



# Review of Western Australian Industrial Relations System

May 2011

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



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AND INDUSTRY  
WESTERN AUSTRALIA

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## About CCI

The Chamber of Commerce and Industry of Western Australia (CCI) is the leading business association in Western Australia (WA).

It is the second largest organisation of its kind in Australia, with a membership of over 6,000 organisations in all sectors including manufacturing, resources, agriculture, transport, communications, retail, hospitality, building and construction, community services and finance.

Most members are private businesses, but CCI also has representation in the not-for-profit sector and the government sector. CCI members are located in all geographical regions of WA.

Around 90 per cent of CCI members are businesses employing fewer than 20 employees and about half of CCI members are in the services sector.

CCI's membership in the accommodation, cafes and restaurants; health and community services; property services; and retail industries is around 30 per cent of our members.



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## Executive Summary

### CCI's Preferred Position

CCI's primary contention is for full referral of IR powers to the federal Government to achieve a single national IR system covering all employers and employees - the transition to which is appropriately staged to allow small or 'micro' employers to plan and prepare for their inclusion.

CCI notes the Government's express commitment to streamline and modernise within the broad framework of the current industrial relations system and awards.

### Scope and Detail of Government's Responses

Although the reform parameters proposed by Government appear narrow, CCI has identified a potential for effecting significant change in several areas.

Accordingly, CCI remains committed to working with the Government to promote a user friendly and effective state IR system.

It would assist stakeholders in their understanding of the Government's intentions and promote a more informed and constructive reform process if details and clarification was provided.

### CCI's Objective

CCI is committed to achieving a simple, effective and relevant industrial relations system that meets the needs of unincorporated businesses in WA.

Accordingly, CCI's recommendations focus on reducing the impost on the taxpayer, by simplifying and streamlining the current complex, over-regulated system.

### State IR Jurisdiction Demographics and WAIRC/IMC Workloads

In essence, the workload data of the WAIRC and IMC when contrasted with the demographics of private sector employers and employees remaining in the state IR system indicates the following:

- the workload of the WAIRC has been steadily declining from the mid 1990s, but dramatically reduced as a consequence of the federal IR reforms in 2006;
- a maximum of around 20 per cent of the total WA workforce remain in the state IR system;



- the WAIRC and IMC have a negligible role in relation to unincorporated businesses that represent the large majority of private sector employers in the state system; and
- union membership and activity in the unincorporated private sector is estimated to be rare or non-existent.

The challenge is therefore to identify and implement reforms that (incrementally) move the system to being more 'user friendly' and relevant to unincorporated businesses

### **Characteristics of Micro Businesses**

Other than the public sector, the vast majority of employers remaining in the state system are unincorporated businesses.

These businesses (aka micro businesses) comprise a workforce of two to seven employees and are likely to include the owner/ working director.

### **Award Modernisation**

It is essential to establish whether state awards, even if rationalised and modernised, are likely to have any practical relevance to the businesses remaining in the state jurisdiction.

If a reformed award framework can be made relevant, the review process must not replicate the federal award modernisation process that consolidated multiple awards rather than modernising their terms and ensuring operational relevance.

Award rationalisation/modernisation is probably best determined through Ministerial direction and implemented by the WAIRC; similar to the federal award modernisation process.

Modernised state awards must:

- be simple to understand and easy to apply, and be expressed in plain English;
- reduce the regulatory burden on business by reducing the number of awards;
- relocate relevant across award generic provisions to the minimum conditions of employment safety net;
- be economically sustainable, and promote flexible, efficient and productive work practices;



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- balance the responsibilities, rights and interests of employees and employers;
- reflect the requirements of the industries/occupations to be covered by the modernised awards; and
- apply as 'common rule' awards, i.e. no award parties.

The 215 current awards can be rationalised into the 20 award categories suggested by CCI.

### **Minimum Wage Determination**

CCI's preferred outcome is that the WA state minima should be identical to the federal minimum.

Unincorporated businesses in WA are the only part of the Australian private sector remaining outside the federal jurisdiction.

### **Unfair Dismissal**

CCI proposes the State unfair dismissal system is amended to achieve the objectives of the review Terms of Reference<sup>1</sup> *"...to reduce the regulatory burden on business (especially small business), to discourage vexatious and frivolous claims and to streamline the process for resolving claims."*

CCI supports the objective to *"... harmonise the provisions for unfair dismissal between the jurisdictions<sup>2</sup>."*

CCI proposes an employer should be able to determine within the first 12 months of service whether an employee is sufficiently able to perform the work or conduct themselves in an appropriate manner without the employee seeking recourse through unfair dismissal.

A casual employee cannot make a claim for unfair dismissal unless employed for a minimum of 12 months on a regular and systematic basis and also have a reasonable expectation of ongoing employment.

