

# **REGULATION OF CHILD EMPLOYMENT IN WESTERN AUSTRALIA**

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## Abstract

Review of the Western Australian legislation and awards regulating child employment in the state reveal a need for a renewed focus on protection of children from exploitation in the workplace. While Parliament is currently considering amendments to relevant legislation<sup>1</sup> that should improve protection they are piecemeal and do not adequately progress toward consistent national regulation.

## Introduction

There is a general appreciation by Australian society that children can be more vulnerable to exploitation in the workforce because of their inexperience, because of their lack of appreciation of what is in their best interests, and because of the low level of bargaining power they possess as holders of basic and undeveloped skills. Protective legislation exists in Western Australia to alleviate this. The Children and Community Services Act 2004 (WA) (CCSA 2004) specifically regulates child employment, and along with the School Education Act 1999 (WA) and safety legislation an existing network of restriction on the use of child labour in Western Australian workplaces is formed.

The Occupational Safety and Health Act 1984 (WA) is general law applicable to all employers and employees in Western Australia<sup>2</sup>, but it does attach to some particular protections for children, for example, in hazardous industries like agriculture there are expectations of safety inductions for inexperienced workers.<sup>3</sup> Education legislation has a direct impact on limiting the employment of children because it requires children of compulsory school age to be enrolled and in attendance at school or elsewhere for educational purposes and not to be employed during those hours.<sup>4</sup> This is required until the end of the year in which the child reaches 17.<sup>5</sup> However, the education legislation, like that of most other Australian states does not seek to

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<sup>1</sup> Part 4, Industrial and Related Legislation Amendment Bill 2007 (WA)

<sup>2</sup> The Occupational Safety & Health Act 1984 (WA) encompasses safety issues relating to employment of children but does not specifically address employer responsibilities in respect of children. For example, there is no higher duty specified in relation to children. Worksafe, the government agency charged with regulatory administration, do provide materials to employers; for example, aids to help with risk assessment and other information that details specific risks to young workers, for example "Children at the Workplace", a Bulletin available at [http://www.docep.wa.gov.au/WorkSafe/PDF/Bulletins/children\\_in\\_workplac.pdf](http://www.docep.wa.gov.au/WorkSafe/PDF/Bulletins/children_in_workplac.pdf), accessed on 31/7/08. However, there are no Codes of Practice or Guidance Notes that are solely dedicated to young workers. Mention of young workers occurs in some Codes of Practice, for example, the Violence, Aggression and Bullying at Work Code of Practice recognises young workers are more vulnerable, available at .

<sup>3</sup> See Agricultural Workbook 12, available at [http://www.docep.wa.gov.au/WorkSafe/Content/Industries/Agriculture%2C\\_forestry\\_and\\_fish/Further\\_information\\_/Agriculture\\_workbook/Safety\\_induction.html](http://www.docep.wa.gov.au/WorkSafe/Content/Industries/Agriculture%2C_forestry_and_fish/Further_information_/Agriculture_workbook/Safety_induction.html), accessed on 31 /7/08

<sup>4</sup> S.9(1) and s. 29 School Education Act 1999 (WA)

<sup>5</sup> S. 6(c)(ii) School Education Act 1999 (WA)

specifically control child employment, rather to best facilitate the education of Western Australian children.<sup>6</sup>

This paper will focus on the CCSA 2004 and award regulation of child employment in Western Australia, making some comments in relation to future directions.

### Current regulation

The CCSA 2004 controls child employment by defining some necessary terms, setting prohibitions and granting exceptions, and finally, by empowering authorities. It is supplemented by a range of awards covering the employment of children in specific industries.

