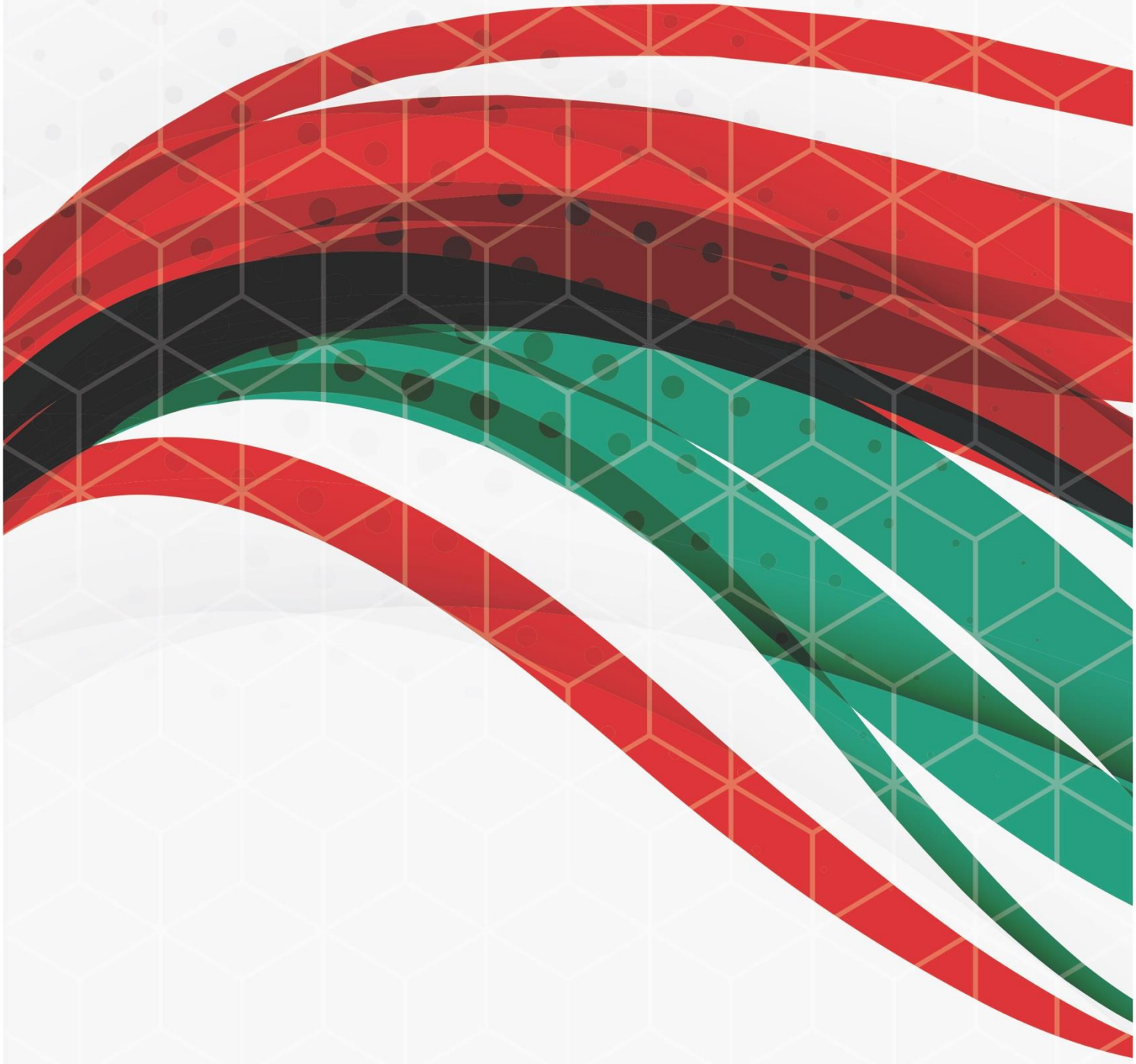
Government of **Western Australia**
Ministerial Review of the State Industrial Relations System

Ministerial Review of the **State Industrial Relations System** Final Report



June 2018

Government of **Western Australia**
Ministerial Review of the State Industrial Relations System

Hon Bill Johnston MLA
Minister for Mines and Petroleum; Commerce and Industrial Relations;
Electoral Affairs; Asian Engagement
Level 9, Dumas House
2 Havelock Street
WEST PERTH WA 6005

Dear Minister

On 22 September 2017, you announced a Ministerial Review of the State Industrial Relations System in accordance with the Terms of Reference then published.

At the same time you announced that Mr Mark Ritter SC had been appointed to conduct the Review, with the assistance of Mr Stephen Price MLA and the support of a departmental Secretariat.

The Review has now been completed and we provide this Final Report.

Yours sincerely

Mark Ritter SC
13 June 2018

Stephen Price MLA
13 June 2018

Recommendations

General Recommendations

1. The *Industrial Relations Act 1979* (WA) (the IR Act) be amended, in accordance with these recommendations and be renamed the *Industrial Relations Act 20XX*[1] (WA) (the Amended IR Act).

2. The Amended IR Act is to be reviewed after three years of operation.

3. In the Amended IR Act there is to be a removal of all gender specific language from the IR Act.

Term of Reference 1

Review the structure of the Western Australian Industrial Relations Commission with the objective of achieving a more streamlined and efficient structure.

4. In the Amended IR Act, the position of the President of the Western Australian Industrial Relations Commission (WAIRC) be abolished.

5. In the Amended IR Act, the role and powers of the President of the WAIRC be subsumed into the position of the Chief Commissioner of the WAIRC.

6. In the Amended IR Act, the qualifications for the office of the Chief Commissioner of the WAIRC and the Senior Commissioner of the WAIRC be amended so that:

   A person is not eligible to be the Chief Commissioner or the Senior Commissioner, unless they are a person who:

   (1) (a) Is a lawyer and has had not less than 5 years' legal experience as defined by s 9(1aa) of the IR Act; and

   (b) Has had significant experience in industrial relations law and/or practice; or

   (2) (a) Has approved academic qualifications as defined in s 21(1) of the *Legal Profession Act 2008* (WA) (the LP Act); and

[1] The year that the Act is passed should be used in the title.

(b) Not less than the equivalent of 5 years' full-time experience as a member of the WAIRC, the Fair Work Commission (FWC), or another court or tribunal exercising industrial relations jurisdiction in Australia.

7. In the Amended IR Act, the Full Bench of the WAIRC be constituted by the Chief Commissioner,[2] as the Presiding Member and two other members of the WAIRC.

8. In the Amended IR Act, the Commission in Court Session of the WAIRC be renamed and constituted as the Full Bench.

9. In the Amended IR Act, the Industrial Appeal Court of Western Australia (IAC) be abolished, and in lieu thereof, the Amended IR Act include a right of appeal, on the ground that the decision involved an error of law, from a decision of the Full Bench of the WAIRC, or the Chief Commissioner when exercising jurisdiction under s 49(12), s 66 or s 72A(7) of the Amended IR Act, to the Court of Appeal of Western Australia, upon a grant of leave by a Justice of the Court.

10. (a) In the Amended IR Act, the jurisdiction of the Industrial Magistrates Court (IMC) is to be amended so that if a claim for the enforcement of a Western Australian Employment Standard (WAES),[3] State award, or other State industrial instrument is made to the IMC, the IMC has jurisdiction to deal with all enforcement proceedings and claims made by or on behalf of the employee against the employer including all claims by the employee or former employee for a denial of a contractual benefit.

(b) In hearing and determining a claim by an employee or former employee for a denial of a contractual benefit, under recommendation 10(a), the claim is to be determined as if the claim was an industrial matter referred to the WAIRC under s 29(1)(b) of the IR Act.

---

2 Or the Senior Commissioner if the Chief Commissioner is unavailable or if the Full Bench is hearing an appeal against a decision of the Chief Commissioner.

3 If and when enacted in accordance with recommendation [54] below.

11. The Amended IR Act provide for the dual appointment of WAIRC Commissioners to the FWC, as contemplated by s 631(2) of the *Fair Work Act 2009* (FW Act).

12. The Amended IR Act provide for the dual appointment of FWC members to the WAIRC, as contemplated by s 631(1) of the FW Act.

13. The Amended IR Act include an amendment so that the compulsory retirement age of the members of the WAIRC be increased from 65 to 70 years of age.

14. The Amended IR Act empower the WAIRC to regulate the conduct of registered industrial agents appearing before the WAIRC, by way of a Code of Conduct to be published by the WAIRC, that includes the entitlement of the WAIRC to, on notice to the agent and with the agent having the opportunity to make submissions on the issue, suspend or revoke an agent's registration or withdraw the right of the agent to appear before the WAIRC, either generally or for a particular matter, occasion or hearing.

15. The Amended IR Act contain a provision that a disqualified person, as defined in s 3 of the LP Act, is prohibited from being a registered industrial agent or appearing as an agent in the WAIRC.

16. The Amended IR Act contain:

    (a) A "slip rule" for orders made by the WAIRC.

    (b) An amendment to the current requirement for a "speaking to the minutes" of orders, to give discretion to the WAIRC to dispense with a speaking to the minutes in a particular case if it is warranted in the opinion of the WAIRC.

    (c) An amendment to the requirement for a "speaking to the minutes" of orders that would permit the WAIRC to specify that unless parties indicate by a specified time that a speaking to the minutes is requested, that the WAIRC may issue the order in the terms of the minutes.

(d) Power for the WAIRC to conduct conciliations by telephone, videolink or other electronic means if a member of the WAIRC decides it is in the interests of justice to do so.

17. The Amended IR Act is not to include any equivalent of the privative clause provisions contained in s 34(3) and s 34(4) of the IR Act, which purport[4] to provide that any decision of the WAIRC will not, subject to the IR Act, be "impeached" or subject to a writ of certiorari, or award, order, declaration, finding or proceeding liable to be "challenged, appealed against, reviewed, quashed or called into question by any court".

18. The Amended IR Act not include any equivalent of s 48 of the IR Act that provides for the establishment of Boards of Reference under awards made by the WAIRC.

19. (a) The Amended IR Act contain an amendment to s 46 of the IR Act so that the applications are heard and determined by the Full Bench of the WAIRC.

(b) The Amended IR Act contain an amendment to s 46 of the IR Act so that an industrial inspector may make an application to the WAIRC under the section, upon leave being granted by the WAIRC to do so and upon such conditions as the WAIRC may see fit to impose.

20. The denial of contractual benefits jurisdiction currently exercised by the WAIRC upon a referral under s 29(1)(b) of the IR Act:

(a) Continue to be so exercised, subject to (b).

(b) The Amended IR Act contain a provision that if the WAIRC does not have jurisdiction in any matter due to the contents of s 75 of the *Commonwealth Constitution*, an employee or former employee may make an application in the Magistrates Court of Western Australia, with the application being determined as if it were a matter referred to the WAIRC under s 29(1)(b) of the Amended IR Act.

[4] The word purport is used, as the subsections may be contrary to the *Commonwealth Constitution*.

21. (a) Subject to (b), the Amended IR Act not include any amendment to s 31 of the IR Act in relation to representation by a legal practitioner.

(b) In the Amended IR Act, s 31 of the IR Act is to be amended so that, unless otherwise ordered by the WAIRC, in any matter in which a public sector employer is a party or intervener, all parties or interveners are entitled to be represented by a legal practitioner who is an employee of that party or intervener.

22. Under the Amended IR Act, the WAIRC is to continue to be a no costs jurisdiction in all matters.

23. Subject to any amendments required by the recommendations contained in the response to Term of Reference 2, the Amended IR Act contain no amendments to s 32 and s 44 of the IR Act.

24. (a) The Amended IR Act contain an amendment to s 84A(1)(b) of the IR Act to permit orders to be enforced by any party for whose benefit the order was made, in addition to the Registrar or a Deputy Registrar.

(b) The Amended IR Act contain a Division to the same effect as Part 5-1, Division 9 of the FW Act, about offences committed in and before the WAIRC.

25. The Amended IR Act not contain any amendment to s 27(1)(o) of the IR Act insofar as it applies to orders the WAIRC may make about discovery, inspection, or production of documents.

26. The Minister for Commerce and Industrial Relations (the Minister) provide the submission from the Transport Workers' Union about substantive amendments to the *Owner-Drivers (Contracts and Disputes) Act 2007* (WA) to the Minister for Transport.

Term of Reference 2

Review the jurisdiction and powers of the Western Australian Industrial Relations Commission with the objective of examining the access for public sector employees to the Western Australian Industrial Relations Commission on a range of matters for which they are currently excluded.

27. In the Amended IR Act, the Public Service Appeal Board (PSAB), the Public Service Arbitrator (PSA) and the Railways Classification Board be abolished.

28. (a) The Amended IR Act, subject to (b), include a single system for public sector employers and employees to refer industrial matters to the WAIRC so that all employees who are currently subject to the jurisdiction of the PSA and the PSAB will be subject to the ordinary jurisdiction of the WAIRC.

    (b) In the Amended IR Act, clause 2(3) of Schedule 3 of the IR Act is to continue to apply to the referral of industrial matters involving a police officer, police auxiliary officer, Aboriginal police liaison officer or a special constable.

29. There be consequential amendments to the *Public Sector Management Act 1994* (WA) (PSM Act) and the *Health Services Act 2016* (WA) (HS Act) to allow government officers to appeal against disciplinary decisions or findings to the ordinary jurisdiction of the WAIRC.

30. In the Amended IR Act, in exercising the jurisdiction referred to in [28] above, the WAIRC will have the jurisdiction and powers to make the same orders as it may make in exercising its jurisdiction in relation to private sector industrial matters, with these variations:

    (a) The WAIRC is to have the jurisdiction and powers that currently may be exercised by the PSA in s 80E(2) of the IR Act.

    (b) The WAIRC may make as part of the order to be made, that the order apply from a date prior to the lodging of the application before the WAIRC.

(c) The WAIRC is to have the jurisdiction and powers that currently may be exercised by the PSA in s 80E(5) of the IR Act.

31. Under the Amended IR Act, and subject to any specific recommendations to the contrary, the division between the industrial matters a public sector employee may refer to the WAIRC, as opposed to those a registered organisation may refer to the WAIRC on the employee's behalf, which affect the employment of an individual public sector employee, are to remain as they are at present under the IR Act.

32. The Amended IR Act is to include a provision permitting a registered organisation to refer an industrial matter to the WAIRC on the behalf of an individual employee that alleges that there has been a breach by an employer of a public sector standard[5] set under the PSM Act, in these circumstances:

(a) Notice of the breach must have first been given to the employer, by the organisation or the affected person, with the employer having twenty-one (21) days to resolve the alleged breach to the satisfaction of the organisation or person.

(b) Subject to (c), if the alleged breach is about the appointment of a person to an office, post or position, the appointment is to not take effect unless and until the matter has been determined by the WAIRC.

(c) The WAIRC may, if the justice of the case requires, make an order under (b) before the final determination of the industrial matter.

(d) In determining the industrial matter constituted by the alleged breach, the WAIRC may, in addition to any other orders it may make:

(i) Order compensation for any loss or injury caused by the breach.

(ii) Order that any process that was the subject of the breach be recommenced by the employer.

[5] It is not part of this recommendation that the WAIRC have any jurisdiction to set or change the standards, or have any "promotion appeals" jurisdiction, as it has in the past.

(iii) Order that a particular person not be appointed to a particular office, post or position.

33. The *Police Act 1892* (WA) be amended so as to ensure that police auxiliary officers may appeal to the WAIRC against any removal decision made against them.

34. The Amended IR Act is to include an entitlement for all public and private sector employees to bring an application to the WAIRC to seek orders to stop bullying at work, based on the model contained in the FW Act Part 6-4B "Workers bullied at work", subject to:

(a) Section 29(1)(b) of the IR Act is to be amended so that an application for an anti-bullying order may be referred by an employee to the WAIRC as an industrial matter.

(b) Subject to (c) the WAIRC shall first endeavor to resolve the industrial matter by conciliation within fourteen (14) days of the application being made.

(c) The Amended IR Act contain a definition of bullying that:

(i) Provides a non-exhaustive list of examples of what constitutes bullying.

(ii) Sets out that bullying is not constituted by a single incident.

(iii) Sets out that whether bullying has occurred is to be determined by an objective test.

(iv) Sets out that actual harm to health and safety is not necessary to establish that bullying has occurred.

(v) Sets out that reasonable management actions by or on behalf of an employer or by another employee, does not constitute bullying, including the reasonable management of disciplinary matters or substandard performance.

(d) In determining the industrial matter, the WAIRC may make any order it thinks fit to resolve the industrial matter, save and except any monetary order, order of compensation or pecuniary penalty.

(e) Any order made may be enforced in like manner as any other order made by the WAIRC.

(f) The determination of the industrial matter by an order may be subject to an appeal to the Full Bench of the WAIRC under s 49 of the IR Act.

35. Section 96A(1) of the PSM Act be repealed and there be consequential amendments to s 96A(2) and s 96A(5)(b) of the PSM Act so that a public sector employee may refer to the WAIRC as an industrial matter under s 29(1)(b) of the IR Act, a decision to terminate their employment under the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* (WA).

36. The sections of the *Young Offenders Act 1994* (WA) and the *Prisons Act 1981* (WA), which contain rights of appeal to the WAIRC against loss of confidence removal decisions, be repealed and replaced by an entitlement for an employee to refer their removal to the WAIRC under s 29(1)(b) of the IR Act, with the WAIRC having the same jurisdiction and powers to determine the application and award remedies as in the jurisdiction that applies to private sector employees and other public sector employees.

37. Section 33P of the *Police Act* be amended so that an officer's appeal against their removal to the WAIRC may be heard by a single Commissioner, with a right of appeal by the parties to the Full Bench of the WAIRC.

38. The PSM Act be generally reviewed with respect to the regulation and termination of employment of public servants and public sector employees.

39. The Minister give consideration to the issue of whether s 41(3) of the *Working With Children (Criminal Record Checking) Act 2004* (WA) ought to be amended to permit the making of an application to the WAIRC for a remedy in respect of a dismissal from employment.

Term of Reference 3

Consider the inclusion of an equal remuneration provision in the *Industrial Relations Act 1979* with the objective of facilitating the conduct of equal remuneration cases and other initiatives in the Western Australian Industrial Relations Commission.

40. The Amended IR Act is to include an equal remuneration provision based upon the model in the *Industrial Relations Act 2016* (Qld).

41. The Amended IR Act is to include a requirement that the WAIRC develop an equal remuneration principle to assist parties in bringing or responding to applications brought pursuant to the equal remuneration provision.

Term of Reference 4

Review the definition of "employee" in the *Industrial Relations Act 1979* and the *Minimum Conditions of Employment Act 1993* with the objective of ensuring comprehensive coverage for all employees.

42. The Amended IR Act is not to exclude from its coverage, any employee whose place of work is the private home of another person, presently referred to as "any person engaged in domestic service in a private home" in s 7(1) of the IR Act.

43. The Amended IR Act is not to exclude from its coverage persons who are currently excluded from the definition of an employee under s 3 of the *Minimum Conditions of Employment Act 1993* (WA) (MCE Act) and regulation 3 of the *Minimum Conditions of Employment Regulations 1993* (MCE Regulations), as persons remunerated wholly by commission or percentage reward, or wholly at piece rates.

44. The Amended IR Act is not to exclude from its coverage persons:

    (a) Who receive a disability support pension under the *Social Security Act 1991* (Cth); and

    (b) Whose employment is supported by "supported employment services" within the meaning of the *Disability Services Act 1986* (Cth), being persons currently excluded from the definition of an employee under s 3 of the MCE Act and regulation 3 of the MCE Regulations.

45. The Amended IR Act is not to exclude from its coverage persons appointed under s 22(1) of the *National Trust of Australia (WA) Act 1964* to carry out the duties of wardens, being persons who are currently excluded from the definition of an employee under s 3 of the MCE Act and regulation 3 of the MCE Regulations.

46. The Amended IR Act is to provide that an employee does not include a volunteer, including persons who are not entitled to be paid for work done by them but who receive some benefit or entitlement in relation to the work.

47. The Amended IR Act include provisions relating to the exercise of the powers of people holding right of entry authorities, with respect to the carrying out of their duties, rights and privileges in places of work that are also private residences, so that:

    (a) Except in a case of urgent occupational safety and health, the right of entry holder must provide 72 hours' written notice to the employer and householder of the intended right of entry.

    (b) The right of entry is only to proceed, subject to (c) and (d), if the employer and householder consents to the entry.

    (c) If the employer or householder does not consent to the entry the right of entry holder may make an application to the WAIRC for an order permitting entry into the residence for such purposes and on such terms and conditions as the WAIRC shall think fit.

    (d) In a case of urgent occupational safety and health, the right of entry holder may apply to the WAIRC for an order entitling them to exercise right of entry powers under the Amended IR Act at the residence, which may be ordered by the WAIRC for such purposes and on such terms and conditions as the WAIRC shall think fit.

48. Given that a residential premise where work is being performed by an employee for an employer is an "industrial location" within the meaning of s 98(3)(a) of the IR Act, the Amended IR Act is to contain a requirement that an industrial inspector

is to give the owner or occupier of any such residential premises 24 hours' notice if they intend to enter the premises subject to:

(a) There being no requirement to give 24 hours' notice if the owner or occupier of the residential premises is carrying on a business, trade or occupation at the premises; or

(b) An industrial inspector being able to apply to the WAIRC for an order permitting the inspector to enter the premises without providing the 24 hours' notice if the WAIRC is satisfied that to give the notice would defeat the purpose for which the power is intended to be exercised.[6]

49. The Amended IR Act contain a provision, broadly similar to s 192 of the *Workers' Compensation and Injury Management Act 1981* (WA), to the effect of allowing enforcement proceedings under the Amended IR Act to be taken by or on behalf of people who are, under the *Migration Act 1958* (Cth) either unlawful non-citizens in Australia who have engaged in work for an employer, or who are lawful non-citizens in Australia who have engaged in work for an employer that is contrary to the conditions of their visa.

50. The definition of an employee under the Amended IR Act include a person whose employment is in Western Australia and who is employed by a foreign state or foreign consulate.

51. A taskforce be assembled and chaired by a representative of the Department of Mines, Industry Regulation and Safety (DMIRS), with representatives from the Chamber of Commerce and Industry WA (CCIWA), and UnionsWA for the purpose of recommending to the Minister any actions that should be taken to assist employers and employees with the change to the regulation of employment in Western Australia contained in recommendations [42]-[50].

