal impact upon the employees concerned and their families, as well as damage to the reputation of the union and employer; and

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<sup>59</sup> Draft Report, page 688.

- 10.36.3 when considering applications under s 424, the FWC has established a number of stringent criteria which limit the granting of such applications, including considering what measures the employer has put in place to minimise the adverse effects of the industrial action.

### ***Aborted Strikes***

- 10.37 CCIWA supports DR 19.3 and 19.4 as an appropriate means for addressing the problems associated with aborted strikes being used as a bargaining tool.

### ***Employer Responses***

- 10.38 CCIWA supports the Commission's comments regarding the need to consider alternative forms of employer response action in addition to lockouts.
- 10.39 From our experience, employers are generally reluctant to take any form of response action because of the potential damage it may have on the long term relationship with employees. Consequently, any extension to the types of employer response action available is likely to be used sparingly. In this way we do not see that it will significantly affect the respective bargaining strength of the parties.
- 10.40 In most cases we would envision that, where utilised, employer response action would be proportionate to the action taken by the employees and be focused on helping the employer minimise the disruption caused to them. For example:
- 10.40.1 imposing a limitation or ban on overtime work or work which attracts attractive penalties to limit the opportunity for striking employees to make up for wages lost due to employee initiated industrial action;
  - 10.40.2 restricting approval of annual leave to prevent leave being accessed to further exacerbate the impact of strike action; or
  - 10.40.3 reducing the number of shifts or altering start/finish times to reflect alternative arrangements put in place to mitigate the action or accommodate client responses to the industrial action (e.g. cancellation or reduction of orders).
- 10.41 In establishing a broader definition of industrial action, we believe that employer response action should be defined in a similar manner to employee initiated industrial action. Subsection 19(1)(a),(b) and (c) of the FW Act defines industrial action in broad terms, allowing employees to take a broad range of activities. We believe that a similar approach should be adopted in defining employer response action to allow for employers to take a range of actions as appropriate to the level or type of industrial action being adopted by the employees. We recommend that the following provides a basis for an appropriate legislative definition:

*“For the purpose of employer response action, industrial action means action of any of the following kinds:*

- the lockout or partial lockout of employees from their employment by the employer of the employees.*
- requirement by the employer that work be performed by an employee in a manner different from that in which it is customarily or ordinarily performed .*
- a ban, limitation or restriction imposed by the employer on the offering or allocation of work, or the approval of requests for annual leave or other leave entitlements prescribed by the National Employment Standards, modern award or enterprise agreement.”*

10.42 In considering a broader definition of employer response action, it would also be necessary to amend the definition of adverse action to confirm that such industrial action does not give rise to a general protections claim.

### ***Unlawful Industrial Action***

10.43 As the Commission has identified, the current penalties are insufficient to deter some unions from instigating unlawful industrial action. We support DR 19.6 that these should be increased to reflect the costs of such action to employers and the community. We also believe that the impact on third parties should also be considered in this assessment. However, we would recommend consideration of non-monetary penalties which provide a greater deterrence to unions, including limiting or suspending its statutory rights under the FW Act, such as limiting union officials right of entry.

### ***Key Recommendations***

10.44 CCIWA recommends that greater consideration needs to be given to the negative impact that industrial action (both actual and threatened) has on the Australian economy, and that:

- 10.44.1 industrial action should only be an option of last resort after genuine negotiations on reasonable claims. The proposed protected industrial action should be objectively reasonable and proportionate, having regard to the matters in dispute and the likely effect of the proposed industrial action on the employees, the employer and other persons;
- 10.44.2 in line with DR 19.2, “significant economic harm” should be redefined to provide for greater consideration of the impact of threatened or actual industrial action on other parties;
- 10.44.3 high income earners should be excluded from the taking of protected industrial action;
- 10.44.4 there should be increased options for employer response action, with greater ability for employers to respond to aborted strike action; and
- 10.44.5 maintain its recommendation for increased penalties for unlawful industrial action and consider the option of non-monetary penalties.