The CCSA seeks to promote the wellbeing of children and, amongst other objectives, specifically looks to protect children from exploitation in employment.<sup>7</sup> In common with other state legislation<sup>8</sup>, it prioritises the best interests of a child above alternate considerations<sup>9</sup>, and dedicates a particular part of the legislation to child employment.<sup>10</sup> The definition of ‘child’ that is applicable to Part 7 is the one that is applicable generally throughout the CCSA 2004 and encompasses all persons less than or apparently less than 18 years.<sup>11</sup> More specifically, Part 7 defines what it is to ‘employ’ a child. The definition is broadly expressed, to capture any engagement of a child to carry out work, not just engagement under a contract of service.<sup>12</sup> The coverage of children engaged in any arrangement including those described as contracts for services is intended.<sup>13</sup> This expansive definition also embraces such engagement regardless of whether or not it is paid.<sup>14</sup>

### The prohibition

The Act institutes an age-based prohibition. The prohibition is imposed on any person who, in relation to a business, trade or occupation carried on for profit, seeks to engage a child under 15 for the performance of work.<sup>15</sup> Other states in Australia also look to a mid-teen age determinant.<sup>16</sup> Interestingly, the International Labour Organisation standard also makes mention of the age of 15 as a minimum age for work when it makes 15 a default minimum to the primary determinant, the age for completion of compulsory schooling.<sup>17</sup> The international standard, if it were to be a

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<sup>6</sup>The Act is supplemented by vocational education regulation offering apprenticeships and traineeships

<sup>7</sup> s. 6(e) Children and Community Services Act 2004 (WA)

<sup>8</sup> E.g. s. 8 Children and Young People Act 2008 (ACT) and Chapter 13 Children and Young Persons (Care and Protection) Act 1998 (NSW)

<sup>9</sup> S. 7 Children and Community Services Act 2004 (WA)

<sup>10</sup> Part 7 Children and Community Services Act 2004 (WA)

<sup>11</sup> S.3 Children and Community Services Act 2004 (WA)

<sup>12</sup> Ibid., s.188

<sup>13</sup> Ibid., s.188(b)

<sup>14</sup> Ibid., s.188(a)

<sup>15</sup> S. 190 Children and Community Services Act 2004 (WA)

<sup>16</sup> E.g. s.10(3) Child Employment Act 2003 (Vic.); s.11(1) and s. 7 Child Employment Act 2006 (QLD); s. 795 and s.3 (Dictionary) Children and Young People Act 2008 (ACT)

<sup>17</sup> C138 Minimum Age Convention 1973 Article 2.3; this convention has not been ratified by the Australian government. However, the United Nations Convention on the Rights of the Child Article 32(2), which the Australian government has ratified, requires prescription of a minimum age for employment

basis for the Western Australian prohibition, would set the effective minimum age for child work at the end of our required compulsory schooling period, that is, at the end of the year the child reaches 17.<sup>18</sup> Such a high minimum age might be considered a good reason for a continued divergence from the international standard where, in effect, an older age for completion of compulsory schooling raises the minimum working age.

The minimum working age of course does not prevent children from lawfully engaging in work. It appears to be a minimum only for some work, typically work commitments that are potentially dangerous or which are continuing and prevent or interfere with the child attending school and enjoying the developmental activities of childhood. Indeed, a transitional period of simultaneous education participation and work performance is anticipated for children by the Convention, recognised by its significant exemptions relating to light work and training.<sup>19</sup>

Exceptions to the prohibition are also utilised by the Western Australian legislation. In short, the under 15 prohibition becomes operative only in respect of some forms and types of work because it is matched with significant exceptions that allow children to work at younger ages. Work that is engaged in within a family business<sup>20</sup> is one of the exceptions, as is work that falls into the categories of performance, entertainment and advertising.<sup>21</sup> In addition to these broad areas of child work, age-based exceptions are granted in respect of children aged between 10 and 13 in relation to delivery work that is supervised by a parent of the child or authorised adult and is carried out before 7pm and after 6am.<sup>22</sup>

Most broadly, age-based exceptions are granted to employers of children 13 and over. These children are not prohibited from engaging in delivery, shop, retail<sup>23</sup> or restaurant work at all, as long as they have permission in writing from a parent and work is finished before 10pm and not commenced before 6am.<sup>24</sup> The work performed in these areas is not required to be supervised by a parent and could involve a wide range of activities, not limited to cashier and shelving work, but including cleaning, packing, cooking and lifting.