[6] This recommendation includes wording in the same terms as s 49I(7) of the IR Act.

52. Given:

(a) The operators of digital platforms in the gig economy are mostly if not entirely constitutional corporations; and

(b) If these constitutional corporations employ people they will be national system employers under the FW Act, whose industrial relations and employees' conditions of employment are governed by the FW Act; and

(c) If these constitutional corporations do not employ people but instead engage someone as an independent contractor under a "services contract", as defined in s 5 of the *Independent Contractors Act 2006* (Cth) (IC Act), so that s 7 of the IC Act applies to exclude State laws from operating in the circumstances there set out, in relation to any workplace relations matter, as defined in s 8 of the IC Act; so that

(d) The State Parliament may have very limited, if any, legal authority to effectively legislate about the engagement, working conditions and termination of engagement of people working in the gig economy; and

(e) The gig economy is a new and fast developing industry in Western Australia; but

(f) As the State Government has a legitimate interest in the engagement, working conditions and termination of engagement of people working in the gig economy in Western Australia; therefore

(g) A taskforce be assembled and chaired by a representative of DMIRS and include a member from CCIWA, UnionsWA, the State Solicitor's Office and a nominee of the President of the Law Society of Western Australia, to monitor the engagement, working conditions and termination of engagement of people in the gig economy and to consider and report to and make recommendations to the Minister as to whether and to what extent the regulation of the industry can or ought to be pursued by the

State Government, by legislation, by way of representations to the Commonwealth Government or otherwise.

53. The Minister consider whether the Amended IR Act should include provisions so that it applies to adult people who are employed as sex workers.

Term of Reference 5

Review the minimum conditions of employment in the *Minimum Conditions of Employment Act 1993*, the *Long Service Leave Act 1958* and the *Termination, Change and Redundancy General Order* of the Western Australian Industrial Relations Commission to consider whether:

(a) the minimum conditions should be updated; and

(b) whether there should be a process for statutory minimum conditions to be periodically updated by the Western Australian Industrial Relations Commission without the need for legislative change.

54. The Amended IR Act include a Part that provides for minimum conditions of employment for employees covered by the State system to be called the Western Australian Employment Standards (WAES).

55. The WAES include:

(a) The minimum wage (including for employees who have a disability that has been assessed to affect their productive capacity to perform their particular job).

(b) Subject to (d), the National Employment Standards (NES), as contained in the FW Act, other than the long service leave NES.

(c) Conditions comparable to those contained in Division 3 of Part 3-6 (Employer obligations in relation to employee records and pay slips) and Division 2 of Part 2-9 (Payment of wages and deductions) of the FW Act.

(d) Any minimum condition of employment, as contained in the MCE Act, if the condition is, on the issue to which it relates, more beneficial to an employee or in addition to any NES condition of employment.

(e) The conditions set out in the *Termination, Change and Redundancy General Order* (TCR General Order) of the WAIRC in lieu of Part 5 of the MCE Act, but incorporating the provisions contained in the FW Act that are more beneficial to employees than the TCR General Order.

(f) Subject to [56] below, provision for long service leave.

(g) Provision for Family and Domestic Violence (FDV) leave as a minimum condition of employment, in accordance with recommendation [61] below.

56. The WAES condition with respect to long service leave include the following:

(a) Express provision for casual employees to be entitled to receive long service leave and guidance on how to calculate their continuous employment.

(b) Express provision for seasonal workers to be entitled to receive long service leave and guidance on how to calculate their continuous employment.

(c) A provision that the WAES entitlement to long service leave may not be "cashed out" until it is an entitlement that has accrued or crystallised as a legal entitlement.

(d) A statement that all forms of paid leave count towards an employee's continuous employment.

(e) A statement that there is continuous employment in circumstances equivalent to when there has been a transfer of business under Part 2-8 of the FW Act.

(f) A provision that, following a written request from any former employee, the employer be obliged to provide a copy of an employee's employment records, relevant to an assessment of if and when they will be entitled to long service leave, to any subsequent employer to whom the first

employer's business has been transferred, at the time of or within one month of the transfer of the business.

(g) Provision for the taking of long service leave in alternative ways.

(h) Confirmation that service as an apprentice counts towards an employee's continuous employment.

(i) A statement that the term "one and the same employer" in s 8(1) of the *Long Service Leave Act 1958* (WA) (LSL Act) includes related bodies corporate within the meaning of s 50 of the *Corporations Act*.

57. The law is to be changed so that in the Amended IR Act, a failure to comply with the long service leave WAES will, like the other WAES, be able to be enforced by the imposition of a pecuniary penalty, compensation and/or associated orders made by the IMC, on application by an industrial inspector, the person who was the subject of the alleged failure to comply or an industrial organisation of which the person is a member.

58. In the Amended IR Act, the minimum wage WAES will be reviewed annually by the WAIRC in accordance with s 50A of the IR Act.

59. In the Amended IR Act, s 51B of the IR Act is to be retained, to enable the WAIRC to make a General Order in relation to a matter that is the subject of a WAES, if the General Order is more favourable to employees than the minimum condition of employment.

60. (a) In the amended IR Act, s 51I of the IR Act is to be retained.

(b) The Minister give consideration to applying for an order under s 51I of the IR Act to increase the minimum casual loading to 25 per cent.

61. The FDV leave to be included in the WAES in the Amended IR Act in terms consistent with Premier's Circular 2017/07 – being as follows:

(a) Ten (10) non-cumulative days of paid FDV leave per annum; and

(b) If these days of leave are completely taken in any year, up to two (2) days' unpaid FDV leave that may be taken if required on each occasion when FDV has occurred.

62. In the Amended IR Act, the WAES requests for flexible working arrangements contain an addition to the entitlement under s 65(1A)(a) of the FW Act to include any dependent of the employee.

Term of Reference 6

Devise a process for the updating of State awards for private sector employers and employees, with the objectives of:

(a) ensuring the scope of awards provide comprehensive coverage to employees;

(b) ensuring awards reflect contemporary workplaces and industry, without reducing existing employee entitlements;

(c) ensuring awards are written in plain English and are user friendly for both employers and employees; and

(d) ensuring that any award updating process is driven by the Western Australian Industrial Relations Commission, with appropriate input from the award parties and other relevant stakeholders.

63. The Amended IR Act is to include provisions requiring the WAIRC, within eighteen (18) months, to:

(a) Review and as necessary amend the scope of the awards of the WAIRC, and/or if required make new awards, with the aim of ensuring, subject to the following that all private sector employees within the State industrial relations system are covered by an award of the WAIRC, including but not limited to the categories of employees contained in Attachment A.

(b) Recommendation (a) does not apply to employees of the types referred to in s 143(7) of the FW Act or who have an income higher than the high income threshold set under s 333 of the FW Act.

(c) Review, and as necessary amend, each award of the WAIRC to:

(i) Include the contents of the WAES so that employers and employees can understand the requirements and entitlements of and pursuant to the WAES.

(ii) Ensure that the award does not contain any provision that:

(A) Is less than the amount of the minimum wage or any other WAES.

(B) Discriminates against an employee or employees on any ground on which discrimination is unlawful under the *Equal Opportunity Act 1984* (WA).

(C) Is obsolete.[7]

(D) Contains references to Boards of Reference that would be inconsistent with the repeal of s 48 of the IR Act.

(E) Contains a reference to an obsolete or outdated apprenticeship or traineeship scheme.

(d) The process engaged in by the WAIRC in (a)-(c) above is not to have the effect of reducing any employee entitlements under existing awards unless the entitlement is able to and should be removed in the process described in recommendation (c)(ii)(C).

7 Examples are clause 15 of the *Printing Award*: "For each female employee employed on day work or on shift work there shall be an interval of ten minutes at a time fixed by the employer between the second and third hour after the employee's ordinary commencing time for rest on each day on which the female employee is required to work"; clause 25 of the *Shop and Warehouse (Wholesale and Retail Establishments) Award 1977* that requires employers to provide "saloon fares" when employees are travelling by coastal boat for work; clause 11 of the *Clerks (Accountants Employees) Award 1984* that provides for a special allowance payable to comptometer or calculating or ledger machine operators; and clause 13(4) of the *Building Trades (Construction) Award 1987* requires an employer to provide notification by "letter or telegram" of a change of meal break arrangement.

64. The Amended IR Act is to contain a provision that states the award review process described in recommendation [63] may, if necessary or appropriate, be undertaken on more than one occasion by the WAIRC with respect to any particular award, within the eighteen (18) month period.

65. The Amended IR Act is to specify the award review process described in recommendation [63] is to be undertaken by the WAIRC on notice to all parties set out in s 50 of the IR Act and any party to the awards under review, or any other party the WAIRC thinks appropriate, and include these parties in the review of, consultation about and drafting of any awards and/or amendments to awards.

66. The Minister is to give consideration to the resources required for the award review process described in recommendation [63] to be reasonably carried out and take steps to ensure that the WAIRC and participating parties have adequate resources to engage in and perform the tasks required by the process.

67. The Amended IR Act contain a provision that any new awards or amendments required to be made to awards as part of the award review process described in recommendation [63] be drafted with the intent that they may be readily understood by the employers and employees covered by the State industrial relations system.

Term of Reference 7

Review statutory compliance and enforcement mechanisms with the objectives of:

(a) ensuring that employees are paid their correct entitlements;

(b) providing effective deterrents to non-compliance with all State industrial laws and instruments; and

(c) updating industrial inspectors' powers and tools of enforcement to ensure they are able to effectively perform their statutory functions.

68. In the Amended IR Act, industrial inspectors are to be empowered:

    (a) To issue infringement notices for breach of record-keeping and pay slip obligations.

(b) Issue compliance notices, based on the model contained in s 716 of the FW Act, if it is in the public interest to do so.

(c) Issue enforceable undertakings, based on the model contained in s 715 of the FW Act, if it is in the public interest to do so.

69. The Private Sector Labour Relations Division (PSD) of DMIRS is to prepare a written public policy to guide the use of the new enforcement mechanisms.

70. In the Amended IR Act, the penalties that may be imposed by the IMC in enforcement proceedings be amended to be equivalent to the penalties set out in s 539 of the FW Act, and contain a provision that has the effect that when the penalties under s 539 of the FW Act are changed over time, the same changes in corresponding penalties apply in the Amended IR Act.

71. The Amended IR Act is to include provisions comparable to s 550 of the FW Act to enable those involved in any contravention of a relevant breach to be penalised and/or ordered to rectify any non-payment, or ordered to pay compensation or any other amount that the employer may have been ordered to pay.

72. The Amended IR Act is to include provisions to enable the IMC to impose penalties for a breach of the WAES or any applicable award, agreement, or other industrial instrument, including but not limited to breaches of long service leave obligations.

73. The Amended IR Act is to include a section comparable to s 557C of the FW Act to the effect that, if, in a contravention proceeding against an employer where an applicant makes an allegation in relation to a matter and the employer was required to make and keep a record, make available for inspection a record or give a pay slip, in relation to the matter, and the employer has failed to comply with the requirement, the employer has the burden of disproving the allegation.

74. The Amended IR Act is to include sections comparable to s 535(4) and s 536(3) of the FW Act prohibiting an employer from wilfully making, keeping or maintaining a false or misleading employment record or wilfully providing a false or misleading pay slip.

75. The Amended IR Act is to include provisions comparable to s 112 and s 113 of the *Fair Trading Act 2010* (WA) to provide for the ability of industrial inspectors to share information acquired during an investigation within DMIRS or with other State Government or Commonwealth departments or agencies, or to obtain relevant information within DMIRS or from another State Government department or agency or any Commonwealth department or agency, to the extent permitted by any Commonwealth law.

76. In the Amended IR Act, s 98 of the IR Act is to be amended so that there is no restriction on the powers of industrial inspectors only being exercised at an "industrial location". Instead, industrial inspectors are to be able exercise their powers at either:

    (a) The premises where work is or was being performed; or

    (b) Business premises where the inspector reasonably believes there are relevant documents or records.

77. In the Amended IR Act the monetary penalties that may be imposed by the Full Bench under s 84A(5) of the IR Act be increased to $10,000 in the case of an employer, organisation or association and $2,000 in any other case.

78. Subject to recommendation [79] the Amended IR Act includes amendments to s 49I of the IR Act to include:

    (a) An entitlement under s 49I(2)(b) of the IR Act to make copies of entries in records and documents by way of a photograph, video record or other electronic means, that is relevant to the suspected breach.

    (b) An entitlement to photograph, or record by video, tape or other electronic means the work, material, machinery or appliance that is inspected under s 49I(2)(c) of the IR Act, that is relevant to the suspected breach.

(c) A civil penalty provision to apply in circumstances comparable to s 504 of the FW Act, for any misuse of any documents or other materials obtained in exercise of the rights contained in s 49I(2) of the Amended IR Act.

(d) In s 49I(1) reference to a suspected breach of the *Construction Industry Portable Paid Long Service Leave Act 1985* (WA).

79. Recommendation [78] is to be subject to:

(a) Compliance with the *Surveillance Devices Act 1998* (WA).

(b) Compliance with reasonable site safety requirements applying at the premises.

(c) The protection of intellectual property rights including with respect to patents and copyrights.

80. The Minister give consideration to the actions that should be taken to assist employers to understand the changes to the enforcement and compliance laws.

Term of Reference 8

Consider whether local government employers and employees in Western Australia should be regulated by the State industrial relations system, and if so, how that outcome could be best achieved.

81. In answer to the question contained in the Term of Reference, the Review reports:

(a) If local government employers in Western Australia are national system employers for the purposes of the FW Act, then they are presently covered by the Federal industrial relations system.

(b) In turn this depends upon whether local governments are trading corporations under s 51(xx) of the *Constitution*.

(c) That issue, either for local government in Western Australia generally, or for a specific local government has not as yet been determined by the High Court, and unless and until that occurs there can be no legal certainty

on the issue. A test case could probably be run on the issue in the Federal Court or possibly the High Court.

(d) To date the preponderance of judicial and industrial commission authority favours local governments in Western Australia not being characterised as trading corporations. If, however, the High Court were to focus upon the extent of trading activities of local governments to determine whether a local government is a trading corporation, then it is possible at least larger local governments in Western Australia could be characterised as trading corporations. There is a body of judicial and academic in support of this view.

(e) Although local governments can be described as being part of the body politic of Western Australia, that in itself may not be sufficient to avoid characterisation as a trading corporation, although it is likely to be at least a relevant factor.

(f) The Western Australian Local Government Association (WALGA) and large local governments consider that at least the larger local governments are trading corporations, and some past certified agreements have been made in the Federal system with unions based on the corporations power where the Australian Industrial Relations Commission made a finding the local governments were constitutional corporations.

(g) By far the majority of local government employers and employees in Western Australia currently operate within the Federal industrial relations system and have done so for some time. The employment is governed by a combination of the Federal *Local Government Industry Award 2010*, enterprise agreements made under the FW Act and common law contracts underpinned by the NES.

(h) The validity of existing enterprise agreements depends upon the local government being a trading corporation. If the local government were not

so, the enterprise agreement would be invalid. That could be tested in the Federal Court but has not occurred to date.

(i) WALGA and large local governments favour remaining in the Federal system and point to disruptions if they were moved to the State system.

(j) Unions support the move into the State system because, in part, of the Federal *Local Government Industry Award 2010* being inferior to interim State awards, a desire to use the State agreement making system and a preference for the State system generally.

(k) The most legally certain process to move local governments to the State system is to use the process outlined in s 14(2) of the FW Act; to pass legislation that declares each local government not to be a national system employer. To be legally effective under s 14 of the FW Act however, the responsible Commonwealth Minister must endorse the declaration.

(l) The process described in (k) is inherently political, may take some time and is not guaranteed to be successful.

(m) Whilst as part of the State body politic, it could be argued, that local governments should be part of the State industrial relations system, there may be pragmatic reasons why the Government may not wish, now, to attempt to proceed with the process that would, if successful create legal certainty and enshrine local government within the State system.

(n) Whether, in all these circumstances the Government wishes to attempt, at this time, to proceed to move local governments to the State system is ultimately a political question, having regard to all of the above.

82. If the Government decides to take steps to ensure that local governments are part of the State industrial relations system then it is preferable to do so by the State Government introducing legislation into the State Parliament consistent with s 14(2) of the FW Act that declares, by way of a separate declaration, that each of the bodies established for a local government purpose under the

Local Government Act 1995 (WA) is not to be a national system employer for the purposes of the FW Act (the declaration).

83. If the declaration is passed by the State Parliament, the State should then expeditiously attempt to obtain an endorsement under s 14(2)(c) and s 14(4) of the FW Act by the Commonwealth Minister for Small and Family Business, the Workplace and Deregulation, to make the declaration effective (the endorsement).

84. As a counterpart to recommendation [80], the State enact legislation that has the effect, upon the endorsement, of deeming enterprise agreements to be an industrial instrument subject to the Amended IR Act.

85. If the endorsement is obtained, a taskforce be assembled and chaired by a representative of DMIRS and include representatives from the Department of Local Government, Sport and Cultural Industries, WALGA, the Western Australian Municipal, Administrative, Clerical and Services Union of Employees, the Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth, to oversee, monitor, assist, facilitate and progress the transition of local government employers and employees between the Federal and State industrial relations systems.

Attachment A Award free employees in Western Australia

The following are examples of employees who are not covered by a State award but who work in industries or occupations that could be considered as traditionally award-type work and/or who would be covered by a modern award if employed in the national industrial relations system.

- Aged and disability support workers employed directly by individuals
- Auto wreckers (excluding sales persons)
- Beauty therapists
- Car salespersons
- Clerical/administrative/reception employees working for:
  - Car yards
  - Caravan parks
  - Child care centres
  - Contract cleaners
  - Fundraising consultant businesses
  - Gyms
  - Interior designers
  - Interpreting services
  - Legal firms (e.g. legal secretary)
  - Mechanical garages
  - Nightclubs
  - Occupational therapists
  - Optometrists
  - Physiotherapists
  - Plumbers
  - Podiatrists
  - Removalists
  - Settlement agencies
  - Swimming pool manufacturers/retailers
  - Telecommunications businesses
  - Tourist centres
  - Veterinary clinics
- Dairy farm workers
- Dance instructors
- Dog/pet groomers
- Enrolled nurses working for doctors' surgeries
- Flower pickers
- Horse and greyhound breeders and trainers

- Interior designers
- IT workers – IT support workers, software developers, website designers etc.
- Market garden workers (if not planting, picking or packing fruit)
- Meter readers
- Nannies
- Shop assistants/salespersons working for:
  - Mobile phone shops
  - Party hire businesses
  - Video/DVD stores
- Newspaper delivery workers employed by Newsagents
- Nightclub employees, including bar staff, glassies, front door staff
- Phlebotomists
- Property managers
- Real estate agents
- Reticulation installers/repairers
- Sign installers
- Swimming pool technicians
- Telemarketers
- Tow truck drivers
- Tree loppers
- Waste industry workers (excluding local government employees)
- Workers in the outer suburbs of Perth making or repairing:
  - Bags, sacks and textiles
  - Boots
  - Particle boards
  - Plywood and veneer products
  - Cases and boxes
  - Rope and twine

Glossary

Acronym	Full Title
2018 IR Act	Proposed name of the *Industrial Relations Act 1979* from the Interim Report of the Review
ABBC Commissioner	Commissioner of the Australian Building and Construction Commission
ACTU	Australian Council of Trade Unions
AIRC	Australian Industrial Relations Commission
AIRCFB	Australian Industrial Relations Commission Full Bench
Amended IR Act	Suggested name for the revised *Industrial Relations Act 1979*
Amendola Report	Review of the Western Australian Industrial Relations System; Final Report by Mr Steven Amendola, October 2009
AMWU	Australian Manufacturing Workers Union (WA branch)
AMMA	Australian Mines and Metals Association
Arbitral Bench	Industrial Commission Arbitral Bench (Proposed Recommendation 6 of the Interim Report)
ATO	Australian Taxation Office
Cawley Review	The Industrial Relations Act 1979 and the Western Australian Industrial Relations Commission. A paper, with recommendations, presented to Hon. J Kobelke, MLA Minister for Consumer and Employment Protection January 2003 by Dr Sally Cawley
CCIWA	Chamber of Commerce and Industry of Western Australia
CEWA	Community Employers WA
CCS	Commission in Court Session
CEO	Chief Executive Officer
CFMEU	Construction, Forestry, Mining and Energy Union, Construction and General Division, WA Divisional Branch
CIPPLSL Act	*Construction Industry Portable Paid Long Service Leave Act 1985* (WA)
CPSU/CSA	Community and Public Sector Union WA Branch / Civil Service Association of WA
DMIRS	Department of Mines, Industry Regulation and Safety
DPC	Department of the Premier and Cabinet
DWER	Department of Water and Environmental Regulation
ELC	Employment Law Centre of Western Australia Inc.

