

CCIQ SUBMISSION

Department of Justice and Attorney- General – Issues Paper

**‘Should Queensland maintain or terminate its
referral of workplace relations jurisdiction
relating to unincorporated businesses to the
Commonwealth?’**

CHAMBER OF COMMERCE AND INDUSTRY QUEENSLAND

22 FEBRUARY 2013

INTRODUCTION

1. CCIQ welcomes the opportunity to make a submission to the consultation process being conducted by the Queensland Government as to whether it should maintain or terminate its referral of workplace relations (WR) jurisdiction relating to unincorporated businesses to the Commonwealth.
2. This proposition was outlined in an Issues Paper released by the Department of Justice and Attorney-General (DJAG) in December 2012.
 - i. The Issues Paper was developed in response to concerns expressed by Queensland's business community (small and medium businesses in particular) with respect to the operation of the Fair Work system (FW system). These concerns will be explored below.
 - ii. Termination of the referral would bring unincorporated businesses back under Queensland's WR system (the Queensland system), which currently applies only with respect to state and local government employees.
2. CCIQ is Queensland's peak employer body for small and medium enterprises (SMEs) and is aware of the importance of WR arrangements to its members. They are a key factor in the overall business operating environment in Queensland (and across the country), as they can affect not only a business's finances, but its overall capacity to structure and plan its operations in a viable, sustainable and profitable manner.
 - i. Consequently, CCIQ is cognisant of the difficulties that SMEs have experienced under the FW system, which has regulated (or re-regulated) every aspect of the labour market to the detriment of those employers who can least afford to comply. These include some of Queensland's key industries, such as agriculture, tourism and hospitality.
 - ii. CCIQ therefore welcomes the Queensland Government's efforts to provide some relief to our state's SMEs, particularly in the absence of any indication from the Federal Government that it might be willing to relax some of the most contentious aspects of the FW system.
3. However, CCIQ believes that maintaining a genuinely national WR system is in the interests of all Queensland businesses, as it is able to provide the certainty, clarity and consistency that were missing from WR laws in Australia for so long. Accordingly, CCIQ does not

currently support the Queensland Government terminating its referral of its WR powers to the Commonwealth with respect to unincorporated businesses. We believe that it is easier to pursue change to one WR system than multiple systems: this is the best way to improve the business operating environment in Queensland in a manner that will benefit *all* employers.

4. However, in light of the significant discontent among Queensland SMEs with the *Fair Work Act 2009* (FW Act) and the regime it underpins, CCIQ considered that it was important to test our views about the benefits of a national system with our members.
 - i. To this end, CCIQ conducted a survey of our members' views on the matters that arise from the Issues Paper through our quarterly *Westpac/CCIQ Pulse Survey of Business Conditions* (the Pulse Survey). 600 businesses took part in the Pulse Survey, while in addition, as separate survey with the same questions was sent to clients of Australian Business Lawyers for completion.
5. The results of the Pulse Survey strongly indicate that while respondent employers do not wish to return to the state system, they also believe that the FW Act requires urgent reform. CCIQ considers that these results serve to affirm the stance it has taken with respect to WR reform, which has been to advocate for a number of crucial changes that we have identified in consultation with Queensland SMEs as having the potential to effect fair and genuine improvements in their businesses.
6. This submission will explore what action can and should be taken in order to not only remove pressures from Queensland employers, but to pave the way for business conditions that support prosperity and economic growth.
 - i. This submission begins by setting out the results of the *Westpac/CCIQ Pulse Survey of Business Conditions*.
 - ii. It will then go on to explain these results by exploring the benefits of a national WR system versus a state system, and identify some of the specific problems that could arise if the Queensland Government terminates its referral of WR jurisdiction to the Commonwealth.
 - iii. The substantive problems with the FW Act will then be examined, before setting out CCIQ's views and recommendations for a path forward on WR reform.