### **Right of Entry**

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<sup>1</sup> Original Terms of Reference, April/May 2009

<sup>2</sup> WA Government proposed response to the Amendola Review of the WA Industrial Relations system.



CCI supports the broad harmonisation of state and federal right of entry provisions, in particular, the adoption of the 'fit and proper person test.'

In order to ensure the new right of entry system balances the interests of the industrial parties, the federal provisions will need to be modified and adapted.

It is important to ensure union access to workplaces minimises or eliminates the potential for:

- false expectations that agreements can be broken;
- pressure for unsustainable wage increases;
- demarcation disputes;
- occupational safety and health entry where there is no substantiated or reasonable grounds provided to the employer/occupier; and
- disruptions to business.

### **Individual Agreements**

CCI notes that changes to the current individual statutory contract provisions of the *Industrial Relations Act 1979* are not being entertained by the Minister at this time.

CCI is of the view that to make the state system relevant and user friendly, employers and employees should be allowed to enter into statutory individual agreements subject to a mandated 'better off overall' test.

CCI is of the view the Employer-Employee Agreements currently available under the *Industrial Relations Act 1979* are unusable and highly restrictive about the form, content and the process of making and registering each agreement.

CCI advocates for a simplification of individual agreement making, which is only available to private sector employees and employers.



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## **Review and Simplify Legislation**

CCI reiterates its' request that the State Government review and simplify employment related legislation with a suite of legislative repeals, amalgamations and rationalisation.

## **Statutory Minimum Conditions of Employment**

CCI is of the view an inevitable corollary to award modernisation is reviewing and enhancing the minimum conditions of employment.

It is proposed the *Minimum Conditions of Employment Act 1993* is amended to ensure it is only this Act that provides the new State minima.



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## Preamble

CCI made a comprehensive submission<sup>3</sup> (August 2009) to the Independent Review of the State Industrial Relations System in Western Australia in which it reiterated its preference for referral of WA's state industrial relations powers to the Federal Government thereby achieving a single national industrial relations (IR) system, at least for the private sector.

In view of the State Government's preference for not referring its' powers, CCI as part of its' submission outlined in detail an industrial relations *Blueprint for the Future*.

CCI remains of the view Government, employers and employees would substantially benefit from the implementation of its' Blueprint.

CCI notes, however, the Government's express commitment to streamline and modernise within the broad framework of the current system and awards.

The current system is neither streamlined, nor are the awards modern.

Although the reform parameters proposed by Government appear narrow, CCI has identified a potential for effecting significant change in several areas.

Accordingly, CCI remains committed to working with the Government to promote a user friendly and effective state IR system.

When considering the Terms of Reference for the *Review into the WA Industrial Relations System*, Steven Amendola<sup>4</sup> made the following observations:

- *"There will be a stand alone Western Australian industrial relations system.*
- *That the system has to meet the needs of the constituency it will cover.*
- *To the extent that it is considered appropriate, the system should take into account, conceptually or in its terms, the Fair Work Act 2009, in its design."*

CCI's submission seeks to reflect these aspirational observations and is consistent with the Government's goals.

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<sup>3</sup> In this submission it will be referred to as: *CCI's Amendola Submission*.

<sup>4</sup> *Review of Western Australian Industrial Relations System, Final Report*, 30 October 2009.



## Government Proposals require further detail

The letter from the Minister for Finance; Commerce; Small Business outlines<sup>5</sup> the Government's proposed changes to the State industrial relations system and reiterates its' intention to "...retain a streamlined Western Australian Industrial Relations Commission and modernised state awards."

The document attached to the Minister's letter is almost identical<sup>6</sup> to the one dated 6 December 2010 that identified various areas of reform. Actions are identified under each of the headings: "Structure and Jurisdiction", "Harmonisation" and "Modernisation", but no details were provided or clarification to elucidate any process of streamlining or modernisation.

The provision of such details and clarification would assist stakeholders in their understanding of the Government's intentions and promote a more informed and constructive reform process.



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<sup>5</sup> Received by CCI on 8 April 2011.

<sup>6</sup> Removal of the reference to the abolition of the provisions of Part VID and Schedule 4 in the *Industrial Relations Act 1979*.

## Introduction

The current system and legislative provisions are no longer relevant or fully understood by employers or employees, and is not operationally practical.

Without major changes to the system and how the WAIRC operates, CCIWA is concerned the Government will not achieve its' expressed goal of "...ensuring the most productive, fair and flexible industrial relations system possible for Western Australia." <sup>7</sup>

CCI is committed to achieving a simple, effective, relevant and sustainable industrial relations system that meets the needs of unincorporated businesses in WA.