The specification of particular jobs (delivery), industries (retail) and locations (shops and restaurants) as the basis for exception seems arbitrary in the current workplace. While legislators have considered these suitable areas and types of work for early teens<sup>25</sup>, it is submitted particular industries, jobs and locations of work can no longer

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<sup>18</sup> See n5

<sup>19</sup> C138 Minimum Age Convention 1973 Article 6 & 7

<sup>20</sup> 'Family business' means a business, trade or occupation carried on by a parent or other relative of the child: s.188 Children and Community Services Act 2004 (WA)

<sup>21</sup> S.191 Children and Community Services Act 2004 (WA)

<sup>22</sup> Ibid. s.190(3)

<sup>23</sup> Reg. 21A Children and Community Services Regulations 2006 prescribes collection of shopping trolleys at or in the vicinity of a shop or other retail outlet as prescribed permissible work for children 13 and over .

<sup>24</sup> s. 191(4) Children and Community Services Act 2004 (WA)

<sup>25</sup> The exceptions were part of the CCSA 2004 as passed. They effectively replaced the licensing provisions for restricted street trading and public entertainment found in s. 106 and s. 108 of the Child Welfare Act 1947 (WA). Begging, performing and racing were prohibited under a certain age: Ibid. s.108.

be considered implicitly suitable for child work. At the least, the exceptions could be viewed as selective permissions to work that are ignorant of the tasks a child might be required to perform and the conditions of work they might be subjected to. This same criticism could be weighed at the exceptions made of performance, entertainment and advertisement in respect of all Western Australian children under 18.<sup>26</sup> Lifting and cleaning work, for example, can be recognised as potentially dangerous to children in terms of back and shoulder injuries and chemical exposure, respectively. Similarly, performance work that involves exposure to adult concepts could equally be recognised as unsuitable work for children.

Interestingly, apart from the nature of work approved for children of 13 and over, there appears to be no restriction on the number of hours of work performed by children in the CCSA 2004. Children in retail, delivery and hospitality can be employed to perform extensive hours of work outside school hours without offending any provision. The number of hours of work performed in any particular period, say over a week, is not of relevance. Nor is the amount of hours of work performed on a daily basis. It could be argued that the Education Act prohibition on employment during school hours is sufficient and that any other consideration of the amount of work undertaken by a child is a matter for parental guidance, and not the legislature. This is a view that has not been followed in Queensland's recent re-regulation of child employment<sup>27</sup> which stipulates maximum hours of work performance by children within given time periods and specific industries.<sup>28</sup>

While there is an absence of limitation of the amount of work undertaken by a child once they are within an exception, there is provision for the case of a particular child to come to the attention of the authority<sup>29</sup>, and where it is considered the wellbeing of that child is likely to be jeopardised by employment or by the nature or extent of work, the authority can limit or prohibit the employment of that child.<sup>30</sup> Such a limitation is focussed on the child rather than the employer, but is provided in respect of the child, and notice is given to its parent and the employer.<sup>31</sup> An industrial inspector is authorised to make enquiries at workplaces which could lead to the authority being notified.<sup>32</sup> It is reasonable to presume an inspector would be interested in the nature of the work being performed by a child, the number of hours of work a child is required to perform, as well as any specific conditions the work is being performed under. An inspector could take proceedings against an employer based on breach of the prohibition in the Industrial Magistrates Court.<sup>33</sup>

It is worth noting the exception of delivery, shop, retail and restaurant work is an extremely large one. Recent statistics tell us nearly half of 15 to 19 year old youth

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<sup>26</sup> S.191(2) Children and Community Services Act 2004 (WA)

<sup>27</sup> Reg. 5(3) Child Employment Regulations 2006 (QLD)

<sup>28</sup> Schedule 1 Child Employment Regulations 2006 (QLD)

<sup>29</sup> s. 193(2) Children and Community Services Act 2004 (WA) names the Chief Executive Officer of the appropriate government department, presumably the Department for Child Protection

<sup>30</sup> Ibid.

<sup>31</sup> Ibid. s. 193(2) and (4)

<sup>32</sup> Ibid. s. 195; the Industrial Inspector would be appointed pursuant to their role under the Industrial Relations Act 1979 (WA) s.98 and Part 3 of the *Public Sector Management Act 1994*

<sup>33</sup> S.196(1) Children and Community Services Act 2004 (WA)

labour in Australia work in retail trade<sup>34</sup>. It is likely many 13 and 14 year olds participating in our workforce would have started work within the same industry, remaining there into their later teens. Even without more statistical information it seems the exception could be responsible for at least channelling Western Australian children into specific types of work. More aptly, the exception does legalise all work within the areas listed and leaves further restriction to subsidiary regulation and responsible employers.