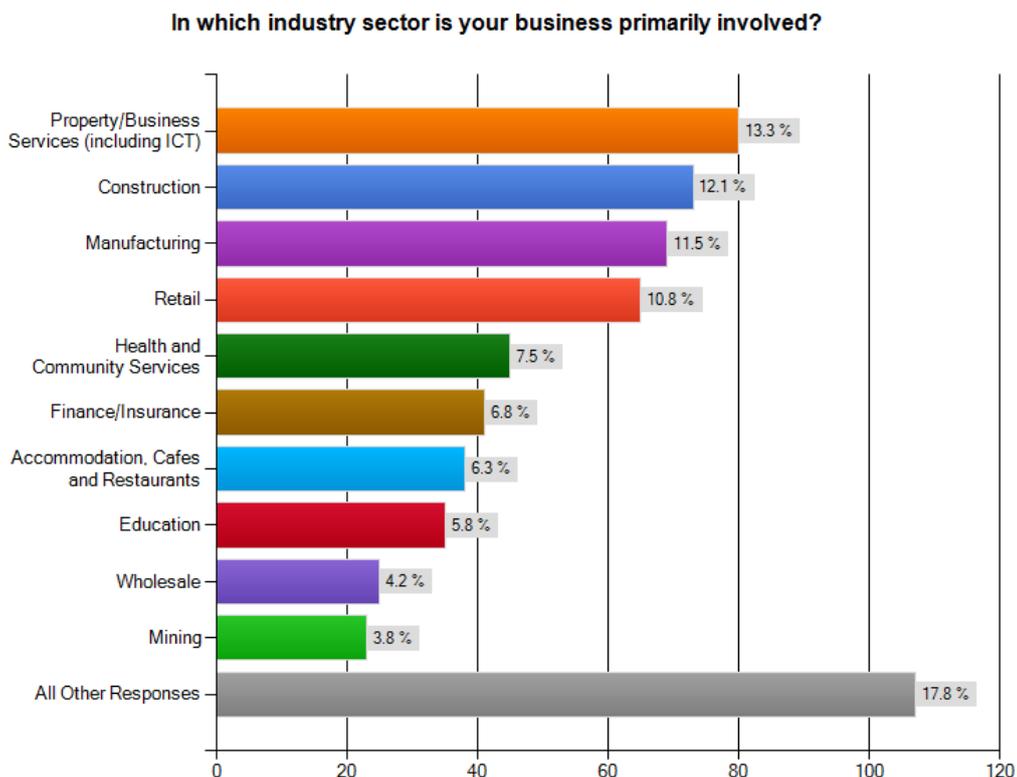
7. CCIQ notes the brief history included in the Issues Paper setting out the shift from state-based WR systems in Australia to a national system, and will not restate that background in this submission.

WESTPAC/CCIQ SURVEY OF BUSINESS CONDITIONS

Demographics of respondents

8. The Pulse Survey respondents were representative of a broad range of industries, business sizes and business types, as **Figures A, B and C** below show. This is important, as it ensures that the Pulse Survey results are reflective of the views held by a good cross-section of Queensland businesses.

Figure A: Breakdown of respondents by industry sector

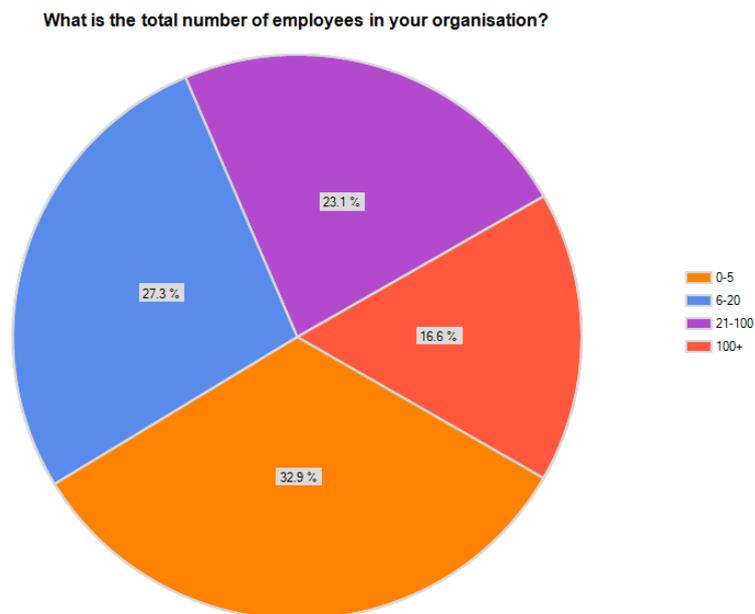


9. **Figure B** shows that the business sizes (when measured by the number of employees) of respondent businesses varied greatly, with small, medium and large businesses participating in the Pulse Survey.
 - i. Given that the proposition contained in the Issues Paper is in response to concerns from the business community about the impact of the FW Act on workplace flexibility and productivity, it is important to determine how businesses of different

sizes perceive the benefits of the national system as compared to the Queensland system in terms of their relative effects on flexibility and productivity. This is because certain aspects of WR regulation affect businesses differently depending on their size.