## **11. RIGHT OF ENTRY**

- 11.1 Union right of entry can pose significant problems for employers, particularly where that right is abused.
- 11.2 Frequency of visits is one of the ways in which unions can abuse this right. CCIWA therefore welcomes the draft recommendations proposed by the Commission to deal with disputes over frequency of visits and, with modification, limitation on the number of visits.
- 11.3 CCIWA would also encourage the Commission to give consideration to what should occur where right of entry visits are disruptive. Examples of union misbehaviour associated with right of entry are well documented and the existing regulation provides no meaningful penalties for such behaviour.

### ***Disputes Regarding Frequency of Visits***

- 11.4 CCI welcomes DR 19.7 to amend s 505A of the FW Act to provide a balanced approach in dealing with disputes about frequency of right of entry visits. As the Commission has rightly identified, the current provisions impose an impossibly high bar which prevents their practical operation.
- 11.5 As outlined in our original submissions, a number of CCIWA members have experienced substantial costs and disruption arising out of a high number of right of entry visits, including one project which had an average of 56 visits per month.<sup>60</sup> Each entry incurs a cost onto the employer or occupier of the site. As such, it is important to ensure that there is a viable mechanism to address circumstances where the right is being abused.

### ***Recruitment of Members***

- 11.6 As the Commission has identified, there are a number of methods by which a union can seek to recruit members. However, the use of right of entry gives unions the advantage of a captive audience. This provides unions with a competitive advantage over other membership based organisations, most of whom have been able to successfully attract membership using traditional marketing methods.
- 11.7 Whilst CCIWA believes that there is no basis for unions to be provided with a statutory right to enter workplaces for the purpose of recruiting members, we are supportive of a limitation being applied of no more than two visits per 90 days where a union does not have an established presence at that workplace.
- 11.8 We believe that the recommendation should clearly state that the restriction applies where the union is not a named party to, or acting as a bargaining representative for, an enterprise agreement applicable to the relevant workers. The current reference to the union also having a member could create confusion as to when the limit

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<sup>60</sup> Chamber of Commerce and Industry of Western Australia, [Submission to the Productivity Commission Review into the Workplace Relations Framework](#), paragraph 15.12.

applies, given that a pre-requisite for a union being a bargaining representative, and consequently a party to an agreement, is that they have at least one member.

### **Location**

11.9 The Commission has identified in its report that:

11.9.1 there is limited evidence of right of entry discussions in break rooms leading to operational difficulties; and

11.9.2 if there are issues of union officials intimidating or harassing employees, this may be more appropriately addressed through enforcing better standards on the conduct of union officials whilst on site.

11.10 Union misbehaviour whilst engaging in right of entry is notorious. CCIWA frequently deals with complaints from employers that union officials have bullied or harassed management, employees and in some cases clients, during right of entry.

11.11 However, the lack of any meaningful penalties or consequences for abuse of right of entry means that such behaviours go unreported.

11.12 Penalties for such breaches have been notoriously low and have done little to deter further breaches. Furthermore, the FWC and its predecessors have generally been reluctant to suspend or terminate an entry permit where an official has misused its rights. This was well demonstrated in a decision involving a union official who was fined \$4,500 by the Federal Court for deliberately ramming a vehicle into a gate with some force when a person was clearly visible behind it.<sup>61</sup> Notwithstanding the seriousness of this action, his right of entry permit was revoked for a period of only three months some two and a half years after the incident occurred. Such limited consequences for actions of this nature have not acted as a serious deterrent for the misuse of a statutory right.

11.13 Consequently, in the face of determined non-compliance there are only limited opportunities for employers to enforce appropriate standards of behaviour.<sup>62</sup> To date, one of the few methods that employers have been able to use to control union behaviour is to control the location of the meeting room, which limits their ability to harass those employees who wish to be left alone.

11.14 In particular, monetary penalties have done very little to deter repeated breaches of the FW Act, with the Construction, Forestry Mining and Energy Union (**CFMEU**) and its officials having penalties exceeding \$6 million dollars between March 2004 and July 2015.<sup>63</sup>

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<sup>61</sup> [Brian Parker, Rebel Hanlon, Thomas Mitchell \[2011\] FWA 2577 \(13 MAY 2011\)](#).

<sup>62</sup> It is important to note that applications under s 507 and 508 of the FW Act which allow for a right of entry permit to be suspended or revoked in limited to the FWC or an industrial inspector. Employers are unable to make their own applications in this regard.