It is suggested the delivery, shops, retail and restaurants exceptions are not equivalent to the light work exception made in the Minimum Age Convention mentioned earlier. Interestingly, Parliament do imply the exceptions example light work in their Explanatory Memorandum when they list light work as an exception to the under 15 employment prohibition<sup>35</sup>. In contrast the international standard refers to light work as work that is excluded from the minimum age restriction because it is safe and unobtrusive work on the basis it is not likely to harm a child's health or development or interfere with their participation at school in terms of attendance or in terms of their capacity to benefit from the education they receive.<sup>36</sup> Moreover, the international standard also specifically refers to limiting the hours of work performed by children and the conditions in which the work is performed.<sup>37</sup> This concept of work would apparently take in a mature judgement of both the type of tasks being performed and the time the child spends performing them, with an outcome that particular work is not light if it presents a risk of harm or interference regardless of which industry or location it involves.

A number of Australian states have adopted this international standard concept.<sup>38</sup> For example, light work is recognised by reference to the nature of the work not being detrimental to the child's health or development in Victoria<sup>39</sup>. In the Australian Capital Territory a broad consideration of light work is undertaken, based on the work not being contrary to the best interests of the child.<sup>40</sup> These exceptions reflect a more traditional view of child protection, with the best interests of the child and their safety being paramount considerations. The light work exception then presents as more protective.

Alternative to the specific exceptions already discussed, legislators could rely on a list of prohibited types and forms of work considered to be dangerous or inappropriate for children. Such a declaration would leave employers unrestricted to employ children in any occupation or circumstance that was not specified. A number of states include such prohibitions in their legislation. For example, Victorian legislation prohibits

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<sup>34</sup> Australian Bureau of Statistics (2007), Unpublished data – August 2007, referred to in Fair Employment Advocate Western Australia, *Vulnerable Workers: Young People*, Discussion Paper 3, April 2008

<sup>35</sup> Children and Community Development Bill 2003 Explanatory Memorandum page 64, available at [http://www.parliament.wa.gov.au/parliament/bills.nsf/4141D53BC0363F8548256E7B0006624C/\\$File/EM++Bill+265-1.pdf](http://www.parliament.wa.gov.au/parliament/bills.nsf/4141D53BC0363F8548256E7B0006624C/$File/EM++Bill+265-1.pdf), accessed on 31/7/08

<sup>36</sup> C138 Minimum Age Convention 1973 Article 7(1)(a) and (b)

<sup>37</sup> Ibid Article 7.3

<sup>38</sup> E.g. s. 20 Child Employment Act 2003 (Vic.), light work is defined in s.5(1); s. 793 Children and Young People Act 2008 (ACT)

<sup>39</sup> For example, s. 5(1) Child Employment Act 2003 (Vic.)

<sup>40</sup> s. 793 (a) Children and Young People Act 2008 (ACT); note 'light work' is also to be identified in regulations

specific types of employment like door to door sales, offshore fishing and building and construction.<sup>41</sup> Queensland legislation allows for the prescription of types of work which are not to be performed at all by children.<sup>42</sup> Other states have general prohibitions on dangerous employment of children.<sup>43</sup> Use of prohibitions based on the type and form of work children can lawfully participate in might better satisfy concerns over safety of child workers. Of course, occupational health and safety legislation already operates to place on any employer of a child a responsibility for minimising the risk of harm to the child once employed<sup>44</sup>, but dedicated prohibitions on types and forms of work could operate to prevent the employment being contemplated in the first place.<sup>45</sup> The self-regulating employer then has no doubt as to the types of task suitably assigned to a child.<sup>46</sup>

It should be noted the CCSA does include an express prohibition on one type of work. That is, there is a prohibition on children performing indecent work.<sup>47</sup> This prohibition attracts a criminal penalty to employers who require indecent, obscene or pornographic performance in the context of entertainment or exhibition or advertisement.<sup>48</sup> For parents who permit this employment there is also a criminal penalty.<sup>49</sup> The indecent prohibition would tend to limit the effect of an absence of restriction on children participating in the employment areas of entertainment, exhibition and advertising. With no age-based restriction, but a hefty penalty for criminal activity, this prohibition presents as a narrow but effective targeted deterrent bolstered by criminal law.<sup>50</sup>