CCI's recommendations are designed to reduce the impost on the taxpayer, by simplifying and streamlining the current complex and over-regulated system. A reformed system should focus on the needs of private sector businesses remaining in the state jurisdiction.

### State Industrial Relations System - Workload

In CCI's Amendola Submission several conclusions were drawn from the workload data of the WAIRC and IMC, including:

- the workload of the WAIRC has been steadily declining from the mid 1990s, but dramatically reduced as a consequence of the federal IR reforms in 2006.
- the WAIRC and IMC have a negligible role in relation to unincorporated businesses that comprise the large majority of private sector employers in the state system;
- the incorporated employers that are non constitutional corporations are estimated to be a very small minority of incorporated businesses, and very few of those utilise the WAIRC or IMC; and
- union membership and activity in the unincorporated private sector is estimated to be rare or non existent. <sup>8</sup>

Recent ABS data about union density across Australia shows that union membership continues to fall.

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<sup>7</sup> Letter from the Minister received by CCI on 8 April 2011.

<sup>8</sup> See pages 23-5 - *CCI's Amendola Submission*



These findings are inconsistent with the Government's assertion that "...the Commission retains broad community support..." In reality both the 'broad community' and micro businesses are unfamiliar with the role of the WAIRC and IMC, and perhaps even of their existence.

### Size and Demographics of WA's Unincorporated Private Sector

It is essential to understand and accurately identify what businesses remain in the state system before any recommendations can be made about the state Industrial Relations system.

Data examined in CCI's Amendola Submission<sup>9</sup> about the size and demographics of the state IR system can be summarised as follows:

- it accounts for between 20 to 30 per cent (or 230,000 to 350,000) of the total WA workforce (which is about 1,168,500 employees);
- nearly ¾ of businesses operate in the Perth hub and the Southwest, Wheatbelt, Great Southern and Peel regions are also key areas of business activity. It is assumed the location of unincorporated businesses reflects similar proportions;
- around 88 per cent of employing businesses employ fewer than 20 employees;
- business activity in WA tends to be dominated by services industries, particularly in property & business services and retail trade;
- about 26.9 per cent (or 314,000) of the total workforce is employed by unincorporated bodies that account for about 28 per cent of businesses;
- unincorporated businesses are distributed across the following industries as follows:
  - 53 per cent are in the services industries;
  - 20 per cent are in agriculture, forestry and fishing;
  - 15 per cent are in construction;
  - 6 per cent are in manufacturing; and

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<sup>9</sup> See *CCI's Amendola Submission* for a summary of the findings in the submission about the size and demographics of the state's private sector jurisdiction and Attachment A.



- 5 per cent are in mining.
- about 16 per cent (or 187,000) of the total workforce is employed by state government;
- WA has the lowest union membership across all sectors of 14 per cent with the private sector only 10 per cent;
- union membership is highest in the public sector, but is low or non-existent in unincorporated businesses. The primary data that was the basis of the above conclusions has now been replaced by 2010 data.<sup>10</sup> The Department of Commerce indicates that it still remains difficult to “...clearly and conclusively identify how many employees in Western Australia are covered under the State industrial relations system;”.<sup>11</sup>

The 2010 data suggests unincorporated entities employ 23.8 per cent of Western Australian employees.<sup>12</sup> CCI views this at the high end and therefore unlikely.

CCI suggests that in reality the number of private sector employees remaining in the state jurisdiction may be closer to 11 to 16 per cent<sup>13</sup>, on the following grounds:

- the vast majority of the collective agreement figure (i.e. 44.5 per cent<sup>14</sup>) will be federal; the number of in term state registered private sector agreements are all but non-existent;
- similarly because the number of state registered individual agreements is negligible, the majority of the 42.0 per cent<sup>15</sup> (representing registered and unregistered agreements) will be federal. A 70/30 split suggests that 29.4 per cent of the WA workforce is covered by a federal agreement whereas an 80/20 split suggests 33.6 per cent - the latter is preferred by CCI.

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<sup>10</sup> See Attachment B - supplied by the Department of Commerce, May 2011

<sup>11</sup> Ibid page 9

<sup>12</sup> ABS, *Employee Earnings and Hours, Australia*, May 2010, (cat. no 6306.0)

<sup>13</sup> In other words federal coverage of the WEA workforce is estimated to be closer to a range of 84.43 per cent to 89.62 per cent.

<sup>14</sup> Tables 1 & 2 – Attachment B

<sup>15</sup> Ibid



- assume the majority of the award only employees are federal<sup>16</sup> – a 70/30 split would represent 6.93 per cent of the WA workforce. An 80/20 split is 7.92 per cent – preferred by CCI; and
- the 3.6 per cent attributed to working proprietor of incorporated business<sup>17</sup> best sits in the federal jurisdiction.