<sup>63</sup> Australian Parliament House. (2015) [Penalties against CFMEU and or CFMEU representative as at 10 July 2015](#).

11.15 Misuse of right of entry is particularly concerning when it is used to intimidate or harass non-union members. The extent of intimidation that may be engaged by unions in holding discussions with employees is encapsulated in the claim being pursued by Fair Work Building and Construction (**FWBC**) against a CFMEU official, who has been accused of:

11.15.1 locking the door to the crib room with a padlock and declaring that *“those sheds were won by f\*\*\*en unionists? Where do you think people used to sit; under a f\*\*\*en tree. You can go p\*\*s in a bucket for all I care”*; and

11.15.2 removing workers’ belongings from the shed, including milk and lunches stored in the refrigerator, which were thrown to the ground outside.

As a result of the alleged conduct, the manager had to organise the employees to have lunch off site at a nearby shopping centre.<sup>64</sup>

11.16 It is the potential for undue pressure to be applied to non-union members that highlights the need for strong rules governing the behaviour of union officials when exercising the privileged position they hold under the FW Act.

11.17 We would therefore encourage the Commission to consider the need for practical deterrence against the misuse of right of entry by establishing a clear code of conduct for union officials with strong penalties for breaches, including mandatory loss of permit.

### ***Key Recommendations***

11.18 CCIWA encourages the Commission to:

11.18.1 retain draft recommendation 19.7;

11.18.2 retain and clarify draft recommendation 19.8 to provide that a union’s right of entry is limited to two visits per 90 days, except where they are a party to, or a bargaining representative for, an enterprise agreement;

11.18.3 recommend the establishment of a code of conduct for union behaviour when exercising right of entry, with penalties that provide a meaningful deterrent for misbehaviour, which can be enforced by an employer, employer association, the FWO or the FWC (on its own motion); and

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<sup>64</sup> Fair Work Building and Construction (13 February 2015) Media Statement - [CFMEU official allegedly locks non-union workers out of smoko shed and throws out their lunch.](#)



## 12. UNFAIR DISMISSAL

- 12.1 CCIWA is largely supportive of the proposed changes to unfair dismissal. In particular DR 5.1, 5.2 and 5.3 will assist in addressing the concerns of most employers regarding the current unfair dismissal system with regards to:
- 12.1.1 employees receiving compensation when terminated for a valid reason, but due to procedural deficiencies their termination was considered unfair;
  - 12.1.2 the costs that arise out of employees bringing vexatious or ‘give it a go’ claims; and
  - 12.1.3 the focus or pressure on parties to settle for a monetary value, even where the employer had a valid reason for dismissal.
- 12.2 CCIWA notes that the Commission’s recommendations are largely in line with the proposals provided in our initial submission. In particular, we commend the Commission for recognising that *“there may be too much of an emphasis on procedural fairness in instances where the conduct of the employee would normally warrant dismissal”*.<sup>65</sup>

### **Lodgement Fees**

- 12.3 CCIWA supports an increase to the application fee for unfair dismissal. When fees are set too low, they do not act as a deterrent against employees making ‘give it a go’ claims. The current lodgement fee of \$68.60 is unlikely to act as a deterrent against bringing a vexatious claim, particularly for those employees on high incomes.
- 12.4 We believe that it would be appropriate to mirror the application fees currently payable in the Federal Circuit Court’s small claims jurisdiction. In that jurisdiction, employees making a claim of less than \$10,000 pay a fee of \$210, while those claiming between \$10,000 and \$20,000 pay \$345.<sup>66</sup> CCIWA proposes that, in line with tying lodgement fees to income, employees earning at or below the C10<sup>67</sup> rate of pay should pay \$210, while employees earning above the C10 rate of pay should pay an application fee of \$345. We suggest that this would be a moderate increase to the application fee, particularly given that employees can claim for up to six months’ wages for unfair dismissal. This is significantly more than the maximum available in the Federal Circuit Court’s small claims jurisdiction.
- 12.5 Further, it is important to note that in instances where an employee cannot afford to pay the fee due to financial distress, they will still have the ability to apply to the FWC for waiving of the fee.<sup>68</sup>

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<sup>65</sup> Draft report, page 227.