Acronym	Full Title
EO Act	*Equal Opportunity Act 1984* (WA)
ECCWA	Ethnic Communities Council of Western Australia
FCA	Federal Court of Australia
FCAFC	Federal Court of Australia Full Court
FDV	Family and Domestic Violence
Fielding Review	Review of Western Australian Labour Relations Legislation – A Report to the Hon. G.D. Kierath MLA, Minister for Labour Relations July 1995 by Commissioner G.L. Fielding
FW Act	*Fair Work Act 2009* (Cth)
FWC	Fair Work Commission
GPG	Gender Pay Gap
Green Bill	Labour Relations Legislation Amendment and Repeal Bill 2012
HS Act	*Health Services Act 2016* (WA)
HSUWA	Health Services Union of Western Australia
HIA	Housing Industry Association
IAC	Western Australian Industrial Appeal Court
IC Act	*Independent Contractors Act 2006* (Cth*)*
ILO	International Labour Organization
ILO Protocol	International Labour Organization Protocol of 2014 to the *Forced Labour Convention 1930*
IR Act	*Industrial Relations Act 1979* (WA)
IMC	Industrial Magistrates Court of Western Australia
Judicial Bench	Proposed Industrial Commission Judicial Bench (Proposed Recommendation 4 of the Interim Report)
Law Society	Law Society of Western Australia
Legal Practice Board	Legal Practice Board of Western Australia
LG Act	*Local Government Act 1995* (WA)
LP Act	*Legal Profession Act 2008* (WA)
LSL Act	*Long Service Leave Act 1958* (WA)
MAP	Ministerial Advisory Panel on Work Health and Safety Reform
Master Builders	Master Builders Western Australia
Master Grocers	Master Grocers Australia (MGA Independent Retailers)
MCE Act	*Minimum Conditions of Employment Act 1993* (WA)

Acronym	Full Title
MCE Regulations	*Minimum Conditions of Employment Regulations 1993* (WA)
Migration Act	*Migration Act 1958* (Cth)
Model WHS Act	*Model Work Health and Safety Act*
My Place	My Place Foundation Inc.
NES	National Employment Standards in the *Fair Work Act 2009* (Cth)
OD Act	*Owner-Drivers (Contracts and Disputes) Act 2007* (WA)
OSH Act	*Occupational Safety and Health Act 1984* (WA)
PSA	Public Service Arbitrator
PSAB	Public Service Appeal Board
PSC	Public Sector Commission
PSD	Private Sector Labour Relations Division of the Department of Mines, Industry Regulation and Safety
PSM Act	*Public Sector Management Act 1994* (WA)
PSMRR Regulations	*Public Sector Management (Redeployment and Redundancy) Regulations 2014* (WA)
Qld IR Act	*Industrial Relations Act 2016* (Qld)
RFTIT	Road Freight Transport Industry Tribunal
SBDC	Small Business Development Corporation
Scarlet Alliance	Scarlet Alliance Australian Sex Workers Association
SES	State Employment Standards (Proposed Recommendation 47 of the Interim Report)
SSTUWA	The State School Teachers' Union of W.A. Inc.
SWS	Supported Wage System
TAFE	Technical and Further Education
TCR General Order	Termination, Change and Redundancy General Order
The Minister	Hon. Bill Johnston MLA Minister for Mines and Petroleum; Commerce and Industrial Relations; Electoral Affairs; Asian Engagement
The Review	Ministerial Review of the State Industrial Relations System 2018 by Mr Mark Ritter SC assisted by Mr Stephen Price MLA
TWU	Transport Workers' Union of Australia Industrial Union of Workers (WA Branch)
UFU	United Firefighters Union of Australia, West Australian Branch
WACOSS	Western Australian Council of Social Service Inc.

Acronym	Full Title
WAES	Western Australian Employment Standards
WAIRC	Western Australian Industrial Relations Commission
WAiS	WA Individualised Services
WALGA	Western Australian Local Government Association
WAPU	Western Australian Police Union
WAPOU	Western Australian Prison Officers' Union
WASU	Western Australian Municipal, Administrative, Clerical and Service Union
WASCA	Supreme Court of Western Australia - Court of Appeal
WCIM Act	*Workers' Compensation and Injury Management Act 1981* (WA)
WGEA	Workplace Gender Equality Agency
WHS	Work Health and Safety
WHS Act	*Work Health and Safety Act 2011* (Cth)
WR Act	*Workplace Relations Act 1996* (Cth)
Work Choices	*Workplace Relations Amendment (Work Choices) Act 2005* (Cth)
WWC Act	*Working with Children (Criminal Record Checking) Act 1984* (WA)

Chapter 1 Introduction

1.1 Introduction

1. On 22 September 2017 the Hon. Bill Johnston MLA, Minister for Mines and Petroleum; Commerce and Industrial Relations; Electoral Affairs; Asian Engagement (the Minister) announced, on behalf of the State Government, a Ministerial Review (the Review) of the State industrial relations system. The Minister announced that Mr Mark Ritter SC,[8] assisted by Mr Stephen Price MLA, would undertake the Review. The Minister also announced the Review would be supported by a Secretariat, drawn from employees within the Department of Mines, Industry Regulation and Safety (DMIRS).

2. Although the number of employees who are covered by the State system is not readily ascertainable, it is estimated to potentially cover between 21.7 per cent to 36.2 per cent of employees in the State. In particular, it covers employers who are individual unincorporated employers (sole traders), partnerships that are not incorporated, some trust business structures, public sector employees, some associations and NGOs (non-government organisations), some independent schools and, possibly, local government. Issues relating to local government have particular complexities as discussed in Chapter 9.

1.2 Publication of the Interim Report

3. On 20 March 2018 the Review published an interim report (the Interim Report). The purpose of the Interim Report was to inform the Government, stakeholders and the public of the progress made by the Review and to seek further consultation, discussions and submissions upon issues that had emerged from a consideration of the Terms of Reference, stakeholder meetings, submissions received by the Review and proposed or possible recommendations to be made by the Review.

[8] Mr Ritter is a barrister at Francis Burt Chambers who practices in the industrial relations and employment law field. As such he has been instructed to act for employers, employees and industrial organisations, including for or against stakeholders who have provided submissions to the Review.

4. The Interim Report should be read with the Final Report. It is not the intention of the Review to repeat all of the background submissions and analysis that is contained in the Interim Report.

5. The purpose of the Final Report is to set out a summary of issues considered by the Interim Report, the details of the subsequent consultations and submissions engaged in and received since the publication of the Interim Report, to analyse the submissions and issues and to provide recommendations to the Minister.

1.3 The Announcement of the Review and the Terms of Reference

6. The Review and Terms of Reference were announced by the Government as follows:

> This Ministerial Review is intended to deliver on the Western Australian Government's election commitment to review key aspects of the State Industrial relations system. The State system has not been comprehensively reviewed and updated since 2002.
>
> The Western Australian Government does not intend to refer any industrial relations powers to the Commonwealth. As such, the Ministerial Review will be predicated on there being no referral of powers.
>
> The Ministerial Review will be required to take into account the constituency of the State industrial relations system, being mainly small business employers and employees and State public sector employers and employees. It is estimated that the State system potentially covers from one in five employees (21.7 per cent) to more than one third of employees (36.2 per cent).
>
> The Western Australian Government is committed to a contemporary, accessible State industrial relations system for employers and employees and a strong independent umpire in the form of the Western Australian Industrial Relations Commission.
>
> The specific Terms of Reference for the Ministerial Review are outlined below.
>
> **Terms of Reference**
>
> The Ministerial Review of the State industrial relations system is to consider and make recommendations with respect to the following matters:
>
> 1. Review the structure of the Western Australian Industrial Relations Commission with the objective of achieving a more streamlined and efficient structure.
> 2. Review the jurisdiction and powers of the Western Australian Industrial Relations Commission with the objective of examining the access for public sector employees to the Western Australian Industrial Relations Commission on a range of matters for which they are currently excluded.
> 3. Consider the inclusion of an equal remuneration provision in the *Industrial Relations Act 1979* with the objective of facilitating the conduct of equal remuneration cases and other initiatives in the Western Australian Industrial Relations Commission.

4. Review the definition of "employee" in the *Industrial Relations Act 1979* and the *Minimum Conditions of Employment Act 1993* with the objective of ensuring comprehensive coverage for all employees.

5. Review the minimum conditions of employment in the *Minimum Conditions of Employment Act 1993*, the *Long Service Leave Act 1958* and the *Termination, Change and Redundancy General Order* of the Western Australian Industrial Relations Commission to consider whether:

   (a) the minimum conditions should be updated; and

   (b) there should be a process for statutory minimum conditions to be periodically updated by the Western Australian Industrial Relations Commission, without the need for legislative change.

6. Devise a process for the updating of State awards for private sector employers and employees, with the objectives of:

   (a) ensuring the scope of awards provide comprehensive coverage to employees;

   (b) ensuring awards reflect contemporary workplaces and industry, without reducing existing employee entitlements;

   (c) ensuring awards are written in plain English and are user friendly for both employers and employees; and

   (d) ensuring that any award updating process is driven by the Western Australian Industrial Relations Commission, with appropriate input from the award parties and other relevant stakeholders.

7. Review statutory compliance and enforcement mechanisms with the objectives of:

   (a) ensuring that employees are paid their correct entitlements;

   (b) providing effective deterrents to non-compliance with all State industrial laws and instruments; and

   (c) updating industrial inspectors' powers and tools of enforcement to ensure they are able to effectively perform their statutory functions.

8. Consider whether local government employers and employees in Western Australia should be regulated by the State industrial relations system, and if so, how that outcome could be best achieved.

7. Although as stated, it is not the intent of the Review to repeat all that which is contained in the Interim Report, it is important to set out the contents of a media statement published by the Minister on 22 September 2017, which said, relevantly:

> The McGowan Government today announced the commencement of its review into the State industrial relations system.
>
> …

> The State system has not been comprehensively reviewed and updated since 2002, and the industrial relations and employment environment has changed significantly since then.
>
> The aim of the review is to deliver a State industrial relations system that is contemporary, fair and accessible.
>
> It will also develop a process to modernise State awards for private sector employers and employees.
>
> …
>
> Stakeholders will be consulted and given the opportunity to make submissions…
>
> The McGowan Government is pleased to announce the delivery of its election commitment to review the State industrial relations system.
>
> The State system needs to be updated to address the changed employment environment and to meet the need to its constituents – predominantly small business employees and employees, and the public sector.
>
> We are committed to ensuring the State industrial relations system is modernised and the review will provide a blueprint on how best to do this.

8. For similar reasons it is appropriate to repeat what was said at [30] of the Interim Report, as follows:

> A day prior to the release of the media statement and public announcement of the Review, the Minister informed a Legislative Assembly Estimates Committee about the Review. The Minister read out the Terms of Reference, announced who would be conducting the Review and also made the following comments:
>
> (a) The Minister had received correspondence from the Hon Michaelia Cash, the then Commonwealth Minister for Employment, who drew to his attention the intention of the Federal Government to sign what the Minister described as "the anti-slavery covenant that is currently being discussed internationally". The Minister said:
>
> > The Federal Government cannot sign that document because the definition of employee in Western Australia excludes certain people… [that] I would probably consider to be employees. It excludes people who work in domestic homes directly for the residents of that home. For example, a person who is employed as a nanny is excluded from the industrial relations system in Western Australia. That means that the Commonwealth Government cannot sign the anti-slavery arrangements that are being discussed internationally because Western Australia continues to allow slavery. The principal reason for including a definition of "employee" [within the Terms of Reference] is to amend the Act to remove slavery from the laws of Western Australia.[9]

[9] Western Australia, *Parliamentary Debates*, Legislative Assembly Estimates Committee A, Hansard, Thursday 21 September 2017 E440-2.

9. The Minister's reference to the "anti-slavery covenant" is to the International Labour Organization (ILO) Protocol of 2014 to the *Forced Labour Convention 1930*.

1.4 The Content of the Terms of Reference and Submissions on Issues Outside of the Term of Reference

10. As mentioned in the Interim Report, the Review was not involved in any way with drafting the Terms of Reference. The Review has had to consider the meaning and construction of the Terms of Reference, as part of the undertaking of the Review. In doing so, the Review has taken into account what the Minister said in the comments referred to above about the purpose of the Review.

11. The Review also reiterates a comment made in the Interim Report about opinions, ideas and suggestions made to the Review that are outside the Terms of Reference. The fact that these matters cannot be considered by the Review does not mean they are not worthy of consideration by the Minister and Government. It just means that the Review cannot consider and report on the topics as part of this Review. **Attachment 1A** to this chapter sets out a list of these matters, for possible further consideration by the Minister.

1.5 The Historical Context to the Review

12. In Chapter 1 of the Interim Report the Review set out what it considered to be the important historical context for the Review.

13. This included the change in the Commonwealth/State paradigm on industrial relations systems and laws that was affected in 2005 and thereafter. In particular, this occurred because of the enactment by the Commonwealth Government of the *Workplace Relations Amendment (Work Choices) Act 2005* (Work Choices), followed by in 2009, the *Fair Work Act 2009* (FW Act) and related legislation which built upon and expanded the Federal workplace relations system established by Work Choices.

14. As set out in the Interim Report, the FW Act, like Work Choices, was based upon the corporations power under the Commonwealth *Constitution*. Both Acts

expressed a clear intention to generally "cover the field" to exclude State industrial laws.

15. As set out in the Interim Report, the other States of Australia have all referred legislative powers to the Commonwealth in respect of private sector employers and employees. Western Australia remains the only State not to have done this. As set out by the Terms of Reference and the Minister's comments however, there is no intention in the present State Government to refer these powers. This followed the pattern of previous State Governments, of both political persuasions, not to do so.

16. As also summarised in the Interim Report, the FW Act does not exclude all industrial relations laws from applying to national system employers and employees operating within the State of Western Australia. Additionally, the States are not precluded from making laws on some topics. In particular, s 27 of the FW Act set out matters that remain within the province of State Governments. They include, relevantly, occupational health and safety, long service leave, the regulation of employer and employee associations and claims for the enforcement of contracts of employment.

17. The Interim Report set out in Chapter 1 Statistics and Information about Relevant Background Issues including who is covered by the State industrial relations system, declines in trade union membership and the industrial relations systems and laws operating in other States of Australia. Note should be taken of those parts of the Interim Report as providing important context for and to the Review.

1.6 Work Done by the Review since the Publication of the Interim Report

18. Since the publication of the Interim Report, the Review has:

(a) Written to stakeholders to inform them about the Interim Report and provide the opportunity to make submissions in response to the Interim Report.

(b) In particular, the Review wrote to each of the people, bodies and organisations who had provided a written submission to the Review prior to the publication of the Interim Report to advise them of that publication and the opportunity to make further submissions.

(c) Corresponded and had meetings with Chief Commissioner Scott and Registrar Bastian of the Western Australian Industrial Relations Commission (WAIRC) to obtain statistics, information and opinions relevant to the contents of the Interim Report.

(d) Through the Secretariat a number of stakeholders were asked whether they would like to meet with the Review to discuss the Interim Report. A number of stakeholders took up this opportunity and 11 meetings were held between 3 April and 23 April 2018. Similar to the stakeholder meetings that occurred prior to the publication of the Interim Report, the Review has found these meetings to be useful in facilitating a direct exchange of comments, concerns, criticisms and ideas about the contents of the Interim Report.

(e) Received 49 written submissions in response to the Interim Report from bodies, institutions and individuals, and 8 submissions in reply to other stakeholder submissions that had been provided and made public on the internet site maintained by the Secretariat. **Attachment 1B** contains a list of those who provided written submissions, with the exception of any organisation or person who wished to make a private submission. On some issues arising from the submissions, the Review has corresponded with the author to obtain additional information, clarification or comment upon information that may affect an issue or submission. Consistently with the position taken prior to the publication of the Interim Report, the WAIRC has not made a public written submission. The views of the WAIRC have, however, been conveyed to the Review in the meetings and correspondence referred to above. As stated in the Interim Report, additionally, the Annual Reports of the Chief Commissioner contain

information relevant to understanding the position of the WAIRC on issues related to the Terms of Reference.

(f) Attended informal meetings with the Minister and Ministerial staff about issues arising from the Interim Report and stakeholder meetings.

(g) Engaged in meetings with Ms Carmel McGregor who has, as set out in Chapter 3, has been appointed by the Government to conduct a review into the Public Sector Commission (PSC).

(h) Considered and analysed the written submissions received. As with the Interim Report, the analysis of the public submissions is included in the individual chapters of the Final Report that deal with each Term of Reference.

1.7 General Recommendations – the Amendment and Expansion of the Industrial Relations Act

19. As set out in the Interim Report, the Terms of Reference require the Review to look at contemporary issues for the State industrial relations system and try to provide recommendations to take things into the immediate future.

20. Based upon the analysis in the Interim Report and what follows in the Final Report, the Review is of the opinion that the IR Act needs to be updated and should be renamed to be called the *Industrial Relations Act 20XX* (WA) (the Amended IR Act).[10]

21. In the Interim Report the Review said the updating and renaming of the IR Act would allow for the correction of some of the more basic problems in understanding the legislation. It was stated that the IR Act is currently replete with numerical complications in its sections, gender specific personal pronouns and could not be said to have a plain English drafting style.

[10] The name to be given to the Act should reflect the year in which it is passed.

22. In the proposed recommendations that accompanied the Interim Report, the Review put forward three general recommendations intended to carry these points into effect.

23. At stakeholder meetings and in submissions from UnionsWA and affiliate unions, there was a clearly expressed concern about the recommendation for a plain English drafting style to the IR Act. It was explained that in the experience of the unions, the consequence of an attempt to produce a plain English drafting style has led to a reduction in entitlements for employees. Bitter experiences in the Federal system were related to the Review. The Review reiterates that the reference to a plain English drafting style was intended to do no more than convey that where amendments to the IR Act were to be made, they should be written with a view towards the IR Act being as readily understandable as possible to the people who use the Western Australian industrial relations system. As outlined, these are generally, in the private sector, small businesses and their employees.

24. The Review understands however the concerns expressed and also that there can be an accepted or understood construction of certain sections of the IR Act which should not be lost by any subtle but unintentionally significant amendments to the IR Act.

25. The Review is also informed that it is the general practice of the Parliamentary Counsel's Office to try to ensure that amendments are written in what might be called plain English. For these reasons, the recommendations to be made by the Review do not now include this suggestion.

26. The general recommendations to be made by the Review are as follows:

1. The *Industrial Relations Act 1979* (WA) (the IR Act) be amended, in accordance with these recommendations and be renamed the *Industrial Relations Act 20XX*[11] (WA) (the Amended IR Act).

2. The Amended IR Act is to be reviewed after three years of operation.

[11] The recommendation is that the Amended IR Act should have the year that it is passed as part of its.

3. In the Amended IR Act there is to be a removal of all gender specific language from the IR Act.

27. General recommendation 2 is to provide for there to be a general review of the IR Act, together with any amendments made as a consequence of this Review to see if it is effectively achieving what is required and intended.

1.8 Overview of Recommendations in Response to the Specific Terms of Reference

28. As a consequence of the analysis contained in response to the specific Terms of Reference, the Review is of the opinion that the Amended IR Act should combine in the one piece of legislation the subject matters now covered by other legislation; as well as a general order of the WAIRC, the Termination, Change and Redundancy General Order. The intention is to enhance, hopefully, the prospect that an employer or employee within the State industrial system, will be able to ascertain the laws that apply to their employment relationship. The topics of minimum conditions of employment, currently within the *Minimum Conditions of Employment Act 1993* (WA) (MCE Act) and long service leave that is at presently incompletely covered by the *Long Service Leave Act 1958* (WA) (LSL Act) should become part of the Amended IR Act.

29. Additionally, the Review recommends, in response to **Term of Reference 5**, that there should, to replace the MCE Act, be a set of State employment standards, called the Western Australian Employment Standards (WAES) that covers the minimum conditions of employment that should apply in Western Australia. The topics covered by the WAES are generally based upon those which, at a Federal level, are contained in the National Employment Standards (NES) in the FW Act, unless there already exists a superior standard under the MCE Act, and with the significant addition of family and domestic violence leave (FDV leave).

30. The presence within the Amended IR Act of the WAES will hopefully make less piecemeal the legislation and awards that need to be consulted to ascertain the minimum conditions of employment of employees within the State system.

31. State awards are the focus of **Term of Reference 6**. As set out in Chapter 7 of the Interim Report, as well as in this Final Report, the Review is of the opinion that the State award system is in the need of some rejuvenation. The Interim Report contained a proposed recommendation that State awards be reviewed and replaced by new awards to be made by the WAIRC over a period of 3 years. The suggestion in the Interim Report was that the new awards have industry and occupation based scope and coverage.

32. The stakeholder meetings and submissions received upon that proposed recommendation were, overall, not supportive of it, or at least some of its component parts. Emphasis was placed upon the resource intensive nature of such a process and the prospect that it would lead to either a reduction in employee entitlements (despite a legislative command for this not to occur) or increased costs for businesses operating within the State system.

33. Due to these considerations the Review focussed on finding alternative methods that might be engaged in to try and resolve the major problems with State private sector awards as discussed in the Interim Report, without the drawbacks identified in the stakeholder submissions.

34. The recommendation with respect to Term of Reference 6 contains the Review's proposal as to how to best achieve this. It involves the WAIRC undertaking a process of review of State awards to try and ensure that employees who are not covered by State awards to obtain coverage either by an amendment to the scope clauses of existing awards or the creation of a new award. Additionally, the review process will be aimed at the removal of terms of awards that are incompatible with the minimum wage, the WAES (as statutory minimum conditions of employment), the *Equal Opportunity Act 1984* (WA) (the EO Act), or that are obsolete. Examples of obsolete terms are contained in the Review's recommendation.

35. **Term of Reference 3** asked the Review to consider whether there ought to be an equal remuneration provision in the industrial relations legislation of the State. As set out in the Interim Report there is a considerable gender pay gap in Western Australia and the Review is of the opinion that the WAIRC ought to be armed with the tools necessary to do what it can to enhance equal remuneration. Chapter 4 of the Final Report affirms the preliminary opinion of the Review that the Amended IR Act ought to include an equal remuneration provision modelled upon the system operating in Queensland.

36. **Term of Reference 7** required the Review to consider the mechanisms for enforcement of employment and industrial entitlements.

37. The submissions received upon the proposed recommendations contained in the Interim Report affirmed the preliminary opinion of the Review that the tools of enforcement are inadequate and out of date. The maximum penalties that may be imposed on infringing employers are too low as compared with the FW Act and in contemporary times. Additionally, the Review is of the opinion that the methods that may be used to enforce conditions of employment, short of commencing court proceedings, are inadequate and should be broadened. One of the recommendations made by the Review is for liability for a civil penalty to apply to an employer who has breached the LSL Act. At present there is no such penalty.

38. As set out in the Interim Report, the Review looked at the right of entry provisions for authorised representatives of organisations who may enter onto work sites, inspect records and collect evidence in support of possible breaches of industrial legislation. The Review set out in the Interim Report, that it held the preliminary opinion there ought to be a fit and proper person test to obtain and hold a right of entry certificate. The preliminary opinion met with a significant quantity of comment and discussion at stakeholder meetings and in submissions. In reviewing these materials, the Review has formed the opinion that considers that, given the confines of the Terms of Reference and the submissions provided upon the proposed recommendation, it is inappropriate to make any recommendation

on the topic. It is a topic, of course that the Minister can consider if he chooses to do so. Observations made about the circumstances within which a right of entry may be suspended or revoked are included in Chapter 7 of the Final Report and of course the Minister may have regard to these. Chapter 7 also discusses ways in which the Review considers that rights of entry need to be enhanced to support the investigation of possible breaches of industrial instruments or legislation, so as to increase the prospects that employees will obtain their entitlements. This includes the recording of evidence by electronic means to support the investigation of a possible breach of industrial laws, coupled with safeguards to be imposed to try to limit the risk of information misuse.