It is also important to factor in a further increase in understanding by, and compliance with, the extended coverage of the Federal system by employers; employers who previously were accustomed to a state IR jurisdiction that also covered trading corporations, i.e. pre 2006.

Alternatively, another way of estimating the federal/state composition is to work from the total number of persons employed in WA of 1,232,500.<sup>18</sup> Assuming there are around 110,000 public sector employees (who are not employed by trading corporations), this leaves 1,122,500 employees.

Using this figure and applying the percentages in Tables 1 & 2<sup>19</sup> the federal jurisdictional coverage is approaching 90 per cent of the WA private sector workforce or 82 per cent of WA's total workforce<sup>20</sup>.

This alternative approach suggests the size of the state industrial relations jurisdiction is about 18 per cent of WA's workforce, with the private sector component around 10 per cent.

In conclusion, CCI asserts the number of private sector employees remaining in the state jurisdiction could be as low as 10 per cent, but is certainly no higher than 16 per cent.

### **Characteristics of Unincorporated (micro) Businesses**

Other than the public sector, the vast majority of employers remaining in the state system are unincorporated businesses.

These businesses (aka micro businesses) comprise a workforce of two to seven employees, which is also likely to include the owner/ working director.

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<sup>16</sup> Ibid - Award only = 9.9 per cent

<sup>17</sup> Ibid Tables 1 & 2

<sup>18</sup> Page 13 ABS, Labour Force Cat 6202.0 April 2011, seasonally adjusted.

<sup>19</sup> Attachment B

<sup>20</sup>  $1,005,984/1,232,500 \times 100$  per cent = 81.6 per cent



Current industrial regulation, in particular outdated awards, severely restrict and prevent businesses from moving to extended trade to cater for modern community needs.

There is little time to read, fully understand and apply what are long and complicated industrial relations rules and regulations, together with other employment related legislation.

CCI's Amendola Submission concluded the nature and type of businesses remaining in the state IR jurisdiction provided compelling grounds to dramatically reform and align the IR system to achieve relevance and practical functionality.

The current industrial relations system remains largely irrelevant and inaccessible to the vast majority of businesses remaining in the state jurisdiction.

The challenge is therefore to identify and implement reforms that (incrementally) move the system to being more 'user friendly' and relevant to unincorporated businesses.



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## Structure and Jurisdiction of the Commission

### Modernisation of State Awards

There are currently 215 State private sector awards covering a small number of employers who remain in the system.

Steven Amendola described these employers as “...*small unincorporated businesses with little or no interest in expending the time and cost required to go through a process of cleaning up awards*<sup>21</sup>.”

CCI re-states its support for a genuine modernisation of State awards<sup>22</sup> noting that their genesis was an historically and vastly different industrial relations environment. The current private sector awards are no longer appropriate, practical or relevant to today's businesses.

The question arises, however, whether even a reformed award system reflects the needs of employers and employees in micro businesses.

Accordingly, CCI advocates that comprehensive research is undertaken to determine the number, nature and types of businesses in the state jurisdiction and what current state awards have operational relevance to those businesses.

Given there are only a few in term private sector agreements registered with the WAIRC, this suggests the majority are award reliant; there are only a handful of registered employer-employee agreements.

The data cited by the Department of Commerce,<sup>23</sup> indicates there are 9.9 per cent of WA employees who are award only, i.e. 122,017. If there is a 30 per cent state jurisdiction coverage, 40,672 are under state awards or, if as CCI submits, the figure is closer to 16 per cent, only 19,522 – or even as low as 12,201 - are covered by state awards.

The research may reveal all that is necessary is for there to be a comprehensive minimum conditions safety net; awards may not be required.

In the CCI Amendola Submission it was recommended<sup>24</sup> that private sector awards should be abandoned in favour of statutory minima with any specific industry core

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<sup>21</sup> *Review of Western Australian Industrial Relations System, Final Report*, 30 October 2009, p 129.

<sup>22</sup> Pp 60-61 CCI's Amendola Submission

<sup>23</sup> See Attachment B

<sup>24</sup> Pages 60-61



matters developed in conjunction with particular industries to ensure a balance between business efficacy and employee protection. A transition period of 12 months would allow employers and employees to retain any award provision and if no agreement is reached the award provisions would be preserved for employees employed before the award ceases.

If a reformed award framework can be made relevant, the review process must not replicate the federal award modernisation process that consolidated multiple awards rather than modernising their terms and ensuring operational relevance.

Instead the emphasis needs to be on modernisation, rationalisation and ensuring award content has practical and operational relevance to employers and their employees.

Amendola's Recommendations 58 to 71 provides the basis for developing core sector awards.

Recommendation 58 identifies two options: Commission based process under Ministerial direction (Option A); and an administrative process by a Taskforce subject to Ministerial direction (Option B).