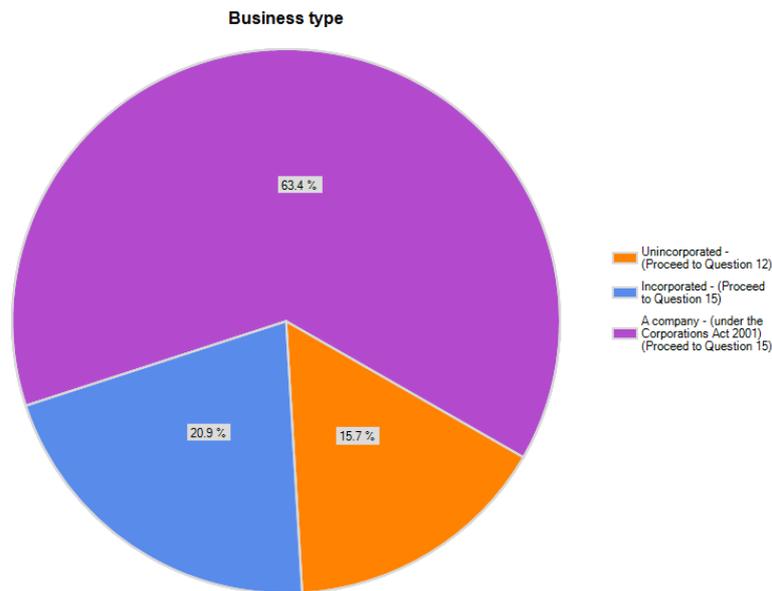
- ii. Just over 60 per cent of respondents were small businesses with zero to 20 employees. Given that Queensland Government’s proposition would directly affect unincorporated businesses, which generally tend to be small, the Pulse Survey results provide an important insight in to how small businesses generally (whether incorporated, unincorporated or companies) view the respective merits of the Queensland and national systems.

Figure B: Breakdown of respondents by business size



- 10. **Figure C** provides a breakdown of respondents by business type, that is, unincorporated businesses (15.7 per cent); incorporated businesses (20.9 per cent); and companies (63.4 per cent).

Figure C: Respondents by business type



Unincorporated businesses

11. Just over 80 per cent (81.8 per cent) of unincorporated businesses that responded to the Westpac/CCIQ Pulse Survey were in operation prior to 2009, when the Queensland Government referred its WR jurisdiction to the Commonwealth.

12. When asked whether they would have preferred to remain under the Queensland system, 60.7 per cent of unincorporated businesses responded 'no' (see **Figure D**). Furthermore, 66.7 per cent indicated that they did not now wish to revert to the Queensland system (see **Figure E**).
 - i. When asked to comment on their response to this question, respondents' answers included that:
 - i. They were tired of continued regulatory changes and had already expended significant time and money becoming compliant with the federal system - they considered that regulatory churn would be more likely to continue under a state system;
 - ii. They did not perceive that the Queensland system would advantage their business in any way; and
 - iii. They thought that they would experience confusion and compliance difficulties with state industrial awards.

Figure D: Unincorporated businesses that would have preferred to remain under the Queensland system