<sup>66</sup> Federal Circuit Court of Australia , General Federal Law Fees – Industrial Law. Available from: <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/forms-and-fees/fees-and-costs/fees-gfl/>.

<sup>67</sup> The C10 rate refers to the tradesperson rate of pay under the *Manufacturing and Associated Industries and Occupations Modern Award 2010*. This classification has historically been used as a benchmark by which wage relativities have been assessed for classification across most awards. This rate sets an appropriate benchmark in assessing capacity to pay.

<sup>68</sup> See *Fair Work Act 2009 (Cth)*, s 395 and regulation 3.07(7) of the *Fair Work Regulations 2009 (Cth)*.

- 12.6 CCIWA also supports the introduction of a fee for employees who progress their claim to arbitration. We propose that the hearing fee of \$715 levied by the Federal Circuit Court for non-corporations provides a suitable guideline.
- 12.7 This, together with a higher initial application fee, will provide increased deterrence against employees bringing ‘give it a go’ claims. This should ease the pressure on employers to provide ‘go away money’, particularly in instances where they have dismissed the employee for a valid reason.

### ***On the Papers***

- 12.8 We agree that the absence of an “*effective filter*” at the front end of the unfair dismissal claims process results in the tendency for parties to steer towards monetary settlement, even when an employee has been dismissed for a valid reason. We therefore welcome DR 5.1 that the FWC should have the discretion to consider unfair dismissal applications ‘on the papers’ prior to the commencement of conciliation. However, we believe the Commission should go further, and suggest that the FWC should have the ability to assess jurisdictional issues ‘on the papers’. For example, employees who have clearly not served the minimum qualifying period should not be able to proceed to conciliation, with the FWC being able to dismiss their application from the outset.

### ***The Issue of Costs***

- 12.9 The Commission estimates that the average costs of an unfair dismissal claim are around \$13,500,<sup>69</sup> acknowledging that the “*general absence of a requirement that losers in arbitrated cases pay the winner’s costs*” creates the incentives for monetary settlement.<sup>70</sup>
- 12.10 In line with the Commission’s observations, there needs to be greater access to costs orders. Costs are currently only available where the claim is vexatious, without reasonable cause, or where there was no reasonable prospect of success. The FWC has also set a high bar in considering this matter. We believe that it is necessary that the bar to accessing costs orders be lowered to assess whether the claim had any reasonable prospect of success, in the interest of discouraging speculative claims.

### ***Key Recommendations***

- 12.11 CCIWA supports the draft recommendations proposed by the Commission in regards to unfair dismissal. We believe that these will address a significant proportion of the concerns raised by employers, whilst maintaining suitable protection for employees.
- 12.12 We encourage the Commission to consider increasing the potential for cost orders to be awarded where there is no reasonable prospect of success, in order to further discourage frivolous claims.

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<sup>69</sup> Draft Report, page 211.

<sup>70</sup> Draft Report, page 230.

### 13. GENERAL PROTECTIONS AND ANTI-BULLYING

- 13.1 CCIWA does not believe that the Commission has adequately addressed the issues associated with the general protections and anti-bullying provisions of the FW Act.
- 13.2 As identified in our initial submission, the main concern that arises for employers in regards to these employee protections is that they represent unnecessary duplication and red tape. Employees are already protected from discriminatory and bullying behaviour in the form of discrimination legislation and occupational health and safety legislation. We therefore see these protections as unnecessary, and urge the Commission to recommend their removal from the FW Act.
- 13.3 However, if the Commission decides that the general protections provisions should remain in the FW Act, we believe that DRs 6.1, 6.2 and 6.3 are at least a first step to restoring the balance between the need to protect employees, and the need to reduce the regulatory burden placed on employers, particularly in instances where employers are faced with vexatious claims.
- 13.4 Further, CCIWA supports DR 6.4 that a cap on compensation be introduced for claims lodged under Part 3-1 of the FW Act. We submit that it would be appropriate for that cap to be the same as that available under the unfair dismissal protection, being six months' of wages or half of the high income threshold amount.<sup>71</sup>
- 13.5 In addition to the comments provided here, CCIWA supports and adopts the recommendations provided by ACCI in relation to general protections and anti-bullying provisions.

