Fair Work Act Review

SUBMISSION BY THE WESTERN AUSTRALIAN GOVERNMENT

17 February 2012
Introduction

The Western Australian Government (WA Government) welcomes the opportunity to make a submission to the Fair Work Act Review (the Review).

The Commonwealth Government, when introducing the Fair Work Bill 2009 into Parliament, stated that the legislation would create a “national workplace relations system that is fair to working people, flexible for business and promotes productivity and economic growth.”¹

Now that the Fair Work Act 2009 (FW Act) has been in effect for over two years, it is timely to assess whether, in practice, it operates as intended. The primary objective of the FW Act is “to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians.”² It is incumbent on the Commonwealth Government, particularly in the current economic climate, to remove any legislative barriers identified by the Review to workplace productivity, growth and flexibility.

Approximately 70% of employees in Western Australia (WA) are covered by the provisions of the FW Act. The WA Government submits that the FW Act should deliver outcomes which assist to improve Australia’s flexibility and productivity and which strengthen the country’s economic performance. Over the next five years, the WA resources sector will generate an estimated $140.1 billion worth of projects.³ It is imperative that the federal workplace relations system facilitates the development and success of these resource projects. The federal system also needs the flexibility to stimulate and support growth and productivity in essential industries outside the rapidly expanding resource sector, including local manufacturing, housing construction and the retail industry.

It is essential that the FW Act does not create an imbalance of power that hinders the competitiveness and growth of the State. The FW Act has been widely criticised as concentrating too much power with unions to the detriment of productivity and flexibility, in a climate where union membership in the private sector is only 14%.⁴

The WA Government submits that there are a number of provisions which should be reviewed and amended to ensure the FW Act meets its stated objective. These are outlined below.

¹ Explanatory Memorandum, Fair Work Bill 2009, page i.
² Section 3 of the FW Act.
Bargaining

The WA Government considers that the bargaining structure of the FW Act should be amended, as a matter of priority, to ensure genuine bargaining and to minimise the damaging effects of protracted industrial action on Western Australian business, workers and their families and the economy. In particular, it is the WA Government’s submission that:

- the interaction between the FW Act’s bargaining provisions (Part 2-4 – Division 8) and protected industrial action provisions (Part 3-3) should be clarified to ensure that bargaining has formally commenced before protected industrial action can be taken;

- Fair Work Australia should have greater capacity to suspend protected industrial action; and

- the WA Minister responsible for industrial relations matters should have standing to apply to suspend or terminate protected industrial action.

Since the introduction of the FW Act, there have been more working days lost to industrial disputes in both Australia and WA. Between the March 2006 and March 2009 quarters there were on average 1,400 days lost in WA and 30,000 in Australia, compared to the period of the June 2009 to September 2011 quarters during which on average there were 4,400 and 43,500 days lost respectively.\(^5\) This increase may be attributable to a variety of factors, however, the role of the FW Act cannot be discounted.\(^6\)

Interaction between the FW Act’s bargaining and protected industrial action provisions

The WA Government has concerns that the FW Act’s new bargaining provisions have been undermined by the majority Fair Work Australia decision in *J.J. Richards & Sons Pty Ltd v Transport Workers’ Union of Australia*.\(^7\) The interaction between the bargaining and protected industrial action provisions under the FW Act is, as demonstrated by the decision, ambiguous. The WA Government supports a construction of the relevant provisions consistent with the minority decision of Senior Deputy President O’Callaghan in the *J.J. Richards* decision. Bargaining should be occurring before a protected action ballot can be granted.

---

6 Including enhanced powers for unions in the context of bargaining and right of entry, and the removal of individual agreement-making.
7 [2010] FWAFB 9963.
As observed by Senior Deputy President O’Callaghan, “a protected action ballot is most likely to apply to a smaller employee population than is the case in the consideration of a majority support determination”. Union membership in Australia has gradually declined in WA and Australia since 1990. Enterprise agreements must be approved by a majority of employees to be covered, not just union members. The FW Act should be amended to make it clear that bargaining must be occurring, as evidenced by a majority support determination, before a protected action ballot can be sought and granted. Without such an amendment, protected industrial action may occur notwithstanding there is no bargaining and no demonstrable prospect of an agreement being made, and contrary to the express wishes of the employer and a majority of affected employees.