The use of a heavy penalty can be recognised as an effective means of restricting child employment, even if it only operates when an exception does not apply. The under 15 prohibition carries a significant penalty<sup>51</sup>, heavy when compared to other states' penalties for similar offences.<sup>52</sup> Prosecutions based on breach of the prohibition have been successful quite recently, with penalties imposed on one employer totalling \$50000.<sup>53</sup> Breach is frequently concerning the use of children for

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<sup>41</sup> S.12(1) Child Employment Act 2003 (Vic.)

<sup>42</sup> S. 9(1) Child Employment Act 2006 (QLD)

<sup>43</sup> E.g. s.222 Children and Young People (Care and Protection) Act 1998 (NSW)

<sup>44</sup> S. 19 Occupational Safety and Health Act 1984 (WA)

<sup>45</sup> Industry specific safety legislation like the Factories and Shops Act 1963 (WA), which contained age bans on dangerous machinery, no longer exists. The Act mentioned was repealed in 1995.

<sup>46</sup> The current system of self regulation by employers is considered possibly risky to children's safety in the workplace: Richardson K, "Age, working hours and creating safe working environments for young workers in Queensland" (2007) 28 QLD Lawyer 76

<sup>47</sup> s.192 Children and Community Services Act 2004 (WA)

<sup>48</sup> Ibid., s.192(1), penalty is 10 years

<sup>49</sup> Ibid., s.192(2), penalty is 10 years

<sup>50</sup> E.g. s.331B and s. 331C(2)(a) Criminal Code Compilation Act 1913 (WA)

<sup>51</sup> S. 190(1) Children and Community Services Act 2004 (WA), penalty is \$24000

<sup>52</sup> See for example s. 10(3) Child Employment Act 2003 (Vic), penalty is 100 (corporation) or 60 penalty units, a penalty unit is currently \$113.42 (fixed pursuant to s. 5(3) Monetary Units Act 2004(Vic.)); s. 10(1) Child Employment Act 2006 (QLD), penalty is a maximum of 100 penalty units

<sup>53</sup> see for example 87 Western Australian Industrial Gazette Part 1 Appendix 1, Complaints/Claims available at

[http://www.slp.wa.gov.au/industrial/indgaz.nsf/2C1CFA63D473371BC825732100127E6B/\\$File/Appendix+1.pdf](http://www.slp.wa.gov.au/industrial/indgaz.nsf/2C1CFA63D473371BC825732100127E6B/$File/Appendix+1.pdf) and 87 Western Australian Industrial Gazette Part 2 Appendix 1, Complaints/Claims available at

[http://www.slp.wa.gov.au/industrial/indgaz.nsf/5C516929E6DF5304C82573D8000B6590/\\$File/Append01.pdf](http://www.slp.wa.gov.au/industrial/indgaz.nsf/5C516929E6DF5304C82573D8000B6590/$File/Append01.pdf), accessed on 29 /7/08

night work beyond the 10pm deadline and the failure of the employer to obtain parental permission for engagement of children under 13. These penalties have been imposed on employers, but there is the facility of imposition of the same penalty on parents who permit their children to work in contravention of the prohibition.<sup>54</sup> A defence to the charge exists if a person, in practical terms, an employer, can prove they believed reasonably that the child was at least 15 years.<sup>55</sup>

The CCSA provisions present as facilitative provisions for some occupation, industry and location based employment of early teen children, accompanied by an otherwise applicable general prohibition on employment of under 15s. Avoiding overly restrictive conditions on under 15s child employment appears to have been achieved by the 2004 legislation, intentional or not, with the apparent maintenance of the under 15 prohibition that Western Australians have come to know.<sup>56</sup> While there is no specific light work limitation, some residual control has been maintained by stiff penalties on employers who abuse the rules of under 15s employment.