#### ***Key recommendations***

- 13.6 CCIWA urges the Commission to recommend that the general protections and anti-bullying provisions of the FW Act be removed.
- 13.7 In the event that the general protections provisions are maintained, we support the imposition of a cap on compensation amounting to six months' of wages or half of the high income threshold amount.

### 14. TRANSFER OF BUSINESS

#### ***Effects on Employment***

- 14.1 CCIWA welcomes the Commission's comment that the protections afforded by the transfer of business provisions should not occur at all costs.
- 14.2 As the draft report identifies, a transfer of business may result in employees losing the opportunity for employment as a result of the above award terms and conditions of employment negotiated with the previous employer.<sup>72</sup>

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<sup>71</sup> Currently \$68,350.

<sup>72</sup> Draft Report, page 754.

- 14.3 In providing assistance to employers in navigating transfer of business provisions, it has been our experience that the imposition of the previous employer's industrial instrument can act as a barrier to the new employer taking over the operations or engaging any of the previous employees.
- 14.4 In essence, a key function of the transfer of business provisions under the FW Act is to protect the industrial instrument. In practice it does not protect the interests of the affected employees who face the prospect of losing their employment.
- 14.5 The question that arises is whether protecting existing terms and conditions should occur at the expense of jobs, particularly when consideration is given to the safety net provided by the modern awards.
- 14.6 The bargaining position of employees is also strengthened in practical terms by the operational knowledge existing staff have regarding the business and the benefit that this has for the incoming employer. Consequently, the incoming employer generally takes active steps to encourage existing staff members to transfer across and remain engaged to ensure the effective operation of the undertaking. Providing a level of consistency with respect to terms and conditions of employment is one of the ways in which new employers can increase the likelihood of this occurring.
- 14.7 The continued operation of the previous industrial instrument frequently hampers the successful transition of existing employees into the operation of the new employer. Enterprise agreements are drafted to reflect the values, culture, policies and operating methods applicable to that employer. These will rarely reflect those of the incoming employer, creating further barriers to the integration of new staff. This can result in even minor issues, such as differing pay cycles, making the transition difficult.

#### ***Transfer of Business between State Public Sector and National System Employers***

- 14.8 The negative impact of the transfer of business provisions is most noticeable in its application to public sector instruments to private sector businesses where government functions are outsourced.
- 14.9 These provisions have caused significant problems for a number of CCIWA members, which have impacted upon their decision to take over these functions or engage existing staff.
- 14.10 In a significant number of examples, the prescriptive nature of the public sector agreements has resulted in existing employees not being offered employment with the new operators. This not only limits the employment options for existing employees, but negatively impacts upon the services provided to the recipients of these services due to the lag time in recruiting and training a new workforce and the loss of corporate memory.

- 14.11 In situations where the outsourced services involve providing care to people with a disability, the aged, or groups facing social disadvantage, the impact engaging new staff significantly disrupts continuity of care.<sup>73</sup>
- 14.12 In other situations, the potential application of the public sector instrument can affect the decision to tender for the provision of these services. In one example, a CCIWA member identified that it withdrew from a competitive tender for services outsourced by the Queensland Government because it identified that the transferring instrument would limit its ability to introduce new methods of working. These methods were necessary to meet the performance standards required for the delivery of the services.
- 14.13 This is also an example of the way in which transfer of business provisions can inhibit the achievement of broader public policy.
- 14.14 The effect of transfer of business provisions between state public sector organisations and private sector employees also needs to be considered in light of the additional protections provided to public sector employees. As a general rule, most public sector entities are limited in their ability to make employees redundant. Therefore, where the employee does not accept the new offer of employment, termination is an option of last resort with a substantial redeployment period established prior to involuntary redundancies being available.<sup>74</sup>

#### ***Are Transfer of Business Provisions Necessary?***

- 14.15 The Western Australian **(WA)** industrial relations system provides an appropriate case study as to why these provisions are unnecessary.
- 14.16 Whilst the application of the WA industrial relations system has diminished, prior to 2006 it was the dominant system governing WA business. The *Industrial Relations Act 1979 (WA)* does not include provisions relating to transfer or transmission of business, yet there were no significant concerns raised that employees were disadvantaged as a result of the absence of such protection.

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<sup>73</sup> In many situations the recipients of the care have developed strong relationships with the individual worker providing the service which is critical in the effective delivery of care. This can be particularly relevant to persons with a mental disability and those who have suffered through a major trauma.