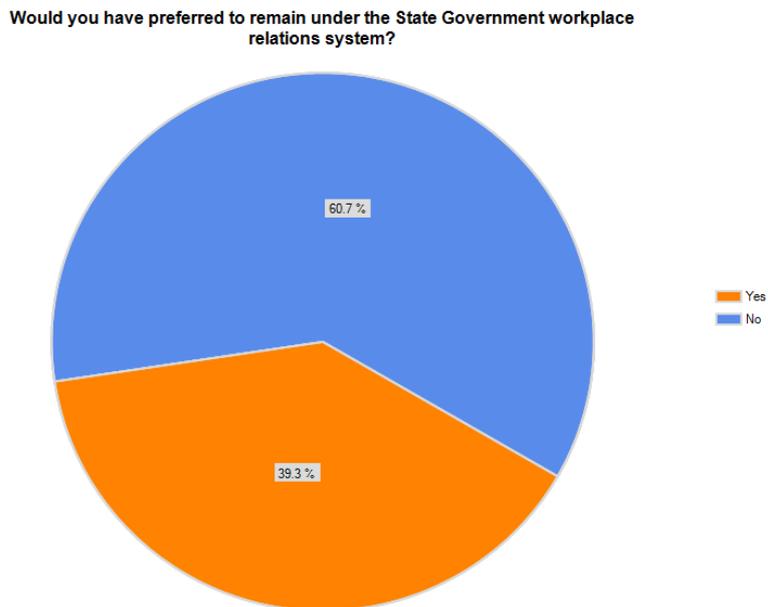
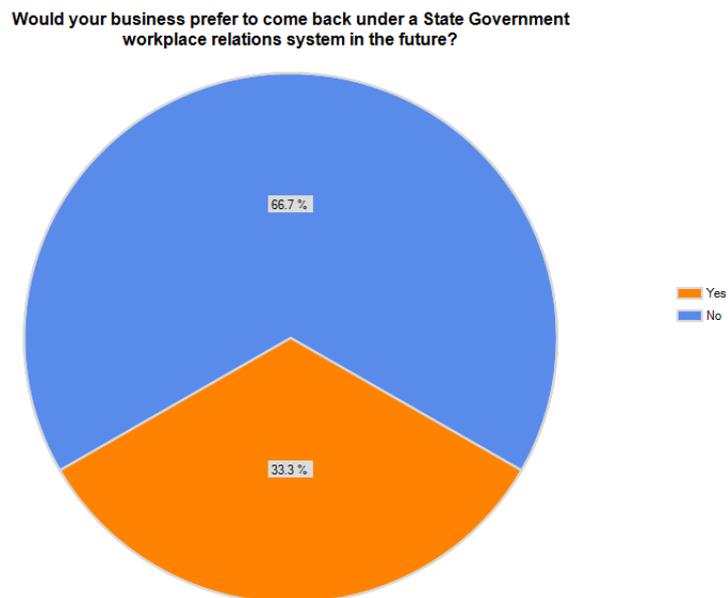


Figure E: Unincorporated businesses that would prefer to come back under the Queensland system in the future

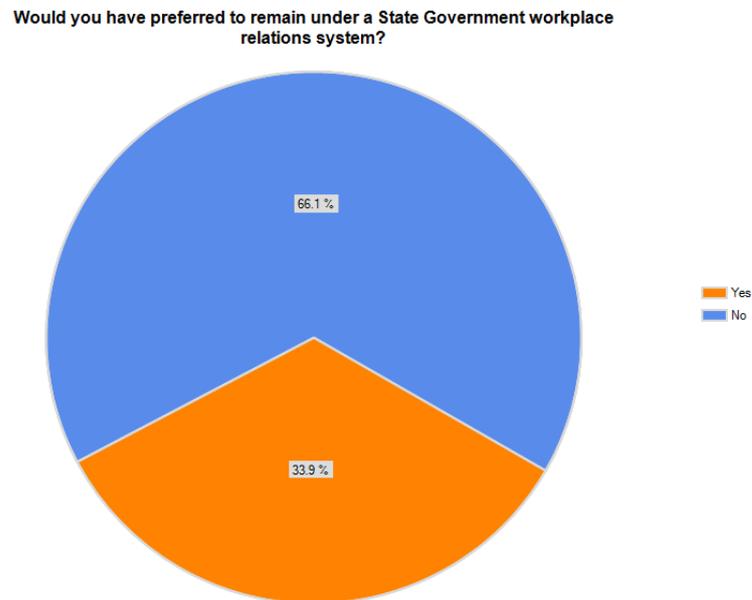


Incorporated businesses/companies

13. With respect to incorporated businesses and companies, just under two thirds (63.9 per cent) were in operation before 2005, which is when incorporated businesses were brought

under the national system. Of these businesses, 66.1 per cent of respondents indicated that they would not have preferred to remain under the State system (see **Figure F**).