39. **Term of Reference 8** required the Review to look at the position of local government within the State industrial relations system. As was anticipated by the Interim Report, there were substantial submissions made in response to the preliminary opinion of the Review that the State should make efforts to try and ensure that local government employers and employees were within the State industrial relations system. As set out in Chapter 9, whether or not local governments and their employees are part of the national system, on the basis that they are trading corporations, remains a vexed and uncertain issue. It will remain so unless and until there is a decision on it by the High Court. As set out in Chapter 9, at present the preponderance of judicial and industrial commission decisions on the issue favour local governments in Western Australia not being characterised as trading corporations, but there is no certainty that the High Court will so decide. As set out in Chapter 9, the *Constitution Act 1889* (WA) provides "the legislature shall maintain a system of local governing bodies", and local governments may be seen as part of the body politic of the State. There are however, academic commentators and some judicial decisions which favour the possible characterisation of local governments as trading corporations. The preliminary opinion of the Review was that it was preferable that, as in New South Wales, Queensland and South Australia, steps be taken to bring local government within the State system. Submissions to the Review since the Interim Report have however provided additional information on the nature and extent of the possible

consequences of such a change. Relevant to this is that by far the overwhelming number of local governments and local government employees in the State currently operate within the Federal industrial relations system. These issues are set out at length in Chapter 9. There are clearly political issues involved in determining whether, at this point in time, local government employers and employees should or should not be part of the State system. Ultimately, the Review reports that as such, it is a matter for the State Government to make a determination on, having regard to these considerations.

40. An alternative, which could be acted upon by a local government, union and with State Government intervention is for attempts to be made to present a "test case" before the Federal Court or the High Court for a determination upon whether a particular local government is, or is not, a trading corporation.

41. **Term of Reference 4** asked the Review to look at the exclusions of employees from coverage under the IR Act and the MCE Act. An impetus for this was that the exclusions have been identified as problematic to Australia signing *ILO Protocol of 2014 to the Forced Labour Convention*. There are also the contemporary problematic issues of the developing "gig economy" and the increasing numbers of people who are employed to perform work in the homes of others, including in the aged care and disability services sector.

42. In considering this Term of Reference the Review followed the general principle that all employees should be entitled to the minimum employment standards of the State and participate in the State industrial relations system, if they are not covered by the Federal system. The opinion of the Review therefore is that the exclusions should be removed. As foreshadowed in the Interim Report however, with respect to the gig economy, the conclusion of the Review is that there is little, at present, that the State can do to effectively legislate about the relationship between the companies operating in the gig economy and the people who are engaged to work by or through them. This is because of s 109 of the Commonwealth *Constitution* in combination with the nature and extent of the coverage of the FW Act and the *Independent Contractors Act 2006* (Cth) (IC Act).

Due to this the Review suggests a taskforce be assembled to monitor the situation and advise the State government on what might be done practically and/or legislatively, in the future, to try to combat concerns that may emerge or solidify. The chapter also makes recommendations about possible coverage of the Amended IR Act over employees of foreign states or consulates, sex workers and non-citizens who are engaged to work but who do not have a valid visa to do so.

43. Chapter 3 of the Final Report is about **Term of Reference 2** and the access of public sector employees to the WAIRC. As set out in the Interim Report, the present regime is overly technical and complex without any concomitant good reason for this. The system separates different parts of the public sector into different pathways of rights, jurisdictions and remedies. The submissions received in response to the Interim Report have affirmed the preliminary opinion of the Review that this needs to change. The focus of Chapter 3 of the Final Report is upon how this can best occur to create a commonality of rights for public sector employees. Included within the recommendations made is for the abolition of the Public Service Arbitrator (PSA), the Public Service Appeal Board (PSAB) and the Railways Classification Board that are, in the opinion of the Review, now unnecessary constituent authorities of the WAIRC.

44. The Review has also had the occasion to consider how a public sector employee may challenge an allegation of a breach of the standards set by the Public Sector Commissioner under the PSM Act. In the opinion of the Review, the system is in need of an overhaul so that if there is an alleged breach of a standard, that is not expeditiously and adequately dealt with by the employing agency, the issue may be referred to the WAIRC.

45. As part of its recommendations, the Review also considers that there ought to be an inclusion in the IR Act, for both public and private sector employees, of an entitlement to seek a stop-bullying order from the WAIRC. The recommendation is that generally this entitlement ought to be modelled on the relevant provisions in the FW Act.

46. Chapter 3 also includes recommendations relevant to police officers, prison officers and youth custodial officers within the State industrial relations system.

47. That leaves **Term of Reference 1** about the structure of the WAIRC. The future structure of the WAIRC is to some extent dependent upon whether there is an implementation of other recommendations. However, the Review is of the opinion that the WAIRC ought to continue as a body that is generally available for those covered by the State system to resolve industrial disputes and make orders and awards that affect the terms and conditions of employment, albeit not inconsistently with the WAES.

48. One concern expressed in the Interim Report, was about the denial of contractual benefits jurisdiction being held by the WAIRC. After receipt of submissions, however, set out in Chapter 2, the Review has formed the opinion that the jurisdiction ought to generally remain with the WAIRC.

49. The possible future structure of the WAIRC, as suggested in the Interim Report, met with some criticism from those who provided submissions to the Review.

50. In light of this, the Review has altered its views as to what the future structure of the WAIRC ought to be. In the opinion of the Review, the position of President of the WAIRC, that has been part of the WAIRC since legislated for in 1979, ought to be abolished. Instead, the role and responsibilities of the President ought to be subsumed into the position of the Chief Commissioner of the WAIRC. As part of this recommendation, the Review believes the qualifications for the office of Chief Commissioner ought to be changed, so that either legal experience, or, a legal qualification coupled with five years' experience as a member of the WAIRC or another industrial commission or court, is a prerequisite for appointment as Chief Commissioner.

51. If the Chief Commissioner takes on the role and responsibilities of the President, there will then be no need for the "Judicial Bench" or renaming of the Commission in Court Session as the "Arbitral Bench", which were discussed and proposed as recommendations in the Interim Report. Instead, the Full Bench of the WAIRC can

remain and be constituted by the Chief Commissioner and two other Commissioners. The Commission in Court Session can simply be renamed the Full Bench, to avoid the confusions inherent in its current name.

52. Although there is a recommended change to the qualifications for the position of Chief Commissioner and Senior Commissioner, as noted in Chapter 2, the present and previous most recent Chief Commissioners both satisfy these qualifications, as does the present Senior Commissioner and current Acting Senior Commissioner.

53. The Review has also affirmed its opinion that the Industrial Appeal Court (IAC) ought to be abolished and replaced by a system that would allow appeals on questions of law to be heard and determined by the Court of Appeal of the Supreme Court of Western Australia, after leave is granted. This would involve an enlargement of the narrow present possible grounds of appeal to the IAC.

54. Chapter 2 also discusses and proposes changes to the retirement age of the members of the WAIRC, and the possibility of dual appointments to both the WAIRC and the Fair Work Commission (FWC).

55. Chapter 2 also discusses particular processes engaged in by the WAIRC and whether there ought to be any amendment to them. For example, after receiving submissions from stakeholders, the Review is of the opinion that the WAIRC ought to remain a no costs jurisdiction and that generally the present restriction upon legal representation within the WAIRC ought to remain as it is currently in s 31 of the IR Act. The Review has recommended, however, a tighter control over agents who may appear for parties within the WAIRC.

1.9 Acknowledgments

56. As in the Interim Report it is appropriate to emphasise the invaluable and dedicated assistance the Review has received from the Secretariat. In particular, the Secretariat has been headed by Ms Lorraine Field who has done sterling work in co-ordinating all aspects of the Review; and in heading the team at the Secretariat that have provided background papers and information, reviews of drafts of chapters of the reports and general counsel on all aspects of the Review.

The Review would also like to acknowledge the very extensive administrative assistance provided by Mrs Joy Druce, in attending at stakeholder meetings and in the preparation and publication of the Final Report, as assisted by Ms Lisa Breglia and Ms Nicole Wyburn.

Attachment 1A Issues outside of the Terms of Reference of the Review

- Unfair dismissal
- Agreement making
- General protections/adverse action
- Individual employee access to the WAIRC
- Industrial action
- Regulation of unions
- Labour hire
- Referral of industrial relations powers for the private sector to the Commonwealth
- Issues relating to the substance of the *Construction Industry Portable Paid Long Service Leave Act 1985*
- The possibility of having a portable long service leave system in industries other than the construction industry
- Post-employment restraints
- Sham contracting
- Aspects of the Labour Relations Legislation Amendment and Repeal Bill 2012 (on issues that are not covered by the Terms of Reference)
- Amendola Report recommendations (on issues that are not covered by the Terms of Reference)
- Online filing (elodgement) and case management system in the Industrial Magistrates Court
- Whether there ought to be a requirement for a fit and proper person test for those who are to be granted a right of entry under s 49I of the IR Act
- Whether the facts and circumstances in which a right of entry holder can have their right of entry revoked or suspended under s 49J of the IR Act ought to be broadened

Attachment 1B Public Submissions on the Interim Report of the Review

- Australian Manufacturing Workers' Union WA Branch
- Australian Mines and Metals Association
- Chamber of Commerce and Industry of Western Australia
- City of Canning
- Community Employers WA
- Community and Public Sector Union WA Branch / Civil Service Association of WA Inc
- Construction, Forestry, Mining and Energy Union, Construction and General Division, WA Divisional Branch
- Department of Communities
- Department of Health
- Department of Justice
- Department of the Premier and Cabinet
- Department of Water and Environmental Regulation
- Employment Law Centre of Western Australia Inc
- Ethnic Communities Council of Western Australia
- Health Services Union of Western Australia
- Housing Industry Association
- Legal Practice Board of Western Australia
- Master Builders Western Australia
- Master Grocers Australia (MGA Independent Retailers)
- My Place Foundation Inc.
- Mr Peter Katsambanis MLA
- National Trust Western Australia
- Public Sector Commission
- Public Transport Authority and Main Roads Commission (joint submission)
- Scarlet Alliance Australian Sex Workers Association
- Slater & Gordon Lawyers
- Small Business Development Corporation
- The Law Society of Western Australia
- The State School Teachers' Union of W.A. (Inc.)
- Transport Workers' Union of Australia Industrial Union of Workers – WA Branch
- UnionsWA
- United Firefighters Union of Australia West Australian Branch
- United Voice
- vegetablesWA

- Western Australian Council of Social Service
- WA Individualised Services
- Western Australian Local Government Association
- WA Municipal, Administrative, Clerical and Services Union of Employees (WASU)
- WA Police Union
- WA Prison Officers' Union

Note: In addition to the above there were nine confidential Submissions on the Interim Report received by the Review.

Public Submissions in Reply

- Community and Public Sector Union SPSF Group, WA Branch/ Civil Service Association of WA Inc
- Master Builders Western Australia
- Transport Workers' Union of Australia Industrial Union of Workers – WA Branch
- WA Prison Officers' Union

Note: In addition to the above there were four confidential Submissions in Reply received by the Review.

Chapter 2 Structure of the Western Australian Industrial Relations Commission

2.1 The Term of Reference

57. The first Term of Reference reads as follows:

> The Ministerial Review of the State Industrial Relations System is to consider and make recommendations with respect to the following matters:
>
> 1. Review the structure of the Western Australian Industrial Relations Commission with the objective of achieving a more streamlined and efficient structure.

58. The Term of Reference is expressed as a command to undertake a review for a specific purpose. The Review is of the structure of the WAIRC. The purpose is the aim of achieving a more streamlined and efficient structure. As set out in the Interim Report, the phrase "streamlined and efficient" is sometimes used as a synonym or code for a cost cutting or savings measure. As there stated, the Review does not think the phrase should be understood in this way. This is because simply creating a structure that might cost less could, in one sense, be a more "streamlined" institution, but not be consistent with the provision of a State industrial relations system that fits the characteristics of a contemporary, fair and accessible State industrial relations system. This is what the Minister announced he envisaged for the future, when announcing the Review.

59. The Interim Report contained a review of the jurisdiction and structure of the WAIRC including its composition and procedures.

60. It contained an analysis of the following:

(a) The genesis of the WAIRC.[12]

(b) The objects of the IR Act, including the observation that the WAIRC does not itself have stated objects.[13]

(c) The general jurisdiction of the WAIRC under s 23(1) of the IR Act.[14]

---

12 Interim Report [116]-[121].
13 Interim Report [122-124], [136]-[140].
14 Interim Report [125]-[127].

(d) The limited jurisdiction of the WAIRC with respect to private sector employers and employees following the enactment of Work Choices legislation and the FW Act.[15]

(e) The nature of the jurisdiction exercised by the WAIRC having regard to s 26 of the IR Act.[16]

(f) The members, membership and constitution of the WAIRC.[17]

(g) The constituent authorities of the WAIRC and Boards of Reference.[18]

(h) The Industrial Magistrates Court (IMC) and its link to the WAIRC.[19]

(i) The appellate structure of the WAIRC including the Full Bench and the Western Australian Industrial Appeal Court (IAC).[20]

(j) The Commission in Court Session (CCS).[21]

(k) The Occupational Safety and Health Tribunal (OSH Tribunal).[22]

(l) The Road Freight Transport Industry Tribunal (RFTIT).[23]

(m) The breadth and nature of the jurisdiction of the WAIRC.[24]

(n) The nature of an "industrial matter" under the IR Act and who in the private sector may refer industrial matters to the WAIRC.[25]

(o) The matters determined by the WAIRC in 2016-2017.[26]

15 Interim Report [128]-[137].
16 Interim Report [141]-[146].
17 Interim Report [147]-[150].
18 Interim Report [151]-[155], [171]-190].
19 Interim Report [157]-[165].
20 Interim Report [166]-[169], [315]-[323].
21 Interim Report [170].
22 Interim Report [191]-[210].
23 Interim Report [211]-[222].
24 Interim Report [223]-[228].
25 Interim Report [229]-[242].
26 Interim Report [243]-[246].

(p) The unfair dismissal and denial of contractual benefits claims heard and determined by the WAIRC in 2016-2017.[27]

(q) Issues relating to the denial of contractual benefits jurisdiction in the WAIRC.[28]

(r) The present composition and workload of the WAIRC including the use of acting members of the WAIRC.[29]

(s) The position of the President of the WAIRC.[30]

(t) Section 34 of the IR Act.[31]

(u) Dual appointments to the WAIRC and the FWC.[32]

(v) The retirement age of members of the WAIRC.[33]

(w) Legal representation and the use of industrial agents in the WAIRC.[34]

(x) Whether the WAIRC should remain a no costs jurisdiction.[35]

(y) Issues arising out of the use of the procedures contained in s 32 and s 44 of the IR Act.[36]

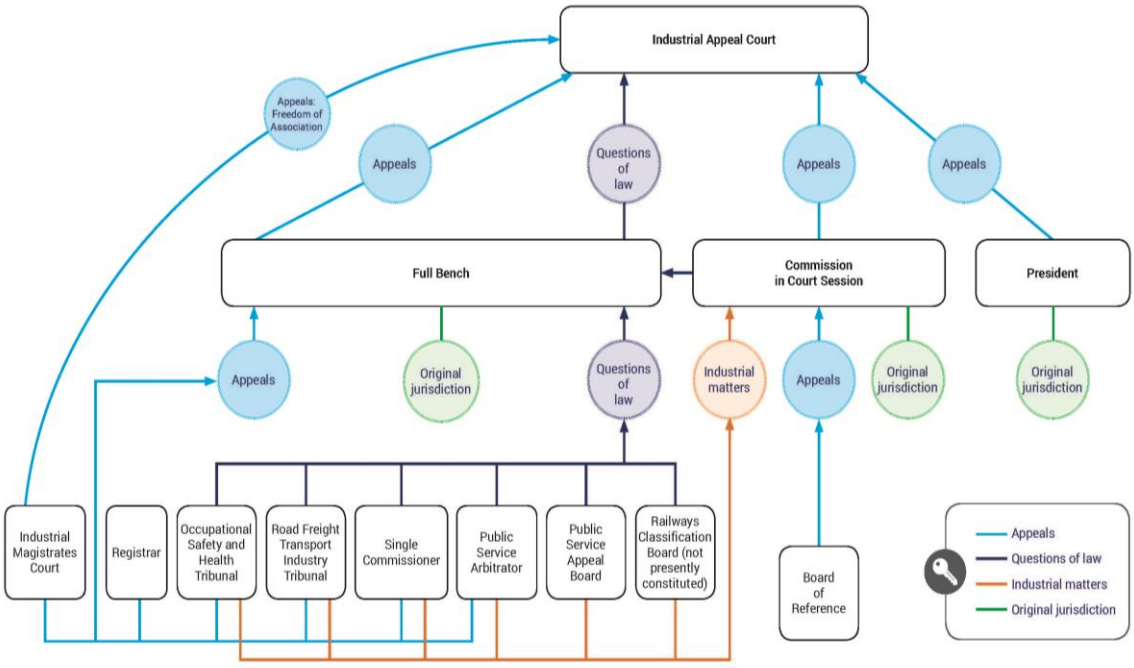
(z) The status of the WAIRC and the issue of offences committed before the WAIRC.[37]

(aa) Streamlining processes for the WAIRC.[38]

27 Interim Report [247]-[249].
28 Interim Report [250]-[260].
29 Interim Report [261]-[274].
30 Interim Report [275]-[314].
31 Interim Report [324]-[326].
32 Interim Report [327].
33 Interim Report [328]-[329].
34 Interim Report [330]-[342].
35 Interim Report [343]-[348].
36 Interim Report [349]-[353].
37 Interim Report [354].
38 Interim Report [355]-[365].

61. The work engaged in by the WAIRC and its relationship to other courts and tribunals in Western Australia, as discussed in the Interim Report, can be illustrated by the following diagram:

Figure 2A - Current structure of the Western Australian Industrial Relations System



62. The Interim Report then included the following proposed recommendations, for discussion and submission purposes, and contained requests for additional submissions on specific questions in response to the Term of Reference and the analysis engaged in by the Review.[39]

> 4. The Full Bench of the Western Australian Industrial Relations Commission (WAIRC) be abolished and replaced by a body to be known as the Industrial Commission Judicial Bench (Judicial Bench) to hear and determine:
>
> (a) Appeals from decisions of single Commissioners of the WAIRC on the basis and grounds set out in s 49 of the IR Act.
>
> (b) Appeals from decisions of the Industrial Magistrates Court (IMC) on the basis and grounds set out in s 84 of the IR Act.
>
> (c) Appeals under s 69(12) of the IR Act.
>
> (d) Applications currently heard by the Full Bench under s 84A of the IR Act.

[39] Proposed recommendations 1-3 were general recommendations which have been discussed in Chapter 1 of the Final Report.

(e) Referrals on questions of law, from the Chief Commissioner or any Commissioner of the WAIRC with the concurrence of the Chief Commissioner, or the Industrial Commission Arbitral Bench, as provided for in proposed recommendation [5] below.

5. The position of the President of the WAIRC be abolished and instead:

(a) The Presiding Member of the Judicial Bench be a Supreme Court Justice, allocated on a case by case basis, by the Chief Justice of Western Australia (the Presiding Member).

(b) The jurisdiction currently exercised by the President of the WAIRC under s 49(12) of the IR Act be exercised by the Presiding Member.

(c) The jurisdiction currently exercised by the President of the WAIRC under s 72A(6) of the IR Act be exercised by the Chief Commissioner.

(d) Any other powers or duties of an administrative nature currently exercised by the President under the IR Act be exercised by the Chief Commissioner.

6. The Commission in Court Session (CCS) of the WAIRC be abolished and replaced by a body to be known as the Industrial Commission Arbitral Bench of the WAIRC (Arbitral Bench) constituted by three Commissioners, with either the Chief Commissioner or Senior Commissioner presiding:

(a) To hear and determine the State Wage Case, applications for a General Order, and other matters presently heard by the CCS.

(b) To exercise the jurisdiction currently exercised by the Full Bench under sections 53, 54, 55, 58, 59, 60, 62, 68, 71, 72, 72A and 73 of the IR Act.

7. (a) The Industrial Appeal Court (IAC) be abolished.

(b) The 2018 IR Act be amended to include a right of appeal to the Court of Appeal of Western Australia, upon a grant of leave by a Justice of the Court, from a decision of the Presiding Member, the Judicial Bench, or the Arbitral Bench on the ground that the decision involved an error of law.

8. The jurisdiction of the IMC is to be amended so that if a claim for enforcement of a State Employment Standard (SES), State award, or other State industrial instrument is made to the IMC, the IMC has jurisdiction to deal with all enforcement proceedings, claims and counterclaims arising between the employer and the employee, or former employer and employee, including any claims by the employee or former employee for a denial of a contractual benefit and any claims of set-off from, or counterclaim to, the denial of contractual benefit alleged by the employee.

9. The 2018 IR Act provide for the dual appointment of WAIRC Commissioners to the Fair Work Commission (FWC), as contemplated by s 631(2) of the *Fair Work Act 2009* (FW Act).

10. The 2018 IR Act provide for the dual appointment of FWC members to the WAIRC, as contemplated by s 631(1) of the FW Act.

11. The 2018 IR Act include an amendment so that the compulsory retirement age of the members of the WAIRC be increased from 65 to 70 years of age.

12. The 2018 IR Act specify that any section equivalent to the current s 26(1)(a) of the IR Act is not to apply if the WAIRC is deciding a question of law in any matter and upon any issue it is required to decide.

13. The 2018 IR Act empower the WAIRC to regulate the conduct of registered industrial agents appearing before the WAIRC, by way of a Code of Conduct to be published by the WAIRC, that includes the entitlement of the WAIRC to, on notice to the agent and with the agent having the opportunity to make submissions on the issue, suspend or revoke an agent's registration or withdraw the right of the agent to appear before the WAIRC, either generally or for a particular matter, occasion or hearing.

14. The 2018 IR Act contain:

    (a) A "slip rule" for orders made by the WAIRC.

    (b) An amendment to the current requirement for a "speaking to the minutes" of orders, to give discretion to the WAIRC to dispense with a speaking to the minutes in a particular case if it is warranted in the opinion of the WAIRC.

    (c) An amendment to the requirement for a "speaking to the minutes" of orders that would permit the WAIRC to specify that unless parties indicate by a specified time that a speaking to the minutes is requested, that the WAIRC may issue the order in the terms of the minutes.

    (d) Power for the WAIRC to conduct conciliations by telephone.