Award rationalisation/modernisation is probably best determined through Ministerial direction, and the process implemented by the WAIRC; similar to the federal award modernisation process.

Relevant stakeholders should be given the opportunity to make written and oral submissions to the WAIRC, which could then determine the content of each award through a form of private arbitration.

CCI suggests that an appeal process is considered, the details and process requirements can be determined in consultation with the stakeholders at a later date.

Modernised state awards must:

- be simple to understand and easy to apply, and be expressed in plain English;
- reduce the regulatory burden on business by reducing the number of awards;
- relocate relevant across award generic provisions to the minimum conditions of employment safety net;
- be economically sustainable, and promote flexible, efficient and productive work practices;



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- balance the responsibilities, rights and interests of employees and employers;
- reflect the requirements of the industries/occupations to be covered by the modernised awards; and
- apply as 'common rule' awards, i.e. no award parties

Although modernised awards would continue to be part of “*a system of fair wages and conditions of employment*”<sup>25</sup>, the new award framework reflects a diminishing role and relevance of awards.

Modernisation of state awards is not intended to disadvantage or discriminate against employees or increase costs for employers.

The focus needs to be on modernising and updating not consolidation, which in CCI's view has severely compromised the effectiveness of the federal award modernisation outcomes.

The 215 current awards can be rationalised into the 20 award categories suggested by CCI.

CCI suggests the following 20 categories are considered for state award rationalisation:

1. Retail;
2. Manufacturing;
3. Building and Construction;
4. Health and Community services;
5. Education;
6. Transport;
7. Hospitality;
8. Wholesale and Storage;
9. Commercial sales;



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<sup>25</sup> Section 6(ca) *Industrial Relations Act 1979(WA)*

10. Mining;
11. Agriculture, Forestry and Fishing;
12. Cultural and Recreational services;
13. Cleaning and Laundry services;
14. Security;
15. Property and Business services;
16. Electricity, Gas and Water;
17. Communication services;
18. Government agencies;
19. Professional, Scientific and Technical services; and
20. General services awards.

It is suggested all the clerical awards are abolished in favour of clerical employees fitting within a classification in each industry award.

Having allocated the 215 awards to each of the categories, it is suggested that phase 1 focuses on key awards, i.e. those where evidence based research shows there are a reasonable number of businesses affected. These areas are likely to include retail, hospitality, restaurants/cafes, cleaning, and community services.

CCI provides a state award service to around 600 members for 67 awards. These awards can be viewed as a guide to the key awards being applied in WA.<sup>26</sup>

Following the award rationalisation and simplification process, it is likely to become apparent that 'core conditions' can be removed from awards and incorporated into enhanced state minimum conditions.

Overtime this may result in the removal of award regulation.

### **Determination of Minimum Wages**

CCI has previously advocated for a significant departure in how the state minimum wage is determined if the State IR powers are not referred.<sup>27</sup>

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<sup>26</sup> See Attachment C



CCI's preferred outcome is that the WA state minima should be identical to the federal minimum. Unincorporated businesses in WA are the only part of the Australian private sector remaining outside the federal jurisdiction.

Currently there is a differential of \$17.30 between the WA minimum wage<sup>28</sup> and the other state and federal minima<sup>29</sup> applying to the private sector.

It is important to note the minimum wages in jurisdictions (other than WA) applicable to the public and local government sectors are different from that applying to the private sector.<sup>30</sup>

In other words, when comparing state wage minima applicable to the private sector with the federal minimum wage, only WA is relevant. Any substantial differential between the WA and federal minimum wage is of concern.

Given the Government's intention to retain a role for the WAIRC in determining a state minimum wage, however, CCI's alternatively suggests consideration is given to utilising an inquisitorial approach to evaluation and determination.

Such a process could have the following characteristics:

- an inquisitorial process based on written submissions, similar to that of the Australian Fair Pay Commission process;
- the scope for employers to argue incapacity to pay is mandated, especially given the micro business constituency;
- the Department of Commerce undertakes/manages the conduct of definitive research about the size and demographics of private sector businesses – their employers and employees – that remain in the state jurisdiction. The outcomes of such research could be used as empirical baseline data to assist the WAIRC in its determination of a state minimum wage;
- federal minimum wage determinations are considered relevant but not determinative consideration;

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<sup>27</sup> See *CCI's Amendola Submission*, for example: pages 57-59

<sup>28</sup> \$587.20

<sup>29</sup> \$569.90

<sup>30</sup> For example: NSW has a two tiered state minima: award free = \$569.90 and state awards = \$592.30. The NSW private sector, however, is bound by the federal minimum wage as it is no longer covered by state awards.