Figure F: Incorporated businesses and companies that would have preferred to remain under the Queensland system

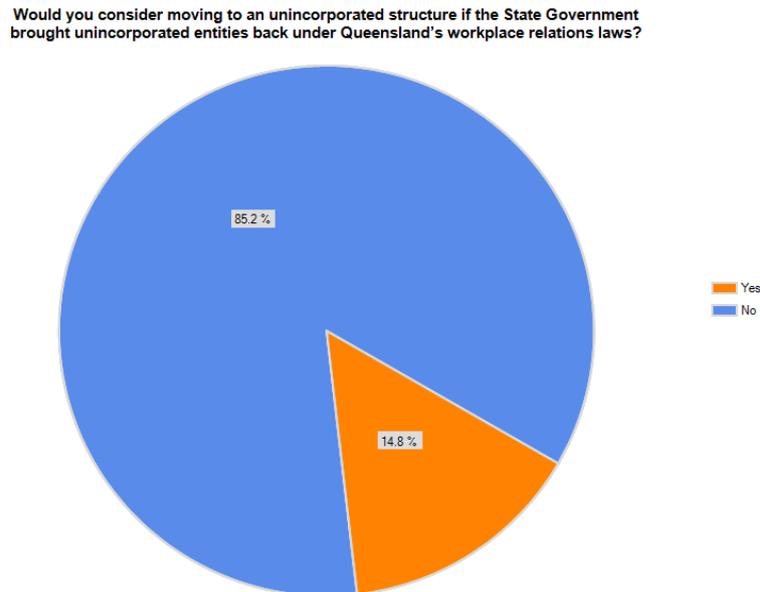


14. When respondents were asked whether, in the event that the Queensland Government was to terminate its referral, they would move to unincorporated arrangements so that they would fall back under Queensland system, 85.2 per cent indicated that they would not do so (see **Figure G**).

- i. When asked to comment on their response to this question, respondents' answers included that:
 - The cost of doing so would outweigh any relative benefits that the Queensland system may offer;
 - They were tired of continued regulatory changes and had already expended significant time and money becoming compliant with the federal system - they considered that regulatory churn would be more likely to continue under a state system;
 - They operated across multiple jurisdictions and federal laws brought consistency for their business, despite where it might be located;
 - They did not perceive that the Queensland system would advantage their business in any way; and

- there would be negative tax implications associated with such a move, as well as implications for management structures and liability.

Figure G: Businesses that would prefer to come back under the Queensland system in the future



All businesses

15. The Pulse Survey asked businesses to comment on what they considered to be the benefits of a national system. Some of the benefits identified by respondents (that is, companies and incorporated and unincorporated businesses) included:

- i. Consistency and less confusion, particularly where businesses employ workers in more than one jurisdiction;
- ii. More simplified awards;
- iii. All businesses within a given industry operate under the same laws, ensuring consistency of expectations among employees and enabling employers to compete on a level playing field;
- iv. Efficiency and less red tape, allowing businesses to streamline their internal policies and processes; and
- v. Less bureaucracy at a state level.