#### State award protections for children

Awards have not traditionally focussed much attention on child workers, perhaps because of the small number of child workers perceived to be covered.<sup>57</sup> However, a number of Western Australian industry awards now contain minimum wages and other conditions of employment for children. Children are usually not identified separately, but included as junior employees. For example, the Restaurant, Tearooms and Catering Workers' Award 1979 provides for junior employees engaged in those areas of work.<sup>58</sup> It is largely concerned with the minimum wages juniors should be paid. A junior employee, while not specifically defined, is, by reference to adult wage percentage calculations, any employee less than 20.<sup>59</sup> Juniors would earn a percentage of the minimum adult wage<sup>60</sup>, and enjoy discounted deductions for board and lodging<sup>61</sup>. The Restaurant Award acknowledges the applicability of the National Training Wage Award 2000<sup>62</sup> which adds protections to training agreements in terms of requirements for supervision and probation.<sup>63</sup> Incidentally, an employer is required to record a junior employee's age<sup>64</sup>. The Restaurant Award does not attempt to provide any other non-wage related protections.

Another example award is the Supermarkets and Chain Stores (Western Australia) Warehouse Award 1982.<sup>65</sup> It considers a junior employee to be any employee under the age of 21.<sup>66</sup> This award again provides for payment of junior employees at a

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<sup>54</sup> S.190(3) Children and Community Services Act 2004 (WA)

<sup>55</sup> s.190(2) Children and Community Services Act 2004 (WA)

<sup>56</sup> It was introduced in 1995: s. 68(2) Industrial Relations Legislation Amendment and Repeal Act 1995 (WA) inserted s. 107B(2) into the Child Welfare Act 1947 (WA)

<sup>57</sup> Chisholm, R., "Children and the Law in Australia" (1981-82) 13(1) Columbia Human Rights Law Review 1 at 47

<sup>58</sup> Available at <http://www.wairc.wa.gov.au/awards/RES002/p16/RES002.html>, accessed on 1/8/08

<sup>59</sup> Cl. 22(2)

<sup>60</sup> Cl. 22

<sup>61</sup> Cl. 30

<sup>62</sup> Cl. 43; that Award provides for training agreements

<sup>63</sup> National Training Wage Award 2000, cl. 10

<sup>64</sup> Cl. 32(b)

<sup>65</sup> Available at <http://www.wairc.wa.gov.au/awards/SUP001/p15/SUP001.pdf>, accessed on 1/8/08

<sup>66</sup> Cl.1B(1)

percentage of the minimum adult wage.<sup>67</sup> A particular percentage increase applies to Saturday work.<sup>68</sup> The recording of a juniors' age is also required.<sup>69</sup> An interesting provision is one for the creation of a Junior Employee's Certificate, which can be required by an employer in respect of a junior employee. It involves the employee asserting their age so that no claim can later be made for payment at a higher rate in relation to a higher age group.<sup>70</sup>

The Supermarkets Award does contain an indirect non-wage protection for child employees. Adult supervision results from the Award's limitation on the number of junior employees in relation to the number of adult employees<sup>71</sup>. In relation to shift work, there is also some provision for specific junior employee protection. An employee under the age of 18 must consent to work on an afternoon shift (which can finish after 6pm) or night shift (which starts after 1am).<sup>72</sup> Impliedly, a day shift would normally be assigned, with the shift finishing by 6pm.<sup>73</sup> A child's consent to work at night is a questionable protection, but of course would not avoid the employer's breach of the CCSA 2004 if employing a child under 15 after 10pm. A higher percentage of the adult wage rate does apply to non-standard shifts.<sup>74</sup>

The two example awards would cover the employment of many young Western Australian employees. As regulation in the specific industries allowed to employ children of 13 and over, the level of extra protection afforded is minimal. Minimum wages are essentially the main protection gained. The awards obviously do not intend to cover all other conditions of employment for children. Protections limiting night work, setting maximum hours of work, banning dangerous work, requiring targeted adult training and supervision, leave for education purposes, and other protections are absent.

### New directions

Review of the Western Australian legislation and awards providing regulation of child employment reveals some lack of protection of children in the workplace. While Parliament is currently considering amendments to relevant legislation<sup>75</sup> that should improve protection they are piecemeal and do not adequately progress toward consistent national regulation.