- the views of businesses and employees directly affected by state wage determinations are given greater weight by the WAIRC in its determination of the state wage minima;
- lesser weight is placed on the generalised statements, broad judgements and assertions about the national or WA state economies;
- in other words, moving to a criteria where the internal inconsistencies between criterion is reduced and any remaining competing objectives better lend themselves to being understood and the interests of affected employers and employees better able to be balanced;
- the WA minimum wage process commences after and is informed by the annual federal minimum wage outcome is publicised.



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## Harmonisation

### Unfair Dismissal

CCI proposes the State unfair dismissal system is amended to achieve the objectives of the review Terms of Reference<sup>31</sup> “...to reduce the regulatory burden on business (especially small business), to discourage vexatious and frivolous claims and to streamline the process for resolving claims.”

CCI supports the objective to “... harmonise the provisions for unfair dismissal between the jurisdictions<sup>32</sup>.”

The following elements are essential to secure a sensible and balanced dismissal laws.

First, an employer should have the discretion to terminate the employment of an employee who commits a single instance of gross misconduct, whether summarily or on notice.

Secondly, an employer should be able to terminate an employee's employment, on just terms:

- where sufficient opportunity has been given to the employee to perform to a satisfactory standard but that employee is unable to perform the work he/she has been contracted to do, or
- where the employee has engaged in a pattern of conduct that is incompatible with the employment relationship.

CCI proposes that an employer, of any sized business, should be able to determine within the first 12 months of employment, whether an employee is sufficiently able to perform the work or conduct themselves in an appropriate manner.

A casual employee cannot make a claim for unfair dismissal unless employed for a minimum of 12 months on a regular and systematic basis and also have a reasonable expectation of ongoing employment.

Access to unfair dismissal should be based on the same high income threshold as the Federal system<sup>33</sup> and indexed in the same manner<sup>34</sup>. The exemption for high

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<sup>31</sup> Terms of Reference

<sup>32</sup> WA Government proposed response to the Amendola Review of the WA Industrial Relations system.

<sup>33</sup> *Fair Work Act 2009*, s382(b)(iii)



income earners should be absolute, and not dependent on award or agreement coverage.

All employees will be required to lodge an application for unfair dismissal within 14 days of the dismissal.<sup>35</sup>

It should continue to be unlawful for an employer to terminate an employee's employment on certain grounds such as temporary absence from work because of illness or injury, trade union membership or participation in union activities.

CCI supports the Government's proposal to provide broader capacity for the Commission to order costs in the case of a party bringing a frivolous or vexatious claim.

CCI does not, however, support the notion that an employer can be "frivolously or vexatiously defending a claim". CCI is of the view that an employer has the right to defend or test the veracity of any claim brought against it in order to mitigate any potential loss.

### Right of Entry

CCI supports the broad harmonisation of state and federal right of entry provisions, in particular, the adoption of the 'fit and proper person test.'

In order to ensure the new right of entry system balances the interests of the industrial parties<sup>36</sup>, the federal provisions will need to be modified and adapted.

The current right of entry provisions create a high level of anxiety, confusion and disputation regarding the extent to which unions have a right of entry in a worksite, and the manner in which that is exercised.

It is important to ensure union access to workplaces minimises or eliminates the potential for:

- false expectations that agreements can be broken;
- pressure for unsustainable wage increases;
- demarcation disputes; and

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<sup>34</sup> Set in accordance with the procedure outlines at Division 3, regulation 2.13 of the *Fair Work Regulations 2009*

<sup>35</sup> Reflects section 394(2)(a) of the *Fair Work Act 2009*.

<sup>36</sup> As per the Terms of Reference



- disruptions to business.

Unions should have a right of entry to:

- investigate suspected contraventions of legislation, an award or agreement; or
- hold discussions with employees.

A union seeking entry to a site must be party to an enterprise agreement applying to employees on the site, and hold a valid right of entry permit.<sup>37</sup>

Where the permit holder seeks to hold discussions with employees, they must provide written notice at least 24 hours (but not more than 14 days) before the intended entry<sup>38</sup>.

The permit holder must reasonably suspect that a contravention has occurred, or is occurring, and the burden of proving the suspicion is reasonable lies with the person asserting the fact.

There has been a growing concern union officials are abusing the occupational safety and health entry provisions in the *Industrial Relations Act 1979* asserting there is a safety risk, but not being able to explain what or where it is. It is not uncommon for a union permit holder to gain entry on this basis and proceed with a safety inspection as a fishing expedition.

Accordingly, a permit holder needs to particularise what the alleged occupational health and safety issue is, and if this is not forthcoming the employer/occupier should be allowed to decline entry until reasonable particularisation is provided.

*Fair Work Act 2009* provisions at ss.513<sup>39</sup>, 514<sup>40</sup> and 510<sup>41</sup> should be adapted and adopted in order to effectively monitor the permit system.