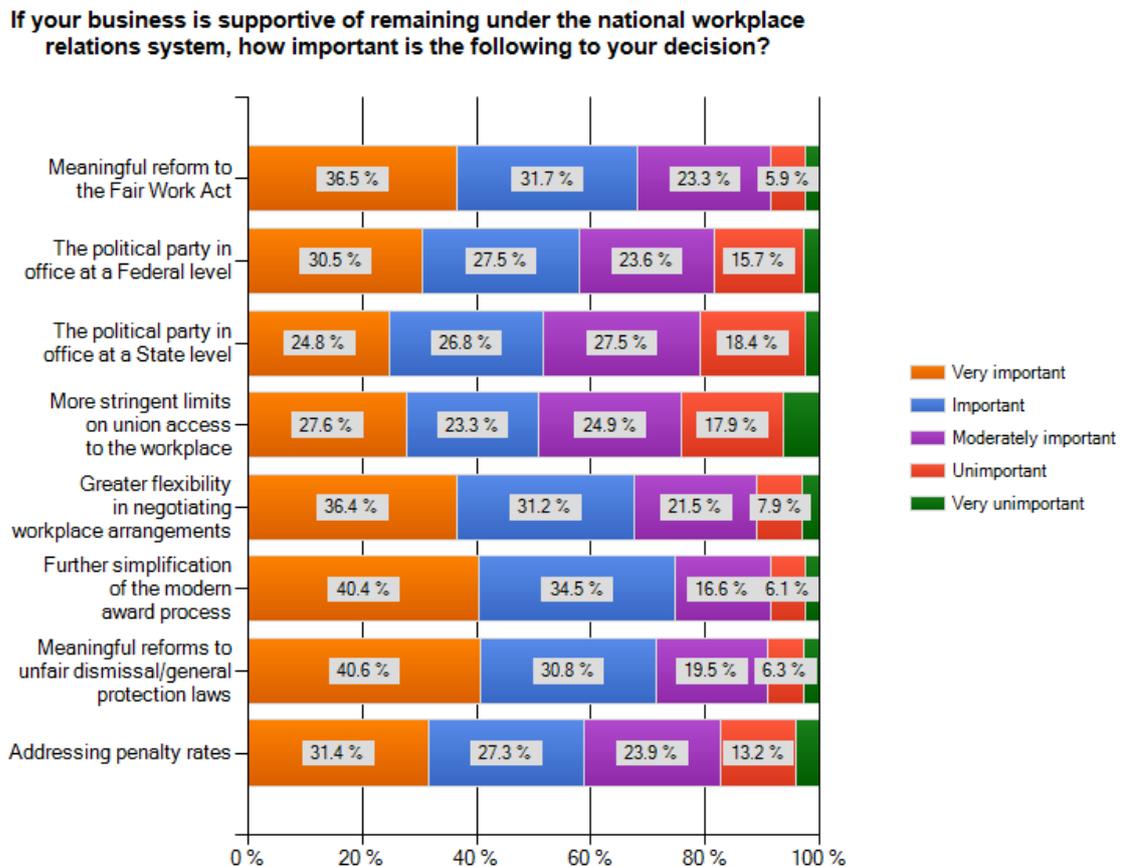
16. While respondent businesses indicated a clear preference to remain under the national system, nearly 68.1 per cent responded positively when asked whether the FW Act requires 'urgent reform'. Some of the problems with the FW Act that respondents identified included:

- i. A general perception that the FW Act is unfairly balanced in favour of employees at the significant expense of employers (both in terms of financial cost, and their prerogative to run their business as they see fit);
- ii. It has become too complex for small businesses to comply with;
- iii. Unfair dismissal laws are stifling the ability of employers to manage their employees and are encouraging the return of 'go away' money;
- iv. It provides for much greater union involvement in the workplace;
- v. It has pushed up the cost of wages, and the penalty rates regime in the FW Act is unsustainable for businesses in the hospitality and tourism industries;
- vi. Flexibility has been almost entirely eroded, and attempts to negotiate flexible working arrangements are met with punitive consequences;
- vii. It does not provide sufficient recognition of the incapacity of SMEs to absorb the cost of additional regulation;
- viii. The reform must be sustainable and designed to remain relevant and applicable for the long-term; and
- ix. The FW Act does not allow businesses to compete in an increasingly global economy.

17. Businesses were asked to indicate how important particular WR issues were to their continued support for remaining under the national system. **Figure H** sets out those issues which respondents considered to be 'very important' or 'important':

- i. Further simplification of the modern awards process (74.9 per cent);
- ii. Meaningful reforms to unfair dismissal/general protections laws (71.4 per cent);
- iii. Greater flexibility in negotiating workplace arrangements (67.6 per cent);
- iv. Addressing penalty rates (58.7 per cent); and
- v. More stringent limits on union access to the workplace (50.9 per cent).

Figure H: Importance of issues determining respondent support for the national system



Implications and analysis of the Westpac/CCIQ Pulse Survey results

18. The Pulse Survey results highlight something of a paradox: the majority of surveyed businesses do not wish to revert to a state-based WR system, but they hold major concerns with respect to certain aspects of the FW Act and believe that it requires urgent reform.

19. It is therefore instructive to take a closer look at the results of the Pulse Survey in the context of the benefits of the national system versus a state system.

Benefits of a national system versus a state system

20. CCIQ considers that the main benefits of a national system are the consistency, clarity and efficiency that it brings when compared with state WR systems. This is not necessarily a reflection on or a criticism of the Queensland system, but relates to the inherent problems of state-based WR laws in a federation such as Australia.

- i. The national system has operated to create uniform employment conditions for all workplaces: this means that businesses operating across state borders do not need

to be familiar with multiple different systems, whilst all businesses no longer have to determine whether they fall under the state or federal system with regard to a particular issue. In this regard, state systems are duplicative, operating to confuse employers about the legal source of their obligations toward their employees.