Suspension of protected industrial action

The WA Government submits that there should be greater capacity for Fair Work Australia to suspend protected industrial action on the ground of “significant harm” to a third party under section 426 of the FW Act. The current threshold for suspending protected industrial action on this ground is excessively high, particularly considering suspension is only temporary in nature.

It is acknowledged that “effective industrial action will almost always cause harm to the employer’s business which, in turn, will frequently adversely affect third parties being the customers, clients or other persons who depend upon the timely supply of goods or services by that employer”. However, when estimated losses of up to $3.5 million per day to a third party are characterised as “not significant in the relevant sense”, there should properly be a reconsideration of what is meant by “significant harm”.

It should not be necessary to establish harm that is “exceptional” or “out of the ordinary” in order to suspend protected industrial action under section 426 of the FW Act. The term “significant” should be legislatively defined consistent with its ordinary meaning – “important, notable; consequential”. Even then, Fair Work Australia would still have to be satisfied that suspension was broadly “appropriate” (section 426(5) of the FW Act).

---

8 Ibid at paragraph 167.
10 At the least, a union should be required to apply for a majority support determination to demonstrate that it is genuinely trying to reach an agreement.
12 Construction, Forestry, Mining and Energy Union v Woodside Burrup Pty Ltd [2010] FWAFB 6021 at paragraph 41.
13 Ibid at paragraph 59.
It is acknowledged that federal industrial legislation has moved away from compulsory conciliation and arbitration as the preferred method for dealing with industrial disputation. It is the WA Government's view, however, that a strong and independent industrial umpire still has a legitimate role in helping to resolve prolonged and intractable bargaining disputes – including by arbitration where appropriate.

**Standing to suspend or terminate industrial action**

It is the WA Government’s strong view that sections 423, 424 and 426 of the FW Act should be amended to enable the WA Minister responsible for industrial relations matters to apply to suspend or terminate protected industrial action. Currently, only Ministers of States that have referred industrial relations powers to the Commonwealth have such standing (as well as Ministers of the Territories).

Excluding the WA Minister from applying to suspend or terminate protected industrial action has no rational basis. The fact that WA has not referred industrial relations powers to the Commonwealth does not affect, in any relevant sense, the impact of industrial action on WA businesses, workers and their families and the economy. The fact is that up to 70% of WA employees are covered by the FW Act.\(^{15}\)

While the WA economy remains on a steady growth path, it is not immune to the risks presented by volatile global financial markets. The WA Government has a legitimate interest in ensuring that protracted industrial action does not unduly impact on the State’s economic growth, business investment and projects already under construction.\(^{16}\) Indeed, section 597A of the FW Act entitles the WA Minister to make a submission in Full Bench proceedings where it is in the public interest to do so. It is difficult to justify why the WA Minister has an entitlement under section 597A, but not in the context of industrial action where there may be strong public interest considerations. The WA Minister may be in a unique position to provide evidence to Fair Work Australia on the impact of particular industrial action on the WA population and/or economy.

As a recent example, the WA Minister for Transport wrote to the Prime Minister in November 2011 seeking the Commonwealth’s intervention in industrial action at Fremantle Port. The WA Government had a legitimate interest in the impact of the industrial action on the State’s largest general cargo port and associated transport chain.\(^{17}\) Prolonged industrial disputation at Esperance Port in 2011 cost an estimated $50 million in State exports.


\(^{16}\) According to Deloitte Access Economics’ Investment Monitor December quarter 2011, projects in the WA mining and petroleum industries account for 46% of all investment under construction or committed to nationally (with a combined estimated worth of $267.2 billion).

\(^{17}\) Fremantle Port handles around $26 billion in trade annually. This equates to an average of $3 million in trade every hour of every day. In this context, even short periods of industrial action can significantly impact on an important part of the WA economy.
Having to petition the Commonwealth to intervene on the State’s behalf is an unsatisfactory and circuitous way of dealing with the issue.

The WA Government also had an interest in the recent Qantas dispute, given the impact on the WA tourism and associated industries, as well as affected WA passengers. While the WA Government considers that it would only intervene where strong public interest grounds warranted such action, the FW Act should nonetheless facilitate such intervention.