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<sup>37</sup> All permit holders must also be registered pursuant to the *Fair Work Act 2009*.

<sup>38</sup> In accordance with s 478(3) of the *Fair Work Act 2009*

<sup>39</sup> Considering application – permit qualification matters.

<sup>40</sup> When a permit must not be issued.

<sup>41</sup> When a permit must be revoked or suspended



## Individual Agreement Making

CCI notes that changes to the current individual statutory contract provisions of the *Industrial Relations Act 1979* (Act) are not being entertained by the Minister at this time.

Part VID of the Act is devoted to Employer-Employee Agreements (EEA) – 64 pages of complex and convoluted provisions. It is no surprise that the take up rate amounts to almost zero. Unincorporated businesses, which generally do not employ many staff, are more likely to prefer simplicity through individual agreements.

CCI is of the view that to make the state system relevant and user friendly, employers and employees should be allowed to enter into statutory individual agreements subject to a 'better off overall' test.

Individual agreement making should be simplified and be readily accessible to private sector employees and employers.

Features of simplified individual agreements are set out below:

- An employee may be offered an individual agreement at any time, provided a better-off overall test<sup>42</sup> has been met.
- An employee who has been offered an individual agreement has the right to be represented by a person of their choosing, including their union.
- Coercion is prohibited. An employee cannot be required or forced to make an individual agreement and cannot be discriminated against for their choice.
- Individual agreements are operational from the date of their lodgement.
- An individual agreement can be offered to an employee covered by a collective agreement<sup>43</sup>.

Individual agreements allow an employer and an employee to alter 'one-size-fits-all' regulation in awards or collective agreements with specifically tailored

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<sup>42</sup> The basis of the better-off overall test is the modern State Award and the *Minimum Conditions of Employment Act 1993*.

<sup>43</sup> In this instance the better-off overall test will be based on the employee's current collective agreement and the *Minimum Conditions of Employment Act 1993*.



arrangements. This can help lift productivity, efficiency, flexibility and reward – benefiting both the business and its employees.

As revealed by WAIRC data, EEA registrations has dropped from 398 in 2002-2003 and to only 4 in 2009-2010. This is not because employers and employees do not want individual arrangements, but because EEAs suffer from a number of flaws that if addressed will ensure they are a viable alternative.

The EEA legislative framework should be overhauled to ensure individual agreements become a viable option and reflect the needs of employers and employees in these businesses.

In particular the process for offering and lodging EEAs is overly prescriptive and difficult to follow creating multiple opportunities for the agreement to fail, as do the requirements regarding the content and structure of the EEA. This complexity is particularly problematic for small business who may seek the option of individual agreements.

The level of difficulty surrounding EEAs was highlighted in an appeal to the WAIRC over the Registry's refusal to register EEAs established by the City of Melville for six of its employees<sup>44</sup>. In its decision, the Commission highlighted that in some aspects of the registration process the Registry had failed to properly interpret and apply the provisions of the Act. This decision highlights the complexity of the EEA provisions and confirms the experiences of CCI in relation to the registration of EEAs for our members.

CCI experience also indicates that EEA lodgement has not resulted in registration. Some reasons related to a narrow interpretation of the Act. Some of the grounds for rejection of EEAs include:

1. Agreements did not include some provisions of the *Minimum Conditions of Employment Act 1993*, i.e. provisions relating to redundancy.

The Act does not require this. It only talks about requirements for registration where an Agreement purports to “provide conditions of employment less favourable to the employee than MCoE Act”. [s 97VD(1)(c)]

2. While the Act refers to Casuals, (97UL) any Agreement with casuals which purports to allow the employer to vary their hours, is being interpreted as



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<sup>44</sup> City of Melville v Registrar, 2003 WAIRC 08023.

disadvantaging the employee in terms of Section 97VS (3) - a virtual prohibition on employing casuals under EEAs results.

3. S 97VS is also being used to refuse EEAs where reference is made to the employer's "...policies or procedures which may be changed from time to time", even though the policies and procedures may not refer to conditions in the Agreement.
4. 97UW is being interpreted as requiring a new EEA if a person is demoted, transferred or promoted.

The need to lodge new Agreements every time the employee's conditions change is a serious deterrent to the use of EEAs.

5. In the Dental Industry it is not unusual that the Dentist has to change the days of the week that a part time employee might be required to work (without reducing the contracted hours).

A clause that reflected this right in an EEA resulted in the rejection of the EEA under 97VS (3). Again the Act is being interpreted in a way that precludes the employer having any flexibility in the use of staff for the benefit of the business.

If changes can be made only with the express agreement of an employee then the employer has no control over the business.