- ii. This is particularly the case with respect to wages and awards: the award modernisation process undertaken by the Australian Industrial Relations Commission and then Fair Work Australia (now the Fair Work Commission) reduced a complex, overlapping system comprised of hundreds of state and federal awards into 122 modern awards. While CCIQ considers that further rationalisation of federal modern awards needs to occur, it would be a retrograde step to re-introduce state-based awards into the WR environment in Queensland, where there are currently 327 industrial awards.
- iii. While the proposition in the Issues Paper relates to unincorporated businesses, the clear disinclination of the majority of business respondents toward returning to the Queensland system leads to the conclusion that from a business perspective, it is not an attractive option. 66.7 per cent of unincorporated survey respondents indicated that they would not prefer to be brought back under the Queensland system, while 85.2 per cent of respondents from incorporated businesses and companies would not move to unincorporated arrangements to take advantage of the Queensland system.
 - The responses provided by all businesses demonstrate that a number of issues are of uniform importance, regardless of industry, business type or business size. For example, given that nearly 75 per cent of respondents highlighted ‘further simplification of modern awards’ as ‘very important’ or ‘important’, it may be surmised that they are a major issue for Queensland businesses. With respect to unincorporated businesses only, it is unlikely that they would benefit from being required to pay Queensland, as opposed to federal, industrial awards. There would also be confusion in certain industries that are heavily award-reliant, and comprised of a combination of incorporated and unincorporated businesses, about the wages and conditions payable between employers.

Specific consequences of terminating the referral in Queensland

21. Other consequences that would result if the Queensland Government terminates its referral of WR jurisdiction to the Commonwealth include:

- i. It would only assist some Queensland employers within a few industries where there is a high concentration of unincorporated businesses, such as agriculture, forestry and fishing. In other industries where there is a combination of companies, incorporated businesses and unincorporated businesses, such as tourism, incorporated businesses would remain under the national system while unincorporated businesses would revert to the Queensland system. This is despite the fact that the tourism industry as a whole in Queensland urgently requires action on issues such as penalty rates and flexibility arrangements in order to remain competitive.
 - Much of the qualitative data taken from the Pulse Survey indicated that businesses valued the ‘level playing field’ that the national system provided, and were eager for this to be preserved.
- ii. The Issues Paper does not highlight exactly *how* the Queensland system would, in its current form, assist or benefit industries with a high proportion of unincorporated businesses. Arguably, the Queensland legislation would have to be subject to a broad-based review as to how it would operate with respect to SMEs before termination of its referral was to occur. This would need to address those issues that survey respondents highlighted as being ‘very important’ or ‘important’ to their support for the national system, including further simplification of modern awards, penalty rates, flexibility arrangements and unfair dismissal reforms, and how the Queensland system would improve upon the national system in respect of these issues.
- iii. Even if the substantive aspects of the Queensland system worked to assist businesses in the short to medium term, belying this is the reality that state governments are subject to change and as a corollary of that, so are state-based WR systems. While the same may be said about federal governments and the national system, any amendments made at the federal level take effect uniformly across the country, rather than subjecting a particular state to the consequences of political fluctuations.
 - This is consistent with qualitative data from the Pulse Survey, which suggested that regulatory churn, that is, constant change in WR laws, posed

a major compliance burden. It is likely that reverting to the Queensland system would exacerbate this problem, rather than do anything to allay it.

- iv. Terminating Queensland's referral would require a significant expansion of Queensland's bureaucracy and industrial umpire (in the Queensland Industrial Relations Commission). For example, Queensland is currently in its second year of transitioning to a modern awards system. Not only would this process be delayed if the referral was terminated, requiring transitional provisions that would add a further layer of confusion for employers, but it would constitute an additional and unnecessary impost on the state's finances.
 - A number of the comments provided by Pulse Survey respondents highlighted the fact that in bringing unincorporated businesses back under the Queensland system, an unnecessary increase in state bureaucracy would result. Given that unincorporated businesses are a minority in the Queensland business community, the cost associated with facilitating their reversion to the Queensland system would arguably be disproportionate to any benefits that might come from doing so.