15. The 2018 IR Act is not to include any equivalent of the privative clause provisions contained in s 34(3) and s 34(4) of the IR Act, which purport[40] to provide that any decision of the WAIRC will not, subject to the IR Act, be "impeached" or subject to a writ of certiorari, or award, order, declaration, finding or proceeding liable to be "challenged, appealed against, reviewed, quashed or called into question by any court".

16. The 2018 IR Act should not include any equivalent of s 48 of the IR Act that provides for the establishment of Boards of Reference under awards made by the WAIRC.

The Review seeks additional submissions on these issues arising from Term of Reference 1.

17. Whether the denial of contractual benefits jurisdiction and/or the interpretation of awards, orders and industrial agreements jurisdiction, currently exercised by the WAIRC,[41] ought to:

    (a) Continue to be exercised by the WAIRC as currently provided for under the IR Act; or

    (b) Continue to be exercised by the WAIRC but only by Commissioners of the WAIRC who, before their appointment, had practised law for not less than five years as an Australian lawyer, as defined in s 4 of the *Legal Profession Act 2008* (WA) (LP Act);[42] or

    (c) Be exercised by the IMC; or

    (d) Be exercised by members of an Industrial Court to be established under the 2018 IR Act, and where the qualification for appointment to the Industrial Court be limited to people who, before their appointment, had practised

40 The word purport is used, as the subsections may be contrary to the *Commonwealth Constitution*.

41 Following a referral under s 29(1)(b)(ii) or an application under s 46 of the IR Act.

42 Subject to a transitional provision that this limit to the exercise of the jurisdiction does not apply to any person appointed to be a member of the Commission prior to the commencement of the 2018 IR Act.

law for not less than five years as an Australian lawyer, as defined in s 4 of the LP Act.

18. Whether parties should be entitled in all matters before the WAIRC, however constituted, to be represented by an Australian legal practitioner, as defined in s 5 of the LP Act, subject to a discretion to be exercised by the WAIRC to disallow any or all of the parties from having legal representation in a particular matter, or on a particular occasion or for a particular hearing.

19. Whether the WAIRC ought to be empowered to make orders for costs, including legal costs:

    (a) In any matter before the WAIRC, but only in the same circumstances as the FWC may make an order for costs under s 401 and s 611 of the FW Act; or

    (b) Alternatively to (a), only in a matter that proceeds to an arbitration by the WAIRC, but only in the same circumstances as the FWC may make an order for costs under s 401 and s 611 of the FW Act; or

    (c) In no cases, so the WAIRC remains a no costs jurisdiction in all matters.

20. Whether, without removing the entitlement held by the parties listed in s 44(7)(a) of the IR Act to make the application specified in that subsection, the 2018 IR Act should contain a consistent set of single provisions for the WAIRC to issue a summons for a compulsory conference, as currently provided for in s 44 of the IR Act, and for the WAIRC to conciliate and arbitrate an industrial matter that is referred to it, as currently provided for in s 32 of the IR Act, and if so how that should be legislatively achieved.

21. Whether:

    (a) The 2018 IR Act should include an amendment to s 84A(1)(b) of the IR Act to permit orders to be enforced by the party for whose benefit the order was made, in addition to the Registrar or a Deputy Registrar.

    (b) The 2018 IR Act should contain a division equivalent to Part 5-1, Division 9 of the FW Act, about offences committed in and before the WAIRC.

22. Whether the 2018 IR Act should include, in any industrial matter before the WAIRC, and subject to the overall discretion of the WAIRC, a right for any party to obtain discovery and inspection of relevant documents held in the possession, power or custody of any other party.

63. The Review discussed the proposed recommendations and requests for additional submissions at the meetings referred to in Chapter 1. Additionally, written submissions were received in response to the Interim Report and about Term of Reference 1, from:

    (a) The Australian Mines and Metals Association (AMMA)

    (b) The City of Canning

    (c) The Department of Water and Environmental Regulation (DWER)

    (d) The Housing Industry Association (HIA)

(e) The Australian Manufacturing Workers' Union (AMWU)

(f) Construction, Forestry, Mining and Energy Union, Construction and General Division, WA Divisional Branch (CFMEU)

(g) The Community and Public Sector Union / Civil Service Association of WA (CPSU/CSA)

(h) The Health Services Union of Western Australia (HSUWA)

(i) UnionsWA

(j) United Voice

(k) The Western Australian Municipal, Administrative, Clerical and Services Union (WASU)

(l) The Ethnic Communities Council of Western Australia (ECCWA)

(m) The United Firefighters Union (UFU)

(n) Slater & Gordon Lawyers (Slater & Gordon)

(o) The Employment Law Centre of Western Australia Inc (ELC)

(p) The Department of Health

(q) Mr Peter Katsambanis MLA, in his private capacity

(r) The Law Society of Western Australia (the Law Society)

(s) The Chamber of Commerce and Industry of Western Australia (CCIWA)

(t) The Western Australian Prison Officers Union (WAPOU)

(u) The Legal Practice Board of Western Australia (the Legal Practice Board)

(v) vegetablesWA[43]

(w) The State School Teachers' Union of W.A. Inc (SSTUWA)

64. There were also submissions received that were confidential. These submissions have been taken into account, and may be referred to in this chapter, albeit the name of the party making the submission will not be identified.

[43] The organisation's name, vegetablesWA is one word and commences with a lower case letter.

2.2 Analysis of Further Submissions

65. The most efficient way to analyse the submissions received is in grouping them in response to the proposed recommendation or requests for additional submissions they are about. The Review will consider each proposed recommendation and issue in turn, before making final recommendations for the Term of Reference.

2.2.1 Proposed Recommendation 4

The Full Bench of the Western Australian Industrial Relations Commission (WAIRC) be abolished and replaced by a body to be known as the Industrial Commission Judicial Bench (Judicial Bench) to hear and determine:

(a) Appeals from decisions of single Commissioners of the WAIRC on the basis and grounds set out in s 49 of the IR Act.

(b) Appeals from decisions of the Industrial Magistrates Court (IMC) on the basis and grounds set out in s 84 of the IR Act.

(c) Appeals under s 69(12) of the IR Act.

(d) Applications currently heard by the Full Bench under s 84A of the IR Act.

(e) Referrals on questions of law, from the Chief Commissioner or any Commissioner of the WAIRC with the concurrence of the Chief Commissioner, or the Industrial Commission Arbitral Bench, as provided for in proposed recommendation [5] below.

66. This proposed recommendation was supported by AMMA and the ECCWA.

67. Mr Katsambanis MLA submitted the Final Report should provide a clear rationale for why the change suggested was necessary and identify what benefits would be derived from any proposed new structure. Mr Katsambanis also submitted it was critical that appropriate funds be made available in State budgets to properly resource any changes to the Supreme Court and "a new Judicial Bench" to cope with any additional workload. As later set out, and with respect, to some extent this involves a misunderstanding of the meaning and intent of the proposed recommendation.

68. The Law Society submitted the Full Bench of the WAIRC has always acted as a suitable filter for appeals, ensuring limited cases progressed to the IAC.

69. CCIWA suggested the Full Bench continue to be named as such. It was submitted that replacing the "Full Bench" with the "Judicial Bench" may result in a lay person

perceiving the "Judicial Bench" to be legalistic in nature, with parties feeling less confident about representing themselves; leading to either "costly legal representation" or the abandonment of the process. Despite these misgivings, CCIWA gave broad support to proposed recommendations 4(a) to 4(e). The Review notes the reason for the name change to the "Judicial Bench" was proposed in the Interim Report, because it was suggested the appellate bench was to be presided over by a Supreme Court Justice. As that person would not be part of the WAIRC the body hearing the appeals could not readily be described as a "Full Bench" of the WAIRC.

70. Not dissimilarly the Department of Health submitted that although it concurred with the proposed recommendation, consideration should be given to ensuring the proposed changes did not increase the complexity of the State IR system.

71. The unions who made submissions on this proposed recommendation were not in favour of it. UnionsWA wrote what might be described as a lead submission, which was agreed with or commented upon by affiliate unions. UnionsWA submitted the proposed recommendation, along with proposed recommendation 6, would, if implemented, effectively create two appellate bodies within the WAIRC, which would be neither streamlined nor efficient. In response, the Review notes the intent of the proposed recommendation was not to increase the number of appellate bodies within the WAIRC, but to accommodate the abolition of the position of the President within the existing framework of the WAIRC, in a reasonably minimalistic way. There already exists within the WAIRC a duality of appellate structures of sorts. For example, the Full Bench hears appeals, amongst others, against the decisions of single Commissioners and the IMC. A WAIRC bench of three Commissioners hears "appeals" from decisions to remove a police officer under s 33P of the *Police Act 1892* (WA) (the Police Act). The CCS may hear appeals from Boards of Reference. It was not intended in the Interim Report that the CCS under the then suggested changed name of the "Arbitral Bench" would undertake any greater appellate responsibilities.

72. The UnionsWA submission was supported by United Voice and the HSUWA. The AMWU made a submission similar to that of UnionsWA. The CFMEU also did not support the abolition of the Full Bench and said the current structure of appeals to the Full Bench worked effectively and was not in need of reform, save for the President's role. The President's role will be more specifically referred to below.

73. The CPSU/CSA also did not support changing the name of the "Full Bench" to the "Judicial Bench". It was submitted the change could be seen as too legalistic and not in line with the ethos of the WAIRC as a "lay person's tribunal". In this context the CPSU/CSA noted the submission of UnionsWA, suggesting the CCS and the Full Bench be amalgamated into a single Full Bench, to hear all appeals. That submission is later referred to. The CPSU/CSA said it was supportive of that submission.

74. The UFU said it did not agree with the proposed changes, for similar reasons, about the WAIRC becoming more legalistic, not a lay person's jurisdiction and because, it argued, an increased legalistic approach would, on the whole, favour employers and ensure that more lawyers were needed in the system possibly denying access for "those parties that may face economic disadvantage".

75. The WASU said that in relation to proposed recommendations "4 to 17", it strongly supported the current role of the WAIRC Full Bench and President. It submitted the WAIRC and the Full Bench should retain their existing powers, including the denial of contractual benefits jurisdiction and interpretation of awards. This jurisdiction will be referred to more specifically below.

2.2.2 Proposed recommendation 5

The position of the President of the WAIRC be abolished and instead:

(a) The Presiding Member of the Judicial Bench be a Supreme Court Justice, allocated on a case by case basis, by the Chief Justice of Western Australia (the Presiding Member).

(b) The jurisdiction currently exercised by the President of the WAIRC under s 49(12) of the IR Act be exercised by the Presiding Member.

(c) The jurisdiction currently exercised by the President of the WAIRC under s 72A(6) of the IR Act be exercised by the Chief Commissioner.

(d) Any other powers or duties of an administrative nature currently exercised by the President under the IR Act be exercised by the Chief Commissioner.

76. This recommendation was supported by the AMMA, CCIWA, the Department of Health and the ECCWA. Again, the unions that provided submissions on the proposed recommendation were not supportive of it. The lead submission by UnionsWA was agreed with by the HSU and the CFMEU. UnionsWA submitted the retention of the President within the WAIRC was needed to ensure that presiding members have industrial relations experience. It was also submitted the proposed recommendation did not address "listing times" for the WAIRC, if the Presiding Member of the Judicial Bench was also a Supreme Court Justice. A further submission was made that the Chief Justice would effectively be choosing a member of the WAIRC, rather than the elected government of the day.[44] It was also submitted the recommendation did not detail where matters relating to s 62 and s 66 would be heard.[45] It was submitted these sections that deal with the alteration, interpretation and disallowance of an organisation's rules should merit the attention of the President.

77. UnionsWA also submitted that an alternative approach would be to have a serving Commissioner, or the Acting President, appointed to the Supreme Court. As a matter of historical interest and an example of how views may change over time, the Review notes that a reason given in the Fielding Review in favouring the abolition of the President's position, was that the then Trades and Labor Council of Western Australia favoured it.[46]

78. The AMWU also expressed significant concern about the proposed recommendation. It was submitted that any appointment to the WAIRC, and especially the Presiding Member on appeals, should have experience in industrial relations. It was submitted that if the Presiding Member was not a "fixed" Supreme Court Justice but rather a "rotating" Justice, it would mean there would be no opportunity for the Supreme Court Justice to build up industrial relations

44 Whilst that is correct it should be noted the Chief Justice presently nominates the members of the IAC, under s 85(3) of the IR Act.

45 It is noted however that the Review did address this jurisdiction at [305] and [306] of the Interim Report.

46 Fielding Review, p 53.

experience. It was also submitted that there was no Supreme Court Justice with "any notable experience or expertise in industrial relations".[47] It was also submitted that there had not been sufficient exploration as to how the model would impact upon listing times, given the current caseload in the Supreme Court. The AMWU also expressed concerns over the Chief Justice allocating the Presiding Member for appeals, as opposed to the executive.

79. The UFU also expressed concern about a rotating member of the Supreme Court presiding over appeals. The submission of United Voice added the appointment would be out of line with the "quasi-judicial nature and layperson's use" of the WAIRC and would likely introduce "more formality and increase the length of time to deal with matters".

80. The Review's consideration of these points is set out following the submissions made on proposed recommendations 6 and 7.

2.2.3 Proposed recommendation 6

The Commission in Court Session (CCS) of the WAIRC be abolished and replaced by a body to be known as the Industrial Commission Arbitral Bench of the WAIRC (Arbitral Bench) constituted by three Commissioners, with either the Chief Commissioner or Senior Commissioner presiding:

(a) To hear and determine the State Wage Case, applications for a General Order, and other matters presently heard by the CCS.

(b) To exercise the jurisdiction currently exercised by the Full Bench under sections 53, 54, 55, 58, 59, 60, 62, 68, 71, 72, 72A and 73 of the IR Act.

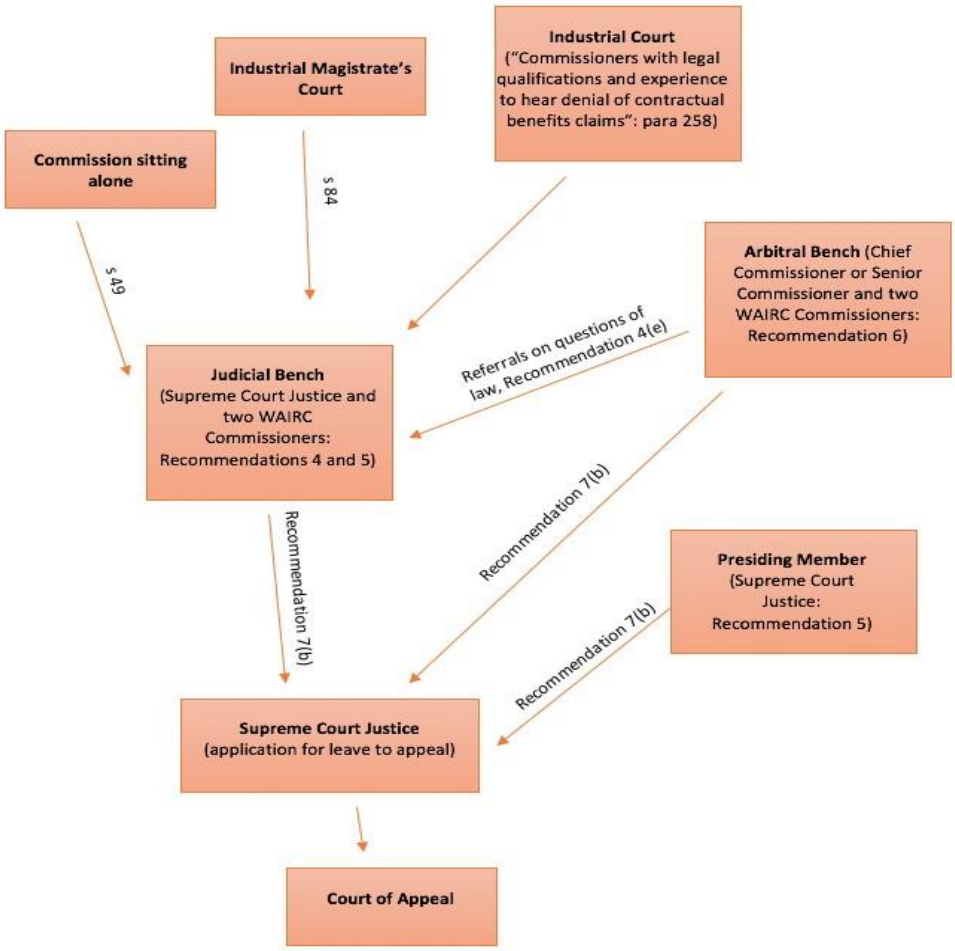
81. Proposed recommendation 6 had support from AMMA, CCIWA, the Department of Health and the ECCWA. UnionsWA did not support the proposal, consistently with what has been set out earlier in relation to proposed recommendation 4. The UnionsWA submission was adopted by the HSUWA, United Voice and the WASU. The AMWU went further in saying that proposed recommendations 4 and 6 together effectively proposed the creation of two Full Bench bodies in the WAIRC and was contrary to the direction of the Term of Reference calling for a more streamlined and efficient structure.

[47] The submission on this point is clearly incorrect having regard to the vast industrial relations experience of, for example, Justice Le Miere before he was appointed to the Supreme Court.

82. The CFMEU did not support the abolition of the CCS, saying that the CCS worked effectively and there was no demonstrated need for reform. The CPSU/CSA supported the submission of UnionsWA but otherwise saw merit in changing the name of the CCS to the "Arbitral Bench". The UFU did not agree with the proposed recommendation on the basis previously outlined, that it could make the industrial relations system seem more legalistic and contrary to it being a "lay person's jurisdiction".

83. The AMWU submission, stating that the structure set out in the proposed recommendation was not more streamlined, was supported by a diagram as set out below, which it said, represented the structure that would be created if the proposed recommendations were implemented. Whilst the diagram is not an entirely accurate representation of what was proposed, the Review takes notice of the point made by it.

Figure 2B - AMWU Diagram of Proposed Structure in Interim Report



84. As set out earlier, in putting forward proposed recommendations 4-6, it was not the intent of the Review that the WAIRC become more legalistic in nature. The Review accepts however that the use of the name "Judicial Bench" could have created that impression. The intent was to distinguish between the existing CCS and the existing Full Bench and to incorporate the abolition of the position of the President. The Review notes the support amongst the unions making submissions, for the position of the President. As set out in the Interim Report however, the abolition of the position of the President has been a long-standing policy of both political parties (albeit not acted upon), and has been supported by the Fielding, Cawley and Amendola Reviews; even if, as set out in the Interim Report, some of the reasoning contained therein may have been overtaken by events or not particularly cogent. Additionally, as set out in the Interim Report, there is at present insufficient work to sustain the position of a full-time President of the WAIRC. The remainder of proposed recommendation 5 was an attempt by the Review to set out how the current work of the President should be divided up.

85. The Review said, in the Interim Report, that it supported the notion that the head of the appellate bench within the WAIRC should be a lawyer with the same qualifications as a person who could be appointed as a Justice of the Supreme Court; and with the status of that position. This was because of the nature and quality of the decision-making that ought to be anticipated from the appointment of such a person to judicially head the WAIRC and preside over the primary appellate bench of the WAIRC.

86. Recommendation 6 was aimed at changing the name of the CCS as well as reallocating the existing work of the Full Bench to accommodate the suggested recommendations concerning the President's position. The Review suggested the name of the CCS be changed as it is inherently confusing. This is because, in exercising its jurisdiction the CCS is generally not acting judicially; saying the body is "in Court Session" does not now have any contemporary meaning.

87. The Review has considered the support of and criticisms made about the proposed recommendations and given additional thought to the issues. As a

consequence, the Review is now of the opinion that the following alternative is the way in which the WAIRC ought to be restructured.

88. In the opinion of the Review the issues identified in the Interim Report together with the concerns expressed about the proposed recommendations can be accommodated by the position of the President being abolished, with the powers and functions of the President being accommodated into the position of Chief Commissioner and there being a change to the qualification for appointment of the Chief Commissioner. As a consequence, the qualification for appointment of the Senior Commissioner would also need to be changed, as explained below.

89. Section 9 of the IR Act sets out the people who are eligible to be the President and the Chief Commissioner. Section 9(1) provides that a person is not eligible for appointment as the President unless the person is a "lawyer" and has had not less than 5 years' "legal experience". Section 9(1aa) of the IR Act provides that:

> ***lawyer*** means an Australian lawyer within the meaning of that term in the *Legal Profession Act 2008*, section 3;
>
> ***legal experience*** means –
>
> (a) standing and practice as a legal practitioner; or
>
> (b) judicial service (including service as a judge of a court, a magistrate or other judicial officer) in the State or elsewhere in a common law jurisdiction; or
>
> (c) a combination of both kinds of legal experience mentioned in paragraphs (a) and (b).

90. To be appointed as Chief Commissioner a person must, in accordance with s 9(2) of the IR Act, have "experience at a high level in industrial relations"; or "not less than five years previously, obtained a degree of a university or an educational qualification of similar standard after studies considered by the Governor to have substantial relevance to the duties of the Chief Commissioner".

91. The qualifications for appointment of Chief Commissioner are therefore reasonably inexact. Essentially however, the qualification seems to be a requirement for experience at a high level in industrial relations, or a tertiary degree in a field substantially relevant to the duties of Chief Commissioner. One could envisage degrees in economics, law or industrial relations as being relevant qualifications. The qualification for the office of President and the Chief

Commissioner are not, of course, mutually exclusive. A person could be qualified to be the President and also qualified to be the Chief Commissioner.

92. The Review is of the opinion that if the qualifications for the appointment of Chief Commissioner and Senior Commissioner were as follows, that could facilitate the enactment of a more efficient and streamlined WAIRC, without losing the present benefits of having a President with legal experience:

A person is not eligible to be the Chief Commissioner or the Senior Commissioner, unless they are:

(1) (a) A person who is a lawyer and has had not less than 5 years' legal experience; and

(b) The person has had significant experience in industrial relations law and/or practice; or

(2) (a) A person who has approved academic qualifications as defined in s 21(1) of the *Legal Profession Act 2008* (WA); and

(b) Not less than the equivalent of 5 years' full-time experience as a member of the WAIRC, the FWC, or another court or tribunal exercising industrial relations jurisdiction in Australia.

93. Under this method of qualification, for example, an Australian lawyer who has had significant experience in industrial relations law would be qualified to be the Chief Commissioner, as would a person who was legally qualified and had 5 years' experience as a member of the WAIRC.