The proposed protections will form a new part of the CCSA and will follow the existing Part 7 of the legislation, which is to be renamed.<sup>76</sup> The main work of the additional part is to place the regulation of employment conditions of children working for constitutional corporations within the jurisdiction of the state industrial relations commission. Unfair dismissal of children and denied contractual benefits

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<sup>67</sup> Cl. 1B(5), 29(2)

<sup>68</sup> Cl. 30

<sup>69</sup> Cl. 22(2)

<sup>70</sup> Cl. 27

<sup>71</sup> Cl. 20

<sup>72</sup> Cl. 35(8)

<sup>73</sup> Cl. 35(2)

<sup>74</sup> Cl. 35(5)(b)

<sup>75</sup> Industrial and Related Legislation Amendment Bill 2007 (WA), Part 4

<sup>76</sup> Ibid. cl.38, "Part 8 – Other protections for children in employment"; Part 7 to be renamed "Part 7 - Prohibitions and limitations on certain kinds of employment of children": Ibid. cl. 37

will also be within the domain of the state commission.<sup>77</sup> The amendments will further address independent contracting in relation to children and limit unpaid trial work performed by children<sup>78</sup>. There will also be an empowerment of the Western Australian Industrial Magistrate in relation to the ordering of employer penalties.<sup>79</sup>

The amending legislation is of particular interest because it will, in effect, give the Western Australian Industrial Relations Commission new impetus to make child employment awards.<sup>80</sup> The Commission is a statutory tribunal, independent of government, which is empowered to deal with industrial matters and provide a system of fair wages and conditions of employment for Western Australian employees.<sup>81</sup> Its job is to take note of the needs of employers and employees in the resolution of industrial disputes, having regard for the community and economic conditions.<sup>82</sup> It is to undertake these tasks according to equity and good conscience<sup>83</sup>, within a discourse of fairness and the appreciation of likely impacts on the parties to the dispute and the local and national community. While the Commission is empowered to consider specifically the interest of persons immediately concerned in a matter presented to it, it is not peculiarly equipped to isolate and prioritise the interests of children like a child protection agency would. It is, instead, used to balancing the interests of both parties. In this context, relying on an industrial relations commission to protect the interests of children is arguably not historically sound.

A strict priority of child interests accords with the past treatment of working children in Australia. Laws evolving from neglected childrens and education laws of the late nineteenth century were made on the premise of care and parental substitution, and required that only the child's interests were considered in any particular situation.<sup>84</sup> Early child employment regulation did not embrace economic precepts around the employer's capacity or even concepts of fairness between the parties. These are part of the contemplations implicit in employment regulation today which the Commission is bound to consider and which might not always sit comfortably with the best interests of working children. Of course, the consideration of children as employees immediately puts them in a bargaining context, and from that standpoint, the commission is well equipped to determine suitable balances. However, concerns over whether or not children should be working in particular jobs, at particular times, or for particular lengths of time, go more to welfare issues that would not historically also contemplate the employers' needs or capacity in relation to the child worker.

Pursuant to the amendments, the Commission, with its usual powers, will be able to hear and determine applications on whether or not a corporate employer is bound by a state award in respect of its child employees.<sup>85</sup> This empowerment is intended to serve children whose conditions of employment have been eroded by federal workplace law allowing for agreements that do not provide comparable wage and

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<sup>77</sup> *Ibid.*, cl. 38

<sup>78</sup> *Ibid.*, cl.

<sup>79</sup> *Ibid.* cl. 38

<sup>80</sup> The Commission already has been empowered to deal with industrial matters concerning the employment of children: Industrial Relations Act 1979 (WA) s. 7(c) and s. 23(1)

<sup>81</sup> *Ibid.* s. 6(ca) and s.23(1)

<sup>82</sup> *Ibid.* s.26(1)(c) and (d)

<sup>83</sup> *Ibid.* s.26(1)

<sup>84</sup> See e.g. Child Welfare Act 1907 (WA), Education Act 1928 (WA)

<sup>85</sup> Industrial and Related Legislation Amendment Bill 2007 (WA) s. 213(1)

other benefits when contrasted with state awards.<sup>86</sup> The amendment will in this way allow for improvement in conditions of work for many children. State award conditions to be relied on by children could conceivably be much improved in the context of the Commission forming minimum conditions of employment that both satisfy the interests of working children and their employers.