Western Australia and its non-referral

22. CCIQ notes that Western Australia remains the only state that has not referred its jurisdiction with respect to unincorporated powers to the Commonwealth. However, it may be argued that this decision was driven by longstanding principles around the sovereignty of the Western Australian parliament that precluded it from referring state powers to the Commonwealth.
 - i. The Issues Paper, in setting out the example of WA as 'the non-referring State', does not identify any significant benefits that unincorporated businesses have gained from remaining under the WA system.
 - ii. Indeed, it operates to highlight the duplicative nature of state-based WR systems, referring to WA Government discussion papers that focus on the need for reforms to WR legislation that would harmonise it with national provisions, as well as for modernisation of State awards. These are lengthy, technical and expensive processes, and it is questionable whether WA's efforts in this regard would be better spent working with other jurisdictions to achieve broad-based change at the national level.

Problems with the FW Act

23. It is necessary to separate the merits of a national system from its substantive content, namely, the FW Act. The underlying problem with the FW Act and the policy rationale behind it is that it seeks to protect employees against the worst category of employer, and in doing so punishes the vast majority of those who do the right thing by their employees.
- i. This has involved extensive and punitive legislation with respect to issues such as pushing up wages and penalty rates, restricting the use of flexibility arrangements to render them essentially meaningless, putting in place unfair dismissal and general protections laws that put hiring decisions in the hands of the Fair Work Commission (FWC), and paving the way for greater union access into workplaces.
24. By supporting a national system, CCIQ in no way seeks to diminish the problems that the problems outlined above have had on Queensland businesses in terms of not only their productivity, but their viability in the short, medium and long term. Rather, it is the extent of the reform required that goes to the need for change to occur on a uniform basis: the effect that the FW Act is having, in its current form, on businesses not just in Queensland but across Australia is undermining Australia's capacity to remain a modern and dynamic economy that can compete in an increasingly global environment.
- i. The feedback that CCIQ frequently receives is that businesses, particularly SMEs, are focused more on their 'day-to-day survival' and fending off closure than on innovations and productivity-enhancing measures. The high costs of employment and the weakening of managerial prerogative has undoubtedly contributed to this mentality among employers.

Necessary changes to the FW system: a path forward

25. CCIQ will continue to advocate for meaningful reform to the FW Act that brings about tangible change for Queensland's SMEs, and we will seek firm commitments from both the Federal Government and the Federal Opposition in the lead up to the federal election (currently scheduled for 14 September).
26. The commitments that we are seeking at the federal level will be drawn from CCIQ's *Workplace Relations Blueprint: A Workplace Relations Framework for Modern Businesses*, which we are preparing to release in the coming month. It contains a number of recommendations with respect to what Queensland's SMES have told CCIQ are the

necessary foundations of a WR system that strikes a balance between the needs and requirements of employers and employees

27. These recommendations include:

- i. Amending the FW Act to better provide for the negotiation of individual flexibility arrangements (IFAs) that give genuine flexibility to employers and employees.
- ii. Introducing measures to better balance the responsibility for superannuation between employers and employees.
- iii. Placing sensible limits on employee access to unfair dismissal and general protections laws, and putting in place mechanisms to discourage vexatious or false claims. A complete exemption for small businesses from unfair dismissal claims is part of this recommendation.
- iv. Further rationalisation be undertaken with respect to modern awards, and allowing for common-sense changes to be made with respect to matters such as minimum engagement periods, extension of maximum averaging periods and flexibility with respect to the operation of penalty rates;
- v. Simplifying the process for negotiating, approving and implementing enterprise agreements;
- vi. Putting more stringent limits on when protected industrial action may be taken; and
- vii. Eliminating barriers to the commencement and completion of apprenticeships and traineeships.

28. These are changes that would provide tangible improvements in the operations of all Queensland businesses.

29. CCIQ draws confidence from the willingness of the Queensland Government to consider measures that will assist the state's SME community, particularly in light of the fact that state governments have limited levers to draw on in this regard.

- i. However, in the absence of appropriate reform following the federal election, CCIQ undertakes to again survey its members about their views on remaining under the national system.

- ii. In the event that their views have changed from those set out in this submission, we would be willing to work with the Queensland Government to review its WR laws to identify common-sense amendments that could be made to the Queensland system.

Conclusion

30. The importance of workplace relations arrangements to Queensland's SMEs cannot and should not be understated, and it is this awareness that has informed CCIQ's commitment to bring about broad, positive changes to Australia's WR system that stand the test of time.
31. CCIQ would be pleased to provide a briefing to the Attorney-General and departmental officials on the full set of results collected in the *Westpac/CCIQ Survey of Business Conditions*, including a full breakdown of the qualitative and quantitative data received.