94. If such a person was appointed as Chief Commissioner it is likely they could fulfil the role of the President, as set out currently in the IR Act. The person would also be likely to be able to do the work envisaged in the Second Reading Speech of the Industrial Relations Minister prior to the enactment of the *Industrial Arbitration Act 1979*, that initially provided for the President's position. That was referred to in the Interim Report.

95. This change to the qualifications of the Chief Commissioner of the WAIRC would have the following benefits in a structural and procedural sense:

(a) There would be no need for a President.

(b) There would be no need for a separate "Full Bench" and "Commission in Court Session" as the Chief Commissioner could preside over the "Full Bench" and the "Commission in Court Session".

(c) Additionally, the CCS could cease to operate under that name and simply be known as the "Full Bench".

96. Accordingly, there would not be any "dual appellate structures" within the WAIRC as it stands, or as suggested in the Interim Report, and as criticised by unions such as the AMWU.

97. There would also be no issue to be dealt with about the insufficient workload for a full-time President of the WAIRC. The workload of the Chief Commissioner could accommodate the current workload of the President, as assisted by the Senior Commissioner and other "ordinary Commissioners". There would be no need for the acting appointments that have been a regrettable part of the WAIRC for the past 12½ years.

98. Given that the decisions of the Chief Commissioner, when sitting as a single Commissioner, may be appealed against, and allowing for leave or other absences from office, the Senior Commissioner, in those instances, should preside over the Full Bench. For this reason, the Senior Commissioner should have the same qualifications for office as the Chief Commissioner.

99. Proposed recommendation 4 of the Interim Report would therefore be unnecessary. The Full Bench could continue to exist as is, except that the presiding officer would be the Chief Commissioner, as qualified under the above-suggested amendments to the IR Act.

100. Proposed recommendation 5 would be altered in that the position of the President of the WAIRC would be abolished but instead the role and powers of the President would be encapsulated within the position of the Chief Commissioner.

101. Additionally, proposed recommendation 6 would also fall away because, as stated, the name of the CCS could simply be changed to that of the Full Bench.

102. To the extent that proposed recommendations 5 and 6 reallocated roles presently undertaken by the President, the Chief Commissioner could instead undertake them.

103. Although it is not always sound to test the viability of a changed structure by reference to the present, if these amendments to the IR Act were made, the present Chief Commissioner would be qualified to undertake the expanded role. This is because Scott CC is legally qualified and had more than 5 years' experience as a member of the WAIRC before being so appointed. The previous Chief Commissioner, Beech CC, was similarly qualified. Before their first appointment to the WAIRC, Scott CC and Beech CC had considerable industrial relations experience, within CCIWA and the WA trade union movement, respectively. They were "lay appointments" to the Tribunal, to use the expression referred to in submissions. Interestingly, both obtained legal qualifications after being appointed to the WAIRC. One could infer this is because they both thought the qualification would be of assistance to the performance of their duties.

104. The current Senior Commissioner of the WAIRC Smith SC, who is presently the Acting President, would also be qualified for the position of Senior Commissioner if the recommended amendments were made. So too would the present Acting Senior Commissioner, Kenner ASC.

105. The Review has discussed these proposed structural changes with Scott CC who has advised that she has no objection to them.

2.2.4 Proposed recommendation 7

(a) The Industrial Appeal Court (IAC) be abolished.

(b) The 2018 IR Act be amended to include a right of appeal to the Court of Appeal of Western Australia, upon a grant of leave by a Justice of the Court, from a decision of the Presiding Member, the Judicial Bench, or the Arbitral Bench on the ground that the decision involved an error of law.

106. Proposed recommendation 7 was about the abolition of the IAC and in lieu thereof providing for a right of appeal to the Court of Appeal of Western Australia, upon a grant of leave by a Justice of the Court from a decision of the then

proposed Presiding Member, Judicial Bench or Arbitral Bench, on the ground that the decision involved an error of law.

107. The latter aspect of this proposed recommendation would fall away given the previously set out recommendations to be made. Instead, if the recommendations were enacted, the right of appeal would be from a decision of the Chief Commissioner[48] or the Full Bench on the ground that the decision involved an error of law. These changes do not alter the benefits the Review thought the abolition of the IAC would bring, including the appropriateness of the "opening up" of the possible grounds of appeal. The Review has affirmed its preliminary view that the IAC should be abolished and replaced by a right of appeal to the Court of Appeal.

108. Proposed recommendation 7(a) was supported by AMMA, CCIWA, the Department of Health and the ECCWA. The AMWU did not object to the proposed recommendation and said the check of the Court of Appeal as an appellate body would provide "peace of mind" to anyone concerned about the possible removal of a judicial head from the WAIRC. Whilst it could be argued the submission is a little simplistic, the Review notes, somewhat colloquially, that the "loss" of a President with the same status as a Supreme Court Justice is somewhat "offset" by having expanded grounds of appeal to the Court of Appeal.

109. UnionsWA did not support the proposed recommendation. It submitted the IAC should not be abolished without ensuring the matters it previously dealt with can be handled in an expeditious manner, with the requisite industrial relations experience, by the Court of Appeal. This submission was adopted by United Voice, the WASU, the HSUWA and the CFMEU. The CPSU/CSA also submitted that the jurisdiction of the IAC should be retained in its current form.

110. With respect, the Review does not accept the arguments made by UnionsWA favouring not abolishing the IAC. It would, with respect, be an overstatement to say that the members of the IAC had, from their appointment to that position

[48] When exercising the jurisdiction currently undertaken by the President.

gained much "industrial relations experience". This is because of the few matters the IAC has determined in recent times. Additionally, it could not be said, as a whole, and with great respect, that, collectively the current members of the IAC had a large amount of industrial relations practice before their appointment to the Supreme Court, and then the IAC.[49] The Review respectfully contends that a Justice of the Supreme Court would have the capacity to determine the questions of law which could, in the future, be determined by the Court of Appeal on appeal from the Full Bench or Chief Commissioner. The Review considers that to be a reasonably obvious proposition. The Review is not concerned that if the IAC was replaced, in effect, by the Court of Appeal, there would be any loss of quality in decision-making.

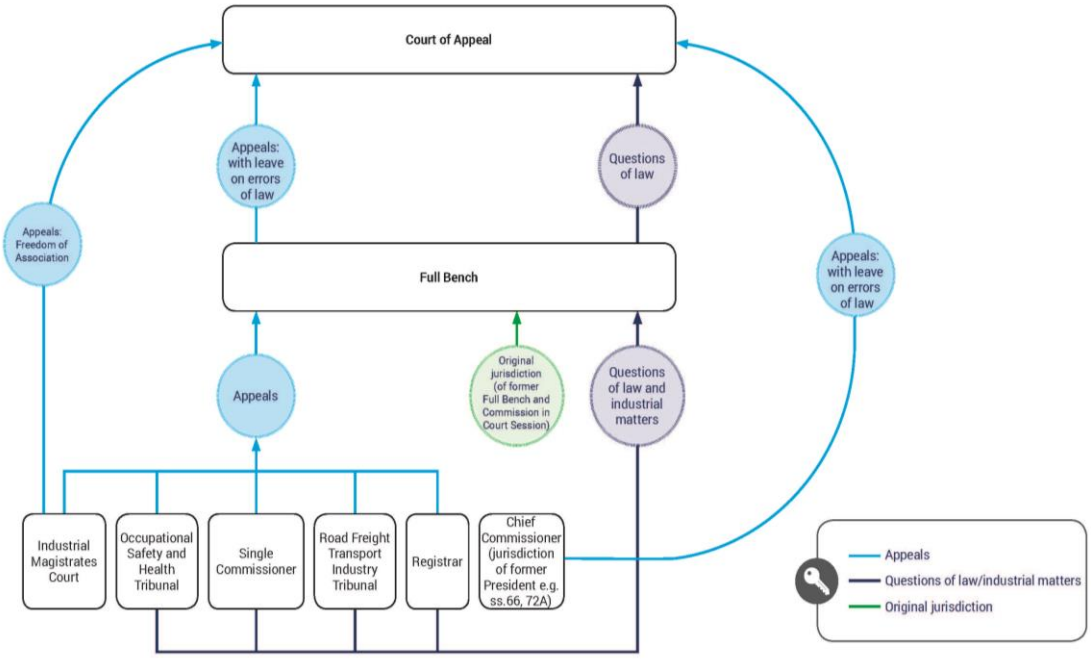
111. With respect to matters being handled in an expeditious manner, the submission is not supported by any evidence that determinations by the IAC at present are particularly expeditious. They are heard and determined by the Court, whose members also have their other judicial responsibilities as members of the Supreme Court and/or Court of Appeal. It cannot be assumed that there will be any additional delay if appeals are heard by the Court of Appeal as opposed to the IAC.

112. The Review considers that proposed recommendation 7 should form part of the recommendations of the Review insofar as it refers to the abolition of the IAC and being replaced by the Court of Appeal, with a right of appeal, on a grant of leave, on the ground that the decision involved an error of law.

113. If the amendments now to be recommended were undertaken the structure of the WAIRC would be represented by the following diagram:

[49] The current members of the IAC are Buss P, Murphy JA, Le Miere J and Kenneth Martin J.

Figure 1C - Diagram of Recommended Structure of Western Australian Industrial Relations System



2.2.5 Proposed recommendation 8

The jurisdiction of the IMC is to be amended so that if a claim for enforcement of a State Employment Standard (SES), State award, or other State industrial instrument is made to the IMC, the IMC has jurisdiction to deal with all enforcement proceedings, claims and counterclaims arising between the employer and the employee, or former employer and employee, including any claims by the employee or former employee for a denial of a contractual benefit and any claims of set-off from, or counterclaim to, the denial of contractual benefit alleged by the employee.

114. Proposed recommendation 8 was about amendments to the jurisdiction of the IMC.

115. The proposed recommendation can be broken down into different parts to assess and analyse the submissions made in response to it. The first is an implicit change to allow the IMC to hear and determine a claim for the enforcement of the State Employment Standards (SES), if they are enacted. There seems to be no opposition to that jurisdiction which would in a sense be a continuation of the

jurisdiction of the IMC to enforce the minimum conditions of employment under s 7 of the MCE Act.

116. The next part of the proposed recommendation is that the IMC have jurisdiction to deal with all enforcement proceedings or claims by an employee, or former employee and, in addition, any claims for a denial of contractual benefits, similar to the jurisdiction exercised by the WAIRC under s 29(1)(b)(ii) of the IR Act.

117. The reason for the inclusion of this proposed recommendation was to make it unnecessary for an employee or former employee to make claims in two jurisdictions for the enforcement of an award or other industrial instrument and a denial of contractual benefits. At present, an employee who, for example, was trying to enforce an award entitlement to four weeks' paid annual leave and an additional contractual entitlement to another week's paid leave would need to apply to the IMC for the former and the WAIRC, or another court of competent jurisdiction, for the latter. That is not considered to be efficient or sensible, in the opinion of the Review. It would be more efficient if the IMC were seized with the jurisdiction to decide both claims. It was a proposed facilitative provision. The intended jurisdiction of the IMC would be the same as the denial of contractual benefits jurisdiction entertained by the WAIRC, to avoid a multiplicity of proceedings.

118. The Review considers that aspect of the proposed recommendation should form part of its recommendations to the Minister.

119. The more contentious aspect of this proposed recommendation is with respect to claims of set-off from or counterclaims to the denial of contractual benefits alleged by the employee. The intent of the proposed recommendation was to tightly limit the circumstances within which an employer may be able to bring this into account and have it determined by the IMC. For example, a situation where an employee is subject to an award which applies to their employment in addition to a common law contract. The employee alleges a breach of the award and the contract. The common law contract may provide for a bonus of $500 per month if

a particular work performance is achieved. If the employee has done the work entitling them to the bonus but it has not been paid, consistently with the proposed amendments to the IR Act, the employee can bring an IMC proceeding to enforce the denial of the contractual benefit together with, say, an allegation they have not been paid all of their award allowances. However, in turn, the employer says that although the bonus has not been paid, the employee stole $200 from the employer. The intent of the proposed recommendation would be to allow that claim to be litigated in the same set of proceedings. The concern of the Review was to avoid the inefficiency and cost of the employer having to proceed with the claim in another jurisdiction.

120. AMMA supported the recommendation subject to there being appropriate disincentives to ensure unmeritorious employee claims for damages not being added to enforcement proceedings. The present "disincentive" is that there is the prospect of costs orders being made against an applicant who institutes a proceeding frivolously or vexatiously.[50] In the opinion of the Review that remains a sufficient "disincentive".

121. CCIWA supported proposed recommendation 8 to avoid the parties having to conduct or defend claims in multiple jurisdictions. In particular, it supported the ability of the IMC to hear all counterclaims and any set-off claims and submitted the WAIRC denial of contractual benefits jurisdiction should be similarly expanded. The latter submission will be later considered. The Department of Health also supported the proposed recommendation.

122. UnionsWA did not support the proposed recommendation on the basis that it contended "counter-claims and setoffs will be used to unfairly pressure workers to deter them from pursuing their rights". This submission was supported by United Voice, the WASU, the CFMEU and the HSUWA. The CPSU/CSA submitted the current jurisdiction of the IMC should be retained but with the inclusion of the SES jurisdiction referred to. The AMWU did not agree with the proposed recommendation. Its concern was similarly that respondents to a claim would be

[50] IR Act, s 83C.

able to utilise counterclaims and set-offs to put pressure on the claimant. An additional concern was it would in effect open up defences and counterclaims to breaches of enterprise agreements "as a matter of policy". It was submitted there should not be "legal defences available for breaches of enterprise agreements".

123. The UnionsWA and AMWU submissions seemed to be somewhat intuitive and not initially supported by evidence. The Review therefore sought, and obtained additional information about them. The additional submissions added weight to the concerns that had been expressed.

124. The ELC said that if the IMC were to be able to deal with denial of contractual benefits matters, where a claim for enforcement of an SES, State award, or State industrial instrument is made to the IMC, this should only occur at the election of the employee. That is consistent with the proposed recommendation. The ELC also said it was concerned about the broad nature of any counterclaim or set-off sought to be instituted by the employer.

125. Given the current primary purpose of proceedings in the IMC is the enforcement of awards and other industrial instruments and the minimum conditions of employment, the Review has obtained the opinion of the "regulator" as to the proposed expanded jurisdiction. This was provided to the Review on behalf of the Private Sector Labour Relations Division of the Department of Mines, Industry Regulation and Safety (PSD).

126. The PSD said employers regularly raise "defences" to alleged breaches of awards, the MCE Act and the LSL Act in the nature of "counterclaims". Examples were provided that it was not uncommon for employers to claim that an employee:

(a) Owes the employer money for accommodation or food.

(b) Damaged the employer's property.

(c) Made unauthorised expenditures on the employer's credit card.

(d) Stole money or other property from the employer.

(e) Loaned money from the employer.

127. Given, however, the present state of the law and the jurisdiction of the IMC, the PSD said such "counterclaims" do not often get determined by the IMC in enforcement proceedings involving an award, the MCE Act or the LSL Act. The PSD said that if counterclaims were allowed in the IMC, they "would overall complicate and delay proceedings and make it more difficult for employees to enforce their minimum entitlements. To the extent that an industrial inspector is the claimant in proceedings, taxpayers' money would be spent on investigating and if necessary defending counterclaims in the IMC (assuming a counterclaim or third party claim could be made against the employee, bearing in mind the inspector would be the claimant)".

128. The Review considers that information supports the position taken by the unions, on these issues, set out above.

129. Given this additional information, the Review considers, on balance that it is preferable not to expand the jurisdiction of the IMC to be able to deal with claims of set-off or counterclaims, as well as the type of enforcement proceedings that are presently determined and the contemplated provision of a denial of contractual benefits jurisdiction. The issue of increased costs to the regulator, inherent inefficiencies in the process and making it potentially more difficult for an employee to be able to obtain their statutory or award entitlements, militate against the expanded jurisdiction.

2.2.6 Proposed recommendation 9

The 2018 IR Act provide for the dual appointment of WAIRC Commissioners to the Fair Work Commission (FWC), as contemplated by s 631(2) of the *Fair Work Act 2009* (FW Act).

130. Proposed recommendation 9 suggested the 2018 IR Act provide for the dual appointment of WAIRC Commissioners to the FWC, as contemplated by s 631(2) of the FW Act. This proposed recommendation was supported by all who made submissions about it, being AMMA, the AMWU, the CFMEU, the CPSU/CSA, the HSUWA, UnionsWA, United Voice and the ECCWA.

131. For the reasons set out in the Interim Report it will form part of the recommendations of the Review.

2.2.7 Proposed recommendation 10

The 2018 IR Act provide for the dual appointment of FWC members to the WAIRC, as contemplated by s 631(1) of the FW Act.

132. As a complement to proposed recommendation 9, this proposed recommendation suggested the 2018 IR Act provide for the dual appointment of FWC members to the WAIRC, as contemplated by s 631(1) of the FW Act.

133. Again, this proposed recommendation met with the unanimous support from those who made submissions about it, being the same bodies referred to above with respect to proposed recommendation 9.

134. For the reasons set out in the Interim Report, the proposed recommendation will form part of the recommendations of the Review.

2.2.8 Proposed recommendation 11

The 2018 IR Act include an amendment so that the compulsory retirement age of the members of the WAIRC be increased from 65 to 70 years of age.

135. This proposed recommendation suggested the 2018 IR Act include an amendment so that the compulsory retirement age of members of the WAIRC be increased from 65 to 70 years of age. The proposed recommendation was commented upon by AMMA, DWER, the AMWU, the CFMEU, the CPSU/CSA, the HSUWA, UnionsWA, United Voice and the ECCWA. All of those bodies supported the recommendation. The only qualification, from UnionsWA and the AMWU was that the compulsory retirement age for FWC members is 65 years of age. That raised the valid question of how dual appointments might be treated.

136. The Review does not however anticipate any particular difficulty with that. If a person was appointed to be a Commissioner of both the WAIRC and the FWC, and they had to retire at the age of 65 from being a Commissioner of the FWC, that appointment would simply lapse, with their appointment as a member of the WAIRC continuing.

137. There does not appear to be anything in the FW Act that would prevent this situation from occurring.

138. For the reasons set out in the Interim Report, the Review will make a recommendation in the terms of the proposed recommendation.

2.2.9 Proposed recommendation 12

The 2018 IR Act specify that any section equivalent to the current s 26(1)(a) of the IR Act is not to apply if the WAIRC is deciding a question of law in any matter and upon any issue it is required to decide.

139. This proposed recommendation was commented upon by CCIWA, the AMWU, CFMEU, the CPSU/CSA, the HSUWA, UnionsWA, the UFU, United Voice, WAPOU, the ELC and ECCWA. There was also a confidential submission from an employee association that addressed the proposed recommendation.

140. CCIWA supported the thrust of the proposed recommendation. It submitted the WAIRC should be required to determine a question of law in accordance with legal principles, as this provides the parties with greater certainty. However, it was submitted the WAIRC still ought to be able to make discretionary procedural decisions, including dismissing matters pursuant to s 27(1), by reference to s 26(1)(a) of the IR Act.

141. The ECCWA also agreed with the proposed recommendation.

142. The confidential submission from an employee association submitted that the principles underlying s 26(1)(a) of the IR Act are implicit in the jurisdiction exercised by the WAIRC and "facilitate the commonsense approach adopted in all matters even where the WAIRC may be deciding a question of law". The submission raised the concern that a narrow legalistic focus may take precedence, without the fundamental principles of equity, good conscience and the substantial merits of the case being paramount to the WAIRC. It was also submitted that a narrow legalistic focus may affect whether advocates who are not legally represented or trained but have tried in good faith to assist the WAIRC to achieve

fair and just outcomes with a minimum of fuss and in a timely manner, could continue to operate.

143. The ELC did not support the recommendation. It emphasised that the WAIRC should be as accessible as possible for self-represented litigants. It was submitted in that regard it was important for the WAIRC to be able to decide matters informally and without regard to technicalities or legal forms regardless of whether they concerned questions of law. It was submitted the WAIRC must still necessarily interpret questions of law in accordance with accepted principles of law, but to make the basis on which the WAIRC can decide questions of law different from other matters within its power has the prospect of causing complexity and confusion.

144. The Review understands the point made by the ELC but notes it was the current existence of possible complexity and confusion that caused the Review to make the proposed recommendation. That is, some questions of law must be determined by the WAIRC and are the essence of the jurisdiction being exercised. For example, the denial of contractual benefits and interpretation of awards jurisdictions. Thus there could be confusion if, on the one hand these legal questions are required to be decided by the WAIRC, when it is also commanded to approach its task in accordance with s 26(1)(a) of the IR Act.

145. UnionsWA did not support the proposed recommendation. It argued that s 26(1)(a) of the IR Act makes the WAIRC more streamlined and efficient by enabling cases to proceed without being held up by technical or procedural deficiencies. Again, with respect, that might be so but the proposed recommendation was not directed at procedural matters. It was directed at a situation where the WAIRC is required to decide substantive questions of law.

146. The UnionsWA submission was adopted by the HSUWA. The WAPOU also supported the view that the WAIRC should continue to be empowered to act according to equity and good conscience. The UFU made a submission similar to the WAPOU.

147. Similarly, the CPSU/CSA said equity and good conscience "should not be removed or diluted". It was also submitted by the CPSU/CSA that there was no justification to remove claims of denied contractual benefits from the WAIRC because a decision could be made on the basis of equity and good conscience. It was contended the system appears to have worked well since its inception. By contrast, the CPSU/CSA submitted the "real problem has been various attempts to erode the jurisdiction by appeals to black letter law principles". Although examples were provided the Review does not accept there has been any significant erosion of the intended jurisdiction.

148. United Voice submitted that s 26(1)(a) of the IR Act is a fundamental aspect of a "lay person's tribunal" in that it protects parties where there is a minor technicality. It was submitted the Interim Report did not provide sufficient evidence of the need to remove this "protection" and it was asserted that its removal would in fact "impede the efficiency" of the WAIRC. The CFMEU made a like submission. It also submitted there was existing authority that directs the WAIRC to follow principles of law.