The proposed Western Australian amendments are intended to be characterised as child labour regulation expressly excluded from the coverage of federal workplace legislation.<sup>87</sup> The perhaps anticipated consequence is the separation of children's employment conditions from those of other workers of a constitutional corporation. A corporate employer hiring any employee under 18 will necessarily contemplate both state and federal systems of regulation where the state award imposes superior or additional obligations. While the amendments may seek simply to preserve state award entitlements in relation to children, they would also mark the creation of a distinct system of workplace relations for children in Western Australia. This would be an interesting result given the context of the new directions, occasioned more as a defensive response to the expansion of federal regulation.

Improvement in conditions of employment for children can be seen in state systems that have already reacted to federal regulatory expansion. Indeed, similar New South Wales legislation has spurred the making of new principles guiding the employment of children.<sup>88</sup> The decision of the Full Bench of the Industrial Relations Commission of New South Wales<sup>89</sup> means that New South Wales employees under 18 should now enjoy the application of specific protective principles. It was made in response to the Industrial Relations (Child Employment) Act 2006 (NSW) requirement that the Full Bench determine principles to be followed by an industrial court in determining whether or not an affected employer of a child has provided the child with conditions of employment that, on balance, result in a net detriment to the child when compared to the minimum conditions of employment for the child.<sup>90</sup> In particular, the Commission decided that a child should not suffer a net detriment to their conditions of employment where they have a corporate employer and their employment is regulated by a federal agreement not offering the minimum conditions of employment applicable to similar employment pursuant to a comparable state award.

The No Net Detriment Principles have already impacted on the children in that state by giving industrial inspectors a new mandate for employer monitoring. The Principles require that a child's conditions of employment at the least provide for payment for all work performed, including work performed during training, probation and overtime, for full payment, without deductions for breakages, shortfalls in the till, or for any goods or services provided by the employer, and requiring payment at the base rate of pay and payment of wage related allowances. These pay protections would instantly add protections to the employment conditions of many children.

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<sup>86</sup> See Legislative Council discussion, 24 June 2008 at <http://www.parliament.wa.gov.au/web/newwebparl.nsf/iframewebpages/Hansard+++Daily+Transcripts,p4296b-4309a/1>, accessed on 1/8/0/8

<sup>87</sup> s.16(3) WRA 1996 (Cth.)

<sup>88</sup> Industrial Relations (Child Employment) Act 2006 (NSW)

<sup>89</sup> The Child Employment Principles Case 2007 [2007] NSWIRComm 1110

<sup>90</sup> Industrial Relations (Child Employment) Act 2006 (NSW), s 5(1)

A net detriment would be recognised, apart from the above necessary conditions of employment, when a child is worse off overall in respect of other conditions. That is, when having considered all conditions of employment, there is a net detriment to the child.<sup>91</sup> The other provisions balanced would include limitations on night work and early morning work, provision for late transport, reasonable notice of rosters and changes of working hours, and entitlements to annual and other forms of leave. Finally occupational, health and safety considerations would be considered. Interestingly, the age of the child and the nature of work to be performed are also to be considered in determining a net detriment. This wide range of factors suggests that agreements involving children with little detail are most likely to register as detrimental in the court. Implicitly, the more protective provisions included in employment arrangements with children, the more likely the Principles will be satisfied.

The New South Wales Industrial Relations Commission derived its set of guidelines by balancing the concerns of employers, parents, children and society members. As an industrial relations commission, not a child protection agency, equipped with powers to determine fair and just workplace outcomes<sup>92</sup> not unlike those of the Western Australian Industrial Relations Commission, it has exemplified that a fair and just determination can also be in the best interests of children.

This paper has reviewed the current regulation of child employment in Western Australia, with reference to existing legislation, awards and proposed amendments. The desirability of further regulation is recognised as most likely to be realised by the state Commission forming and refreshing awards focussed on improving protections in the workplace for working children. This approach has some welfare constraints, and is not progressing Australia in the direction of consistent national regulation of child employment, but it does promise to improve some children's experiences of work.

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<sup>91</sup> No Net Detriment Principles, Principle 4

<sup>92</sup> Industrial Relations Act 1996 (NSW) s. 146