6. Agreements have been rejected or referred back without any verbal contact or clarification sought because of perceived omissions such as no reference to meal breaks and the non inclusion of carer's leave. There is nothing in the Act to require that all conditions must be included in Agreements.
7. Agreements have been rejected on the basis that the dispute provisions do not comply with the model provisions when the Act does not require strict adherence to the model clause, although Section 97UO has mandatory provisions.

The model provisions are inordinately long and excessively prescriptive to the extent that they would dominate most Agreements.

This requirement is a deterrent to most employers who never have serious issues requiring independent arbitration with individual employees.

These difficulties highlight the need for the Government to simplify the process for making and registering individual agreements.



CCI recommends that in order to develop a more workable system of individual agreements the following changes need to be considered:

- (a) Section 97XZ & 97YB provide that employment cannot be conditional on the acceptance of an EEA. This establishes a significant barrier to establishing stable employment arrangements across an organisation. This prohibition is difficult to understand given the requirement for EEAs to pass a NDT against the relevant award, which ensures protection is afforded to employees and that conditional employment can be offered to employees engaged on the terms of the award or an industrial agreement;
- (b) Section 97VV requires the NDT to “take into account all relevant terms ... whether money or otherwise”. This establishes an overly complex NDT which is difficult to assess, and as such reference to “or otherwise” should be removed.
- (c) Section 97UR provides that EEAs for existing employee not take effect until registered. Given the complexities involved in registration this process may take several months, significantly delaying the operation of the agreement;
- (d) Section 97VF provides for a 14 day cooling off period after an EEA is lodged, creating uncertainty for the employer. Given the NDT and other protections this is unnecessary;
- (e) Section 97WD allows for the inspection of an EEA by any person (other than “protected information” i.e. employee name and address). This affords the employer no privacy from competitors and other third parties of efficiencies gained as a result of an EEA;
- (f) Section 97UF restricts the making of an EEA where an Industrial Agreement is in operation, including an agreement which continues to operate beyond the nominal expiry date;
- (g) Section 97UA limits EEAs to individual agreements. This should be amended to provide scope for an agreement having many individual employees as signatories.



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## Statutory Minimum Conditions of Employment

Although the Government has made no specific reference to reviewing WA's minimum conditions of employment the CCI is of the view that this is an inevitable corollary to award modernisation.

Currently statutory minimum conditions of employment are predominantly provided for by *Minimum Conditions of Employment Act 1993* and some other legislation, e.g. *Public and Bank Holidays Act 1972*.

In the CCI Amendola submission there was a comparison of the current provisions in the *Minimum Conditions of Employment Act 1993* with the National Employment Standards (NES) and proposed a set of minima - see Attachment D.

It is proposed that the *Minimum Conditions of Employment Act 1993* is amended to update and to ensure it is only this Act that provides the new State minima. This will necessitate consequential amendments to various pieces of legislation.

To avoid doubt, the *Minimum Conditions of Employment Act 1993* will require an amendment that explicitly confines application of its' provisions to public sector and unincorporated private sector organisations.



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## Review and Simplify Legislation

CCI reiterates<sup>45</sup> its' request that the State Government review and simplify employment related legislation with a suite of legislative repeals, amalgamations and rationalisation, and where practicable incorporate all statutory employment condition related minima into the *Minimum Conditions of Employment Act 1993*.

One of the most pressing amendments is in relation to the *Public and Bank Holidays Act 1972*.<sup>46</sup>

CCI is recommending an amendment that maintains the status quo prior to 1 January 2010 and aligns WA legislation more closely with other states and territories.

The following proposal maintains the status quo for most award covered employees, and is widely consistent with the public holiday principles set down by the Australian Industrial Relations Commission Public Holidays Test Case<sup>47</sup> that ensured all employees have access to the same number of public holidays.

CCI's proposes the following position:

- Where New Year's Day or Australia Day fall on a Saturday or Sunday, a substitute public holiday should be appointed on the following Monday.
- Where Anzac Day falls on a Sunday, a substitute public holiday should be appointed on the following Monday.
- Where Christmas Day or Boxing Day fall on a Saturday, a substitute public holiday should be declared on the following Monday.
- Where Christmas Day or Boxing Day fall on a Sunday, a substitute public holiday should be declared the following Tuesday.

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<sup>45</sup> Page 13 *CCI's Amendola Submission*

<sup>46</sup> This matter has been the subject of several letters by CCI to the Government over the last couple of years.

<sup>47</sup> 1994 Print L4534 and 1995 Print L9178



## Summary of CCI Responses

Attachment E identifies the responses by CCI to all the matters listed in the document attached to the Minister's letter received 8 April 2011.

Additionally this Attachment cross references each of the Government proposals with the relevant recommendations in the Amendola report.