149. This theme was also taken up and expanded upon by the AMWU, in its submission. The AMWU strongly disagreed with the proposed recommendation. It did not accept the WAIRC could not decide questions of law in a way that is consistent with equity, good conscience and the substantial merits. It submitted that the issues identified in the Interim Report's example at [142] were "more than just mere legal technicality"; it was asserted that they form the "substantive tests of the denial of contractual benefits jurisdiction". In this regard, the AMWU relevantly pointed the Review to the observations made by the Full Bench in *Health Services Union of Western Australia (Union of Workers) v Director General of Health,*[51] as follows:

> 163 Firstly, s 26(1)(a) is not a source of jurisdiction, but applies only to the exercise of jurisdiction otherwise granted by legislation. *Griggs v Norris Group of Companies* (2006) 94 SASR 126 is apposite on this point. There, the Full Court of the Supreme Court of South Australia considered s154 of the then *Industrial and Employee Relations Act (SA) 1994*. Section 154(1) provided that in exercising its jurisdiction

[51] (2008) 88 WAIG 543, Ritter AP at [163]-[164].

the South Australian Industrial Relations Court and the South Australian Industrial Relations Commission were "*governed in matters of procedure and substance by equity, good conscience, and the substantial merits of the case, without regard to technicalities, legal forms or the practice of courts*". White J, with whom Perry J agreed (Layton J dissenting) said at [36] that s154(1) was not itself a source of additional jurisdiction but a statutory direction as to the manner in which the jurisdiction elsewhere vested was to be exercised. (See also [41]).

164 Secondly, the Commission and the Arbitrator as a constituent authority of the Commission cannot ignore the substantive law, whether statutory or common law, in the exercise of its jurisdiction. This point was referred to by White J in *Griggs* at [44] by quoting from *Featherston v Tully* (2002) 83 SASR 302 at [156]-[158]. *Featherston* was about the Court of Disputed Returns, which by s103(1) of the *Electoral Act 1985 (SA) "was to be guided by good conscience and the substantial merits of each case without regard to legal forms or technicalities"*. In *Featherston* it was said that the Court was obliged to act judicially, to apply the requirements of the *Electoral Act* and the common law and to afford natural justice to all parties and interveners.

150. On this theme, reference may be had also to *Tye v Care Services Administration Pty Ltd,*[52] where Smith AP, with whom Kenner ASC and Emmanuel C agreed, at [37] said:

> The direction in s 26(1)(a) of the Act, requiring each member of the Commission to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms, does not assist Ms Tye's arguments. As Ritter AP pointed out in *Health Services Union of Western Australia (Union of Workers) v Director General of Health* [2008] WAIRC 00215; (2008) 88 WAIG 543 [163] - [164]:
>
> (a) section 26(1)(a) is not a source of jurisdiction;
>
> (b) section 26(1)(a) applies only to the exercise of jurisdiction conferred by legislation; and
>
> (c) the Commission cannot ignore the substantive law in the exercise of its jurisdiction.

151. The issue was earlier considered in *The Registrar v Liquor, Hospitality and Miscellaneous Union, Western Australian Branch*.[53] There, the issue was whether a Commissioner had the power to revoke a direction to the Registrar for the enforcement of an order given under s 84A(1)(b) or s 93(9) of the IR Act after proceedings had commenced. In deciding the answer was no, the following was said at [41]-[48]:[54]

> 41 In this context it is sometimes submitted that s26(1)(a) of *the Act* provides the Commission with some discretionary flexibility in exercising its jurisdiction.

52 (2017) 97 WAIG 1319, (2017) WAIRC 00689.
53 (2007) 87 WAIG 1199.
54 Reasons of Ritter AP, agreed with by Beech CC and Scott C.

Section 26(1)(a) of *the Act* provides:-

> *"(1) In the exercise of its jurisdiction under this Act the Commission —*
>
> *(a) shall act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms;"*

42 Section 26(1)(a) does not however assist in determining the question before the Full Bench. The subsection does not provide license for a Commissioner or the Full Bench to ignore limits upon the exercise of the powers or jurisdiction of the Commission; or to avoid or mould legal principles to a conclusion thought desirable about the Commission's jurisdiction.

43 In the article, *Procedure and evidence in 'court substitute' tribunals*, Professor Neil Rees, Australian Bar Review, Volume 28, No. 1, page 41, there is a traced history of sections like s26(1)(a) and the present understanding of their meaning by Australian courts. At page 83, Professor Rees concludes:-

> *"In earlier times 'equity and good conscience' clauses were intended and interpreted to mean that the recipient of the power had some latitude to depart from the rules of substantive law which would have governed proceedings in the courts. They seem to permit 'a sort of rough and ready local justice to litigants in small cases'. That view of these powers is no longer sustainable."*

44 Earlier at page 63, Professor Rees referred to *Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26 and the joint judgment of Gleeson CJ and Handley JA. Professor Rees cited the observation by their Honours at page 29 that *"[t]he words "equity, good conscience and the substantial merits of the case" are not terms of art and have no fixed legal meaning independent of the statutory context in which they are found".* However, Professor Rees also referred to the conclusion by their Honours that such a clause did not give the New South Wales Equal Opportunity Tribunal license to depart from *"the obligation to apply rules of law in arriving at its decisions"*. (Page 29). Professor Rees also referred to the rationale for this conclusion by their Honours which was that if it permitted the Tribunal to do anything other than apply the general law *"there would have been no point in conferring a right of appeal to the Supreme Court on a question of law".* (29). Professor Rees said that this rationale was compelling.

45 On this issue it is noted that under s90(1) of *the Act*, an appeal lies to the Industrial Appeal Court from any decision of the President, the Full Bench or the Commission in Court Session, on, amongst other things, the ground that the decision was erroneous in law in that there had been an error in the construction or interpretation of any act, regulation, award, industrial agreement or order in the course of making the decision appealed against.

46 At pages 64/65 Professor Rees referred to the reasons for decision of the High Court in *Sue v Hill and Another* (1999) 199 CLR 462 where in a joint judgment, Gleeson CJ, Gummow and Hayne JJ at paragraph [42] said that provisions of this type *"do not exonerate the court from the application of substantive rules of law …"*. Professor Rees also referred to the similar observations by Gaudron J at paragraph [149].

47 Other decisions referred to by Professor Rees were *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 and *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 223 ALR 171. In the latter, Gummow J at [34] referred to s420 of the *Migration Act* which is in not

dissimilar terms to s26(1)(a) of *the Act*. By reference to the reasons of the court in *Eshetu*, his Honour at [35] said that the section "*does not delimit boundaries of jurisdiction*".

48 In summary, s26(1)(a) does not give license to either a Commissioner or the Full Bench to do other than act according to law and construe the limits of the jurisdiction or the powers of the Commission other than on the basis of legal principle.

152. After considering the submissions opposing the recommendation and reconsidering these cases, the Review, upon reflection, does not consider that it is necessary to amend s 26 of the IR Act. That is because given the way in which the WAIRC has construed the section, although there is some latent tension in its existence and breadth, it does not present a sufficient obstacle to the proper determination of cases according to law, where that is required by the jurisdiction being exercised, to warrant amendment, given the concerns expressed in the submissions.

2.2.10 Proposed recommendation 13

The 2018 IR Act empower the WAIRC to regulate the conduct of registered industrial agents appearing before the WAIRC, by way of a Code of Conduct to be published by the WAIRC, that includes the entitlement of the WAIRC to, on notice to the agent and with the agent having the opportunity to make submissions on the issue, suspend or revoke an agent's registration or withdraw the right of the agent to appear before the WAIRC, either generally or for a particular matter, occasion or hearing.

153. Each of the bodies that made submissions about this proposed recommendation supported it. They were AMMA, the Department of Health, DWER, the AMWU, the CFMEU, the CPSU/CSA, the HSUWA, UnionsWA, United Voice, the ELC, the ECCWA and the Legal Practice Board. Significantly, no industrial agent provided any submissions on the proposed recommendation.

154. The Legal Practice Board also reiterated a submission it had made prior to the publication of the Interim Report but which was inadvertently not there referred to. This was that a disqualified person, as defined in s 3 of the *Legal Profession Act 2008* (WA) (LP Act) should be prohibited from being a registered industrial agent or appearing as an agent in the WAIRC. The reason for the submission was to protect the interests of members of the public. The Review accepts that submission. If a legal practitioner has been disqualified in the public interest so

that they cannot practise as a lawyer, then for the same reason they ought not to act as a registered agent, or appear as an agent for a party before the WAIRC. This is not for the purpose punishing the individual but to protect the public from representation by a person who has been assessed by the relevant authorities to be not of sufficient character or capabilities to continue to so act.

155. The Review will make a recommendation to this effect to the Minister.

2.2.11 Proposed recommendation 14

The 2018 IR Act contain:

(a) A "slip rule" for orders made by the WAIRC.

(b) An amendment to the current requirement for a "speaking to the minutes" of orders, to give discretion to the WAIRC to dispense with a speaking to the minutes in a particular case if it is warranted in the opinion of the WAIRC.

(c) An amendment to the requirement for a "speaking to the minutes" of orders that would permit the WAIRC to specify that unless parties indicate by a specified time that a speaking to the minutes is requested, that the WAIRC may issue the order in the terms of the minutes.

(d) Power for the WAIRC to conduct conciliations by telephone.

156. Proposed recommendation 14(a) was supported by AMMA, CCIWA, the CPSU/CSA, UnionsWA, the HSUWA, United Voice, the ELC and the ECCWA. The AMWU also said it did not object to recommendation 14(a). The Review will make a recommendation in these terms.

157. With respect to recommendations 14(b) and 14(c) they were supported by AMMA, CCIWA, the Department of Health and the ECCWA. UnionsWA did not support these recommendations, on the basis that the reason for them was said not to be explained in the Interim Report. This submission was adopted by the CFMEU and the AMWU.

158. CCIWA submitted that the speaking to the minutes was an unnecessary procedural hurdle that ought to be removed from the legislation. It was submitted the WAIRC could instead request the parties provide brief submissions as to what order should be made in more complex matters, on a case by case basis.

159. The genesis for the suggested changes in proposed recommendations 14(b) and 14(c) was from discussions held with members of the WAIRC. The position of the Review was that having a request for a speaking to the minutes in all cases was an unnecessary procedure. It was not required in every case. Accordingly, the intent of the proposed recommendation was to provide some flexibility where the WAIRC thought it was warranted.

160. The Review proposes to make a recommendation to the Minister in terms of 14(b) and 14(c).

161. Proposed recommendation 14(d) provided for power for the WAIRC to conduct conciliations by telephone. That was supported by AMMA and CCIWA. CCIWA made the point that attendance in person at conferences can be particularly onerous for small businesses where it is time away from running a business. The Department of Health submitted it was still preferable for the WAIRC to conduct conciliations in person where possible but an alternative by video conference or by telephone should also be facilitated.

162. The AMWU did not agree with proposed recommendation 14(d) stating that the emphasis should remain on conducting conciliations in person. The AMWU said in its experience conciliations held in person progressed more effectively and reached mutually satisfying resolutions more regularly, when compared with telephone conciliations. In making this submission, the AMWU clearly had in mind its experiences in the FWC, given there is an increased reliance in the FWC on telephone conciliations. The UFU also said its experience in dealing with the FWC and telephone conciliations was not positive. It said that they often produced less productive outcomes. The UFU suggested that it only be used as a last resort, if at all.

163. A confidential employee association submission also said its preference was for conciliations to be held in person because a physical presence can be helpful to achieve efficient outcomes. However, it submitted it did not have an objection to

conciliations being conducted by telephone provided it was conducted by a member of the WAIRC.

164. UnionsWA supported recommendation 14(d) provided that telephone conciliations should only be used in exceptional and limited circumstances. It said the experience of its affiliates in the FWC was that telephone conciliations can be a disadvantage to all parties, including the Commissioner. That submission was adopted by the CFMEU and United Voice. The CPSU/CSA also supported the proposed recommendation. The HSUWA supported the WAIRC having the power to conduct conciliations by telephone, particularly where one or both of the parties were located away from the Perth metropolitan area, although its preference was for face to face conferences particularly in dealing with workplace disputes. It was submitted the parties should have the right to request a face to face conference and the WAIRC should only refuse to do so where such a conference would cause significant hardship to either party. It was also submitted that if there was to be a change it should perhaps refer to the telephone or other electronic means. The Review accepts this point.

165. The ELC supported the WAIRC having the power to conduct conciliations by telephone but reiterated it should have the discretion to determine which format is most likely to be appropriate for the relevant applicant and give the applicant the opportunity to opt for a particular format.

166. The ECCWA supported the proposed recommendation.

167. In the opinion of the Review, conciliations are generally best held in person. However, that is not always practicable due to issues of location and in some instances, the viability of the business of an employer. The Review will recommend to the Minister that there be an amendment to the IR Act giving the WAIRC the power to conduct conciliations by telephone, videolink or other electronic means where it considers it to be in the interests of justice to do so. The discretion will of course be required to be exercised having regard to the contents of s 26(1)(a) of the IR Act.

2.2.12 Proposed recommendation 15

The 2018 IR Act is not to include any equivalent of the privative clause provisions contained in s 34(3) and s 34(4) of the IR Act, which purport[55] to provide that any decision of the WAIRC will not, subject to the IR Act, be "impeached" or subject to a writ of certiorari, or award, order, declaration, finding or proceeding liable to be "challenged, appealed against, reviewed, quashed or called into question by any court".

168. All bodies that made submissions about this proposed recommendation either supported it or did not object to it. They were AMMA, CCIWA, the AMWU, the CFMEU, the HSUWA, UnionsWA, United Voice and the ECCWA.

169. The CPSU/CSA opposed the removal of these subsections, asserting it would provide an additional avenue for parties to challenge the decisions of the WAIRC. With respect, the Review does not accept this. This is because as pointed out in the Interim Report at [326], the subsections "are largely ineffectual in preventing any review by the Supreme Court of any decision that involves a "jurisdictional error", and are, quite possibly, unconstitutional".[56]

170. For the reasons set out in the Interim Report, there will be a recommendation in terms of the proposed recommendation.

2.2.13 Proposed recommendation 16

The 2018 IR Act should not include any equivalent of s 48 of the IR Act that provides for the establishment of Boards of Reference under awards made by the WAIRC.

171. This proposed recommendation was agreed with by AMMA, the CPSU/CSA and the ECCWA. UnionsWA said the issue needed to be considered in the context of Term of Reference 6 to do with State awards. That position was supported by affiliate unions the AMWU, the CFMEU, the HSUWA and United Voice.

172. The Department of Health asserted that several WA health system industrial agreements provide for Boards of Reference under the IR Act. It was said that consideration should therefore be given to the impact of removing the Boards of Reference mechanism.

---

55 The word purport is used, as the subsections may be contrary to the *Commonwealth Constitution*.

56 *Re Harrison, ex parte Harris* [2015] WASC 247, [104]-[106]; *Kirk v Industrial Relations Court of New South Wales* (2010) 239 CLR 531, [97]-[100].

173. The Review has considered the relevant "health" agreements and considers there is no impediment to the proposed recommendation being made. From information obtained by the Secretariat, the following WA Health System industrial agreements include a reference to Boards of Reference:

(a) WA Health System – Medical Practitioners – AMA Industrial Agreement 2016. Under this agreement, a practitioner may refer a claim for alleged wrongful or unlawful termination or a dispute about the granting of rights of private practice to a Board of Reference. However, according to clause 54(7) of the agreement, "a Board of Reference constituted pursuant to this Agreement is not a Board of Reference within the meaning of the *Industrial Relations Act 1979* and nothing in this agreement shall be construed as meaning any party is obliged to agree to the establishment of the Board of Reference constituted under the *Industrial Relations Act 1979*".

(b) WA Health System – United Voice – Enrolled Nurses, Assistants in Nursing, Aboriginal and Ethnic Health Workers Industrial Agreement 2016. The reference to Boards of Reference is part of a schedule attached to the agreement which is a FWC order regarding workload management. The Board of Reference provisions do not relate to the employees covered by the State industrial agreement.

(c) WA Health System – Australian Nursing Federation – Registered Nurses, Midwives, Enrolled (Mental Health) and Enrolled (Mothercraft) Nurses – Industrial Agreement 2016. The reference to Boards of Reference is part of a schedule attached to the agreement which is a FWC order regarding workload management. Again, the Board of Reference provisions do not relate to the employees covered by the State industrial agreement.

174. Given the above, it would appear that the abolition of Boards of Reference would have no impact on "health" industrial agreements.

175. Section 97 of the Labour Relations Legislation Amendment and Repeal Bill 2012 (the Green Bill) would have abolished Boards of Reference under s 48 of the

IR Act. Transitional provisions in clause 10(2) of proposed Schedule 6 of the IR Act provided that, despite the repeal of s 48 of the IR Act by s 97 of the Green Bill, a Board of Reference constituted under s 48 in relation to an award immediately before the repeal continued into existence and s 48 has effect in respect of that Board as if they had not been deleted, so long as the relevant award remains in force and a Board is required to be constituted in relation to it.

176. Similar savings provisions could be enacted to apply to Boards of Reference in industrial agreements (in addition to awards) in order to avoid any unintended consequences.

177. The fact that awards may be updated, as discussed in Chapter 7 of the Final Report, does not, in the opinion of the Review, provide any impediment to removing s 48 from the IR Act. The Review will make a recommendation to this effect.

2.2.14 Additional submissions 17

Whether the denial of contractual benefits jurisdiction and/or the interpretation of awards, orders and industrial agreements jurisdiction, currently exercised by the WAIRC,[57] ought to:

(a) Continue to be exercised by the WAIRC as currently provided for under the IR Act; or

(b) Continue to be exercised by the WAIRC but only by Commissioners of the WAIRC who, before their appointment, had practised law for not less than five years as an Australian lawyer, as defined in s 4 of the *Legal Profession Act 2008* (WA) (LP Act); or

(c) Be exercised by the IMC; or

(d) Be exercised by members of an Industrial Court to be established under the 2018 IR Act, and where the qualification for appointment to the Industrial Court be limited to people who, before their appointment, had practised law for not less than five years as an Australian lawyer, as defined in s 4 of the LP Act.

178. The request for additional submissions received a variety of responses. CCIWA supported proposal 17(c) that would provide for the denial of contractual benefits jurisdiction and/or the interpretation of awards jurisdiction to be exercised by the IMC rather than by the WAIRC. In the alternative, CCIWA supported proposal

[57] Following a referral under s 29(1)(b)(ii) or an application under s 46 of the IR Act.

17(b). It said there was no significant concern with the current exercise of these powers by the WAIRC, although it accepted the proposed adjustment would enhance the operations and authority of the State IR system.

179. A confidential submission by a public sector employer body said that the current jurisdiction with its extensive powers of conciliation was the appropriate place for these matters to remain. It was also submitted that lawyers are needed in the IMC which might limit the ability to find solutions for the settlement of low level conflicts. It was submitted that the IMC was not necessarily set up to deal with conflict resolution but to ensure there are no "technical breaches of the application of industrial instruments".

180. The Department of Health also agreed with proposal 17(c). In relation to 17(b) and (d), the Department submitted the requirements could be relaxed so Commissioners who have a tertiary qualification in law and who have worked in a relevant field for a period of not less than five years prior to appointment, could be appointed.

181. By contrast the AMWU submitted there was no justification to change the way in which the WAIRC deals with the denial of contractual benefits and interpretation of awards jurisdictions. It submitted that a strength of industrial tribunals was that the Commissioners were experienced in industrial relations and come from a variety of professional backgrounds. It strongly disagreed with proposal 17(b) that would have the effect of restricting non-lawyer Commissioners and would provide a disincentive to the government of the day to appoint non-lawyers to the WAIRC. It was submitted this would prejudice industrial relations specialists who work in the trade union movement, and to a lesser extent, employer representatives. It also disagreed with proposal 17(c) and 17(d).

182. A confidential employee association submission supported proposals 17(a) and 17(b). It was submitted that matters also require an industrial approach based on equity, good conscience and the substantial merits of a particular case and

therefore should continue to be provided by the WAIRC, and not by the IMC or a new industrial court.

183. The CFMEU did not support the denial of contractual benefits jurisdiction being moved from the WAIRC. It submitted the WAIRC was best placed to deal with industrial matters, including the denial of contractual benefits in employment contracts.

184. The CPSU/CSA submitted that the contractual benefits jurisdiction should be retained in the present form. It referred to there having been a series of cases since 1986, challenging the scope of the WAIRC's jurisdiction on denial of contractual benefits. It asserted that "often the jurisdictional demurer [sic] is designed to force the claimant with a legitimate contractual benefit to recover the debt or the so-called damages in a more expensive jurisdiction", and cited cases in support of the contention. It was submitted that was more of a real issue rather than the qualification of Commissioners. The point has been addressed earlier.

185. The SSTUWA had reservations about any proposed changes to the contractual benefits jurisdiction. It submitted that a diversity of backgrounds amongst Commissioners has been beneficial to the workings of the WAIRC and the denial of contractual benefits jurisdiction should generally be retained within the WAIRC.

186. UnionsWA did not support the proposed recommendation. It submitted it would restrict non-lawyer Commissioners being appointed to the WAIRC. It submitted the denial of contractual benefits jurisdiction should be retained within the WAIRC. The UFU made a similar submission and the HSUWA adopted the submission of UnionsWA. The WASU as stated earlier, said the WAIRC should retain the powers it has always held regarding denial of contractual benefits jurisdiction.

187. United Voice was concerned about the possibility of limits for the jurisdiction of Commissioners who had no legal background as it said it would create a "sub-class" of Commissioners. It also said the Interim Report failed to consider how the proposed recommendation might improve the efficiency of the WAIRC. It

submitted there was no clear case presented that Commissioners without a legal background performed "worse" than those that do, or have more successful appeals against their decisions.

188. In response to this point, the Review endeavoured to obtain additional information from the WAIRC. To the extent that additional information was available, it did not establish any trend of there being a greater proportion of decisions of Commissioners without a legal background being appealed against as opposed to those that were, in the denial of contractual benefits jurisdiction.

189. In the stakeholder meeting with UnionsWA and affiliates, an additional point was made that was also echoed in discussions with members of the WAIRC. This was that often there will be a case before the WAIRC that seeks a remedy in respect of an unfair dismissal as well as a denial of contractual benefits. Both of these cases can, at the same time under the current jurisdictional arrangement proceed before the WAIRC. It was submitted that it would be inefficient to require two sets of proceedings in these cases. The Review regards that as a weighty consideration.

190. Having regard to the submissions made in response to the questions asked by the Review, the Review does not accept that there is a compelling case for making a recommendation that the WAIRC lose the denial of contractual benefits jurisdiction; or that it only be exercised by Commissioners with legal experience, or that a separate industrial court be created to deal with the issue.