**General protection provisions**

The WA Government has concerns with the breadth of the “adverse action” provisions of the FW Act, particularly section 351 dealing with discrimination. It is the WA Government’s view that section 351 unnecessarily duplicates various State and federal laws (e.g. anti-discrimination laws). There is an increasing tendency, particularly in the industrial relations sphere, for federal laws to overlap with State laws and to complicate (rather than improve on) existing regulation.

The current six-year timeframe for bringing an adverse action claim (not involving termination) is unduly long and creates unnecessary uncertainty for business. This can be contrasted with the 12-month timeframe for making a complaint under the *Equal Opportunity Act 1984 (WA)*. A shorter timeframe is further justified taking into account:

- the reverse onus of proof for adverse action claims;
- that a person may be held liable notwithstanding they had multiple reasons (including lawful reasons) for taking certain action; and
- that there is no cap on the amount of compensation that can be ordered as a result of adverse action, including compensation for non-economic loss such as distress, hurt or humiliation.

In the circumstances, the WA Government considers it reasonable that there be a significantly reduced timeframe for bringing an adverse action claim (not involving termination) under the FW Act.

**Individual Flexibility Arrangements**

The individual flexibility arrangement (IFA) provisions of the FW Act (sections 144-45 and 202-204) were introduced to “ensure that the needs of employers and employees are met” and to “assist employees in balancing their work and family responsibilities and improve retention and participation of employees in the workforce.” IFA need to deliver what they purport to do.

---

18 Noting that international dignitaries for the Commonwealth Heads of Government Meeting in Perth were also affected by the disputation.
19 Section 83(4), although the Commissioner for Equal Opportunity may accept a complaint out of time where there is good cause.
20 *Australian Licenced Aircraft Engineers Association v International Aviations Service Assistance Pty Ltd* [2011] FCA 333.
employers and employees with flexibility and the ability to achieve good business outcomes.

The WA Government considers that the ability for IFAs to be terminated by the employer or employee with 28 days’ notice is unworkable. The ability to unilaterally withdraw at short notice could create serious operational disruptions for an employer, particularly where the IFA concerns rosters and hours of work. Conversely, an employee may have altered their hours of work to deal with childcare arrangements. It is undesirable for employers and employees alike that IFAs be underpinned by such uncertainty.

The WA Government accordingly submits that the FW Act be amended to require IFAs to specify a nominal term, with no ability for parties to unilaterally withdraw from the agreement during that term.

There is anecdotal evidence that unions are seeking to limit the use and scope of IFAs in enterprise agreements, which in turn undermines their stated objective. The FW Act should be amended to prescribe a flexibility term that must be included in all enterprise agreements. This would minimise the risk of “Claytons” flexibility terms being included in enterprise agreements as a result of union opposition.

National Employment Standards (NES)

Long service leave

The current NES provisions in relation to long service leave (LSL) are complex and cumbersome, making it difficult for employers and employees to determine their respective rights and obligations. The WA Government is currently participating in the Long Service Leave National Employment Standard working party with the Commonwealth Government and other States and Territories to attempt to establish a new national LSL standard.

It is the WA Government’s view that any new LSL standard should not diminish the current application of the Long Service Leave Act 1958 (WA) to national system employers and employees. The WA Government supports the ability for “cross border” national employers to negotiate a single LSL provision in enterprise agreements.

If there is to be a new legislated LSL standard, it is essential that the standard not impose any additional cost, or administrative burden, on employers in Western Australia.

---

Annual leave loading payable on termination

The WA Government is concerned about confusion arising from the conflict between NES provisions with regard to payment of annual leave loading on termination and the annual leave provisions of some modern awards.

Section 90(2) of the FW Act requires that an employee with a period of untaken annual leave be paid out on termination what they would have been paid if they had taken this leave. A number of modern awards provide that annual leave loading is not payable on termination, or only payable in certain circumstances.23

The Fair Work Ombudsman is advising employers and employees that payment of annual leave loading is required on termination, regardless of award provisions. This situation has led to confusion for employers and employees about what provisions apply, and may expose employers to underpayment claims and/or prosecution.

23 For example, the Meat Industry Award 2010 specifies “No annual leave loading is due for a period of leave paid out which is less than one year.”