<sup>74</sup> In the case of Western Australia, the [Public Sector Management \(Redeployment and Redundancy\) Regulations 2014](#) regulate the redundancy process of WA Government employees, which is reflected in the [Redeployment and Redundancy Guidelines](#).

14.17 In 2009, Steven Amendola was commissioned by the WA Government to undertake a review of the State industrial relations system to identify which elements of the FW Act should be incorporated into it. In considering transfer of business, the report did not identify a need to adopt transfer of business provisions within the WA system, concluding that:

*“Where a comprehensive set of minimum conditions applies universally to all employees, there may be little need for such provisions. Indeed, the Secretariat has noted to me that small businesses could be deterred from engaging a transferor’s employees if encumbered with the transferor’s existing employment arrangements.”<sup>75</sup>*

14.18 The report instead recognised that there would be merit in providing a mechanism to allow a new employer to voluntarily adopt the agreement which applied to the previous employer.

14.19 This is a better alternative to providing greater ability for the FWC to make an order determining that an agreement does not transfer. Flexibility to allow the FWC to make orders relating to transferring instruments has the potential to partially address the problems arising from transfer of business provisions. However, it does not address the general reluctance of the FWC to make such orders. As was highlighted by the decision of *CEPU and ASU v CSIRO*,<sup>76</sup> which was noted in the draft report,<sup>77</sup> the FW Act establishes a range of considerations to be taken into account. However, the FWC has given unequal weighting to each of these criteria with a bias towards preserving the existing conditions of employment.

14.20 Changes to the current test are unlikely to address this bias.

### **Key Recommendation**

14.21 CCIWA recommends that the transfer of business provisions should be removed, taking into account the negative impact that they have on protecting the jobs of existing employees and the safety net provided through modern awards.

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<sup>75</sup> Amendola, S. (2009) Review of Western Australian Industrial Relations System – Final Report, page 200.

<sup>76</sup> [Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v The Commonwealth Scientific and Industrial Research Organisation \(CSIRO\) \[2010\] FWA 1171\(15 February 2010\).](#)

<sup>77</sup> Draft Report, page 755.

## APPENDIX A - EXAMPLE OF PREFERRED HOURS SCHEDULE

<b>Preferred Hours of Work</b>					
<ol style="list-style-type: none"> <li>1. Preferred hours are those worked outside and/or in addition to the usual working hours where you would otherwise, under an Award, receive penalty rates of pay;</li> <li>2. You genuinely consent to working these hours at your agreed rate of pay in lieu of penalty rates because these working hours suit your personal circumstances;</li> <li>3. This agreement offers you a choice between working ordinary hours and preferred hours.</li> </ol> <p>You are not required to elect preferred hours at the time of signing this AWA or afterwards. If you do not elect to work preferred hours your hours of work will be rostered in accordance with Clause 5. If you are required to work outside the ordinary span of hours for which you have not nominated a preference you shall be paid in accordance with the relevant Award rates applicable at the time you sign this Agreement.</p> <p><input type="checkbox"/> <b>I elect to work preferred hours as stated below.</b> I understand that I can change my preference by written request and the Company will take all reasonable steps to accommodate such request as quickly as possible. All written requests to stop preferred hours will be accommodated within 4 weeks of the request.</p>					
<b>Shift</b>	<b>Hourly Rate of Pay</b>	<b>Day (7am - 7pm)</b>		<b>Night (7pm - 7am)</b>	
		<b>Preferred Hours</b> (Insert Span of Available Hours)	<b>Any</b> (Please Tick)	<b>Preferred Hours</b> (Insert Span of Available Hours)	<b>Any</b> (Please Tick)
Monday					
Tuesday					
Wednesday					
Thursday					
Friday					
Saturday					
Sunday					
Public Holidays					

☐ **I elect not to work preferred hours at this stage.**

\_\_\_\_\_  
**Name of Employee**

\_\_\_\_\_  
**Signature of Employee**

Date: \_\_\_\_ / \_\_\_\_ / \_\_\_\_

\_\_\_\_\_  
**Signature of Employer**

Date: \_\_\_\_ / \_\_\_\_ / \_\_\_\_