191. With respect to the jurisdiction to be exercised under s 46 of the IR Act in relation to the construction of awards and other industrial instruments, the Review has concerns that remain because of the potentially binding nature of the decisions that can be made, pursuant to s 46(3) of the IR Act. Due to this, the Review is of the opinion that this jurisdiction ought to be determined by the Full Bench of the WAIRC, in the future. If the Full Bench is to be constituted as is to be recommended in this chapter of the Final Report, the Bench will be presided over by either a Chief Commissioner or a Senior Commissioner who has at least legal

qualifications and considerable industrial relations experience on the WAIRC or otherwise. Such a Full Bench would, in the opinion of the Review, be a more appropriate body to make the decisions about the interpretation of awards under s 46 of the IR Act which have the effect prescribed in s 46(3) of the IR Act.

192. On a separate matter, the Review also considers that an industrial inspector should be empowered to make an application under s 46(1), if leave is granted to do the same, and on notice to any organisation or other interested party bound by the instrument. The requirement for leave is so that the WAIRC can control the circumstances in which the jurisdiction is exercised. The WAIRC should also be able to impose conditions on the leave being granted, such as the giving of notice of the application to parties bound by the industrial instrument. The PSD has submitted to the Review that being able to exercise this jurisdiction could be a useful tool of enforcement, as it would allow the regulator to ascertain the meaning of an instrument before considering whether to take enforcement proceedings. The Review agrees this could be a useful adjunct to the powers of the PSD and so will recommend the change to the Minister.

193. The CPSU/CSA also made submissions upon the recent decision of the High Court in *Burns v Corbett*.[58] This was a pending decision at the time of the Interim Report but was handed down by the High Court on 18 April 2018. The decision involved the so called diversity jurisdiction contained in s 75 and s 76 of the Constitution. Section 75 establishes original jurisdiction of the High Court including in all matters "between States, or between residents of different States, or between a State and a resident of another State". In turn, s 77 of the *Commonwealth Constitution* empowers the Commonwealth to make laws establishing the extent of the jurisdiction of Federal courts other than the High Court, and investing State courts with Federal jurisdiction. As has been decided in previous cases of the High Court, Chapter III of the Constitution, including these sections, establishes a Federal judicature that may exercise judicial authority with respect to the matters listed in s 75 and s 76 of the Constitution. Whilst not a uniform court system, it

58 [2018] HCA 15.

has been described as an "integrated national court system", at the head of which the High Court exercises constitutionally guaranteed appellate jurisdiction.[59]

194. In *Burns v Corbett*, a majority of the High Court accepted that there arises from Chapter III of the Constitution an implied limitation on State legislative power that prevents a State law from conferring adjudicative authority, in respect of the matters listed in s 75 and s 76 of the Constitution, on a State administrative body as opposed to one of the "courts of the States" as referred to in s 77 of the Constitution.

195. To illustrate, in *Burns v Corbett*, Mr Burns made complaints to the Anti-Discrimination Board of New South Wales about statements made by a Ms Corbett and Mr Gaynor. Mr Burns was a resident of New South Wales, Ms Corbett was a resident of Victoria and Mr Gaynor was a resident of Queensland. The complaints were referred to administrative tribunals in New South Wales. It was accepted by the parties before the Court that in hearing and determining Mr Burns' complaints the administrative tribunals were exercising the judicial power of the State because it was able to render a binding, authoritative and enforceable judgment, independently of the consent of the persons against whom the complaints had been brought. However, it was agreed that the administrative tribunal was not a court of the State, for the purposes of s 77 of the Constitution.

196. Accordingly, in the result, a majority of the High Court decided that in the factual circumstances, the administrative tribunal did not have jurisdiction. A question that is raised is whether, following *Burns v Corbett*, there is any problem in the WAIRC exercising jurisdiction in any matters in which there are residents of different States involved. This could apply, for example, in the denial of contractual benefits jurisdiction if the employer was resident in one State but the employee was resident and the employment occurred in Western Australia. The same could apply in the unfair dismissal jurisdiction of the WAIRC.

[59] See *Burns v Corbett* at [20].

197. Relevant to this point, it has been held that, in s 75 of the Constitution, the expression "residents of different States", refers to people and not corporations;[60] although there has been some criticism of this ruling by Kirby J in *British American Tobacco of Australia v Western Australia,*[61] and the issue could be revisited by the Court.

198. Following *Burns v Corbett*, whether the WAIRC could exercise jurisdiction in a matter where there were residents of different States involved would depend upon whether the WAIRC was characterised as a State court for the purposes of s 77 of the Constitution. Given the analysis of the issue by the High Court in *Burns v Corbett,* there must be considerable doubts that it is, as presently constituted. This is despite the fact that, as noted in some submissions to the Review, s 12 of the IR Act declares the WAIRC to be a court of record. Partly on this basis it has been held by the IAC that, for example, for the purposes of the (former) *Corporations Act (Cth)* it is a "Court".[62]

199. There was some consideration of the issue in *Saldanha v Fujitsu Australia Pty Ltd*[63] and *Rogers v J-Corp Pty Ltd* (Rogers).[64] In *Rogers*, the Full Bench decided the WAIRC was a "court of the State" as it had institutional integrity, is an independent and impartial tribunal, conducts its hearings in public and has all of the defining characteristics of a court. That decision involved an appeal from a decision of an Industrial Magistrates Court. There was however, and with respect, an error in the analysis of Smith AP at [34]. Her Honour there said the Industrial Magistrates Court and the Full Bench on hearing an appeal from an Industrial Magistrates Court was bound by the rules of evidence. That is incorrect having regard to regulation 35(4) of the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005*; and see also *Liquor, Hospitality and Miscellaneous Union West*

60 *Australasian Temperance and General Mutual Life Assurance Society v Howe* (1922) 31 CLR 290.
61 (2003) 217 CLR 30, [109].
62 *Helm v Hansley Holdings Pty Ltd (in liq)* [1999] WASCA 71, (1999) 118 IR 126. In the same case at [9] the Court held that in deciding an unfair dismissal case the WAIRC is "acting judicially".
63 (2008) 89 WAIG 76.
64 [2015] WAIRC 00862 at [14]-[15].

Australian Branch v The Minister for Health[65] and *Australasian Meat Industry Employees Union, South and Western Australian Branch v Shagay Pty Ltd*.[66]

200. Additionally, *Rogers* did not consider a point emphasised by the High Court in *Burns v Corbett,* that a pathway of appeal to the High Court is a characteristic of a State court for the purposes of s 77 of the Constitution.[67] There is no such pathway from decisions of the WAIRC, at present, because an appeal from the Full Bench of the WAIRC proceeds to the IAC and there is no right of appeal from the IAC to the High Court.

201. If the WAIRC is not a "State court" this would not affect its authority to determine most cases, but the relevant provisions of the IR Act would need to be read down so that they do not purport to confer any jurisdiction in the WAIRC when residents of different States were involved. This would be accommodated by s 7 of the *Interpretation Act 1984* (WA) and by analogy with the reasons of *Burns v Corbett* at [64].

202. Research done by the Secretariat suggests there are a small number of WAIRC decisions that may involve residents of different States, if residents could include corporations. For example, in *Fitzgerald v Oil Drilling Exploration (International) Pty Ltd*[68] the appellant was a resident of Western Australia and the respondent company was based in South Australia and in *Puskus v Caimes Pty Ltd*[69] in which the appellant was a resident of Western Australia and the respondent a company based in Queensland.

203. In those cases in which *Burns v Corbett* might apply, it would be sensible to consider creating a jurisdiction within the Magistrates Court to allow the case to proceed to be heard, as a denial of contractual benefits, or unfair dismissal case, as the case may be.

65 [2011] WAIRC 00192 at [80]-[81].
66 [2017] WAIRC 00464, Schedule 1 [8]-[9].
67 See *Burns v Corbett,* at [20] and [97]-[99].
68 (2000) WAIRC 01043.
69 (2013) WAIRC 01063.

204. The CPSU/CSA submission referred to the limited extent to which *Burns v Corbett* might apply in Western Australia. The above sets out the limited but relevant circumstances in which it could.

205. Slater & Gordon and the Transport Workers Union (TWU) also helpfully provided submissions on the *Burns v Corbett* issue. Slater & Gordon contended it is likely the WAIRC is not a "State court", and agreed there were circumstances in which the *Burns v Corbett* decision may have an impact, particularly in denial of contractual benefits cases. It submitted that the WAIRC could conciliate these claims, and if the matter did not resolve, it could then proceed to a civil court. The Review agrees. Slater & Gordon made suggestions on how to fill the potential "gap", with one suggestion being, similarly to the above, that a State court be given the power to determine a denial of contractual benefits claim but retaining the "no costs" jurisdiction of the WAIRC. Having regard to the discussion of the costs issue, later in this chapter, the Review favours that course.

206. The TWU submitted there were also possible implications from *Burns v Corbett* with respect to the jurisdiction of the WAIRC, under the *Owner-Drivers (Contracts and Disputes) Act 2007* (OD Act), when constituted as the RFTIT. Although time and circumstances prevent the Review from thoroughly looking at that submission, it could well be correct. In those circumstances the WAIRC could again be empowered to conciliate the dispute, and if it required determination, then jurisdiction could be granted to the Magistrates Court to do so. The Review appreciates the Attorney General will also be considering the issue insofar as it may have an impact on the State Administrative Tribunal (SAT), and so the Minister can be expected to liaise with the Attorney General on these matters as well.

207. The recommendation to be made by the Review will reflect this.

208. The TWU also made a substantive submission to the Review about possible changes to the OD Act. That issue is later dealt with.

2.2.15 Additional submissions 18

Whether parties should be entitled in all matters before the WAIRC, however constituted, to be represented by an Australian legal practitioner, as defined in s 5 of the LP Act, subject to a discretion to be exercised by the WAIRC to disallow any or all of the parties from having legal representation in a particular matter, or on a particular occasion or for a particular hearing.

209. The considerations which led to this request for additional submissions were set out in the Interim Report at [330]-[342]. The Review referred to the reasons of Ipp JA in *Orellana-Fuentes v Standard Knitting Mills Pty Ltd & Anor; Carey v Blasdom Pty Ltd trading as Ascot Freightlines & Anor*[70] where His Honour said that it was "self-evident" that legal representation is ordinarily an important part of procedural fairness and it is ordinarily in the public interest to allow citizens to have legal representation for the purposes of the conduct of litigation. As His Honour said however, the "need for legal representation depends on the background of the party concerned, the nature of the proceedings, the nature of the tribunal and the nature of the claim". Section 31 of the IR Act was clearly intended to strike a balance having regard to these considerations. The balance was in favour of a person not being entitled to be represented by a legal practitioner as of right. Legal representation could occur however, if all parties consented or it was allowed by the WAIRC having regard to whether there was a question of law raised, argued or likely to be raised or argued in the proceedings. Where proceedings involved applications of the sort set out in s 29(1)(b) or s 44(7)(a)(iii) of the IR Act, then a party is entitled to legal representation. The same applies in cases before the PSAB, under s 80L(1) of the IR Act.

210. Otherwise in contradistinction to being represented by a legal practitioner, s 31(1)(b) entitles a person to appear by an agent. The issue of agents is dealt with elsewhere in this chapter of the Final Report.

211. Both the Law Society and the Legal Practice Board supported legal practitioners being able to appear in the WAIRC as of right and without any question of obtaining leave. The Legal Practice Board submitted the requirement to seek leave adds a level of complexity that is not found in other State courts or tribunals.

[70] (2003) 57 NSWLR 282, with the concurrence of Spigelman CJ and Hanley JA.

It was submitted that a person could be placed at a significant disadvantage to their opponent if leave was refused at the commencement of a hearing, when the person otherwise expects to be represented by counsel. It was also submitted that not infrequently unrepresented parties appear against represented parties in other courts and tribunals and when that occurs procedures are in place to ensure that both parties have a fair hearing.

212. Consistently with this, AMMA submitted there was no demonstrated reason why the WAIRC should be given the power to deny a party the right to be legally represented. It was submitted private sector employers in the State system were likely to be of a small size such that they will not have in-house industrial relations expertise and as such will need external assistance. CCIWA made a similar submission. CCIWA argued there was uncertainty in the present position. CCIWA submitted the entitlement to be represented by a lawyer is linked to the right to a fair hearing and that currently industrial agents have an unfettered right of representation before the WAIRC. CCIWA submitted there was a distinction without a difference. With respect however, there is a difference, one being that somebody is legally qualified the other being that they are not. It was submitted that legal practitioners can assist the WAIRC by reducing the matters in issue and employers may wish to engage a lawyer so that they can focus on running their business. The Review accepts that point.

213. A confidential submission from a public sector employer said there was already a growing trend to "lawyer up", which moves the WAIRC away from being an accessible jurisdiction for employers and employees to resolve issues in a conciliatory manner. It was submitted that being "too legalised" creates a further barrier between employer and employee.

214. The Department of Health similarly contended that it would be concerned if parties were entitled to be represented by an Australian legal practitioner in all matters. It did submit however, that s 31 of the IR Act should be amended as it limits the ability of a legal practitioner to appear on behalf of their employer if they are an employee of the organisation.

215. In a stakeholder meeting, it was said that at times solicitors who are employed by public sector agencies have been prevented from appearing at conciliation conferences at the WAIRC, upon the objection of a union.

216. The vegetablesWA submission emphasised the traditional right of access to the WAIRC by anybody regardless of their ability to pay for a solicitor. It also submitted that if the predominant aim of the industrial relations framework was to assist parties to resolve disputes, the introduction of formal structured legal argument and process is not necessarily conducive to reaching mutual agreement.

217. All of the unions who made submissions upon the issue were opposed to legal representation as of right. The AMWU noted the process in the FWC under s 596 of the FW Act with respect to legal representation, where leave must be obtained. The AMWU submitted that parties, at present, have the ability to request representation by a legal practitioner before the WAIRC, and in the experience of the union it was rarely denied outside of conciliation. UnionsWA made a submission similar to that made by the AMWU. This submission was in turn adopted by the HSUWA. Similar submissions were made by the SSTUWA, the CFMEU, the UFU, United Voice, WASU and the WAPOU. The CPSU/CSA said that there would be an increase in costs of dealing with matters in the WAIRC if the rules were changed for legal representation. It submitted there should be no "trial by chequebook" in the WAIRC.

218. One point that should be made in response to some of these submissions is that on this issue, the Review asked a question. It had not made a proposed recommendation. It was a question for additional submissions as to whether parties should be entitled to be represented by an Australian legal practitioner. It is therefore disappointing that United Voice in its submission referred to the question as a "recommendation" and then said the "recommendation is entirely antithetical to the WAIRC operating as a laypersons tribunal and remaining an accessible avenue for workers to seek justice". Not dissimilarly the WAPOU referred to being concerned about "the dominant narrative throughout the Interim Report that legal professionals are the only, or even the preferred,

practitioners that should operate within the realm of industrial relations". With respect, the Review considers the observation to be misplaced. More relevantly, the WAPOU submitted that a greater use of legal practitioners could result in a system that is more costly. That is a matter of concern to the Review.

219. The ELC referred to it being preferable for the IR Act to contain a provision equivalent to s 596 of the FW Act. The ELC said that it was more likely for employers to be represented than employees and that many employees find it intimidating where their employer is represented by a lawyer and they are not. This was balanced by the point also made by the ELC that lawyers often allow matters to be dealt with more efficiently and can assist in resolving matters more effectively.

220. The ECCWA believed that all parties should be entitled to representation in all matters before the WAIRC. This would be subject to a discretion to be exercised by the WAIRC to disallow all or any of the parties from having legal representation in a particular matter, or a particular occasion or for a particular hearing.

221. There is clearly a division of views.

222. Overall however, the Review is not persuaded that there is cause to recommend a change to s 31 as it currently operates. In coming to this conclusion the following points are noted:

(a) In matters in which an individual employee or former employee may make a claim for unfair dismissal or a denial of contractual benefits, they have a right to be represented.

(b) The WAIRC can allow representation by legal practitioners when it is agreed to by both parties.

(c) The WAIRC can permit legal representation where there are legal issues raised in which it will benefit from representation by legal practitioners.

(d) There is a prospect of a greater tendency towards having lawyers and therefore legal costs being incurred if there is a blanket right to representation.

(e) The FW Act does not permit representation as a right but contains the limitation set out in s 596 of the FW Act.

(f) Aside from the issue of the public sector agency employees, there have not been particular examples placed before the Review of disadvantage caused by a denial of a right to representation.

(g) There is in the opinion of the Review something to be said about the WAIRC remaining accessible to parties being represented by lay advocates, whether they be employees of unions or employers, particularly at conciliations.

(h) There has been concern about people being able to be represented by agents but not legal practitioners as of right, although those concerns are likely to be tightened following the introduction of the Code of Conduct for agents referred to earlier and disqualified legal practitioners not being able to appear.

(i) The restricted right to representation under s 31 of the IR Act attempts to strike a balance that the Review is not satisfied should be disturbed.

223. The Review does consider however there ought to be an amendment to allow public sector agencies to be represented by an employee who is a legal practitioner. There seems no reasonable barrier to potentially exclude such a person. If in a particular case the WAIRC sees that this would be unjust then it should have the discretion to order that the legal practitioner not represent the agency. In public sector matters the opposing party will usually be a public sector union. The public sector unions in WA will usually have available either an experienced in-house lay advocate or in-house legal practitioner. Accordingly, it is unlikely there will be an imbalance of representation before the WAIRC or a need

to "lawyer up", unless the union thinks it is in their best interests to do so. In the opinion of the Review, in these cases the general position ought to be that all parties and any interveners ought, subject to an order by the WAIRC, be entitled to be represented by a legal practitioner who is an employee of that party or intervener.

2.2.16 Additional submissions 19

Whether the WAIRC ought to be empowered to make orders for costs, including legal costs:

(a) In any matter before the WAIRC, but only in the same circumstances as the FWC may make an order for costs under s 401 and s 611 of the FW Act; or

(b) Alternatively to (a), only in a matter that proceeds to an arbitration by the WAIRC, but only in the same circumstances as the FWC may make an order for costs under s 401 and s 611 of the FW Act; or

(c) In no cases, so the WAIRC remains a no costs jurisdiction in all matters.

224. Again, this was a request for additional submissions, having regard to the comments made in [343]-[348] of the Interim Report.

225. The parties that made submissions which supported the WAIRC becoming, in some instances, a costs jurisdiction were AMMA, CCIWA, the Department of Health and vegetablesWA. The Law Society submitted that in unfair dismissal and denial of contractual benefits claims, costs orders should be able to be made in accordance with suggestion 19(b) of the Interim Report but for all other matters they should be within 19(c), so the WAIRC remained a no costs jurisdiction. The ELC and the ECCWA both submitted the WAIRC ought to remain a no costs jurisdiction.

226. All of the unions who made submissions opposed the WAIRC becoming a costs jurisdiction. They were the AMWU, CFMEU, CPSU/CSA, HSUWA, SSTUWA, UnionsWA, UFU, United Voice, WASU and WAPOU. The reasons set out were:

(a) It could unfairly affect lay person claimants who are generally unsophisticated litigants.

(b) Potential applicants have limited savings and could face financial devastation in the event of an adverse costs order.

(c) The fear of a costs order could deter people with good claims from making applications to the WAIRC.

(d) Although there was (by the SSTUWA) an acknowledgment of the concern in relation to vexatious claims, the issue was not of such magnitude that it outweighs the "policy problem" created when persons of modest means with good claims are deterred from seeking a just determination of those claims.

(e) The no costs jurisdiction of the WAIRC is an essential component of the right for all workers to access justice.

(f) Costs orders would discourage applications with a disproportionate impact upon the most vulnerable.

(g) Moving to a costs jurisdiction would tilt the WAIRC in favour of employers with the resources to withstand a costs order and to "mount routine argument against workers for costs orders".

(h) Frivolous and vexatious claims can already be dealt with by being dismissed under s 27(1)(a) of the IR Act.

(i) There was insufficient evidence upon which to support any change.

(j) There was a fear that a practical implication of moving to a costs jurisdiction would be an application for costs as a matter of routine at the conclusion of every proceeding, where the union was unsuccessful, and unions and workers would bear the burden of defending the merits of bringing the claim every time.

227. In *Fisk v Kenji Auto Parts*[71] Le Miere J (with whom the rest of the other members of the Court agreed) considered the policy objectives which might underlie the "costs rule" in s 83C(2) of the IR Act which provides that in enforcement proceedings under s 83, and s 83B of the IR Act, before the IMC, "costs shall not be given to any party to the proceedings for the services of any legal practitioner or agent of that party unless, in the opinion of the IMC, the proceedings have been frivolously or vexatiously instituted or defended, as the case requires, by the other party". His Honour said:

> First, the rule ensures that the court is accessible, particularly to the poor or relatively poor, who might be deterred from bringing a valid prosecution, or properly defending a prosecution, by the possibility of having to pay the fees of their opponent's lawyer, particularly where the legal fees are likely to exceed the amount in issue. Secondly, the rule encourages proceedings to be determined in an informal and expeditious manner by deterring parties from instructing lawyers to advance technical and lengthy prosecutions or defences. Thirdly, the rule discourages unmeritorious applications or defences without punishing a party for bringing, or defending, a prosecution in good faith.

228. While some of these observations were specific to the jurisdiction before his Honour, others have a resonance with claims before the WAIRC generally, where there is a no costs jurisdiction. The observations to some extent, support the points made by the unions.

229. The union's reference to s 27(1)(a) of the IR Act is, in the opinion of the Review, also relevant.

230. The section provides the WAIRC with the power to, at any stage of the proceedings, dismiss the matter before it or any part of the matter if it is trivial, not necessary or desirable in the public interest or for "any other reason the matter or part should be dismissed or the hearing thereof discontinued, as the case may be". This would clearly empower the WAIRC to dismiss a claim that was brought frivolously or vexatiously. It is a power that can be exercised at any stage of the proceedings.

231. The Review also notes that the no costs jurisdiction of the WAIRC is in contradistinction to that in the FWC as referred to in the Interim Report at [345].

[71] (2007) 164 IR 417 at [19].

However as noted in the Interim Report at [348] there are differences in the jurisdiction of the FWC and the WAIRC. In particular, the WAIRC may deal with all industrial matters within its jurisdiction, can order a compulsory conference when requested by an organisation or employer under s 44 and also conciliates under s 32 and s 44 to try and resolve a dispute.

232. In all the circumstances the Review is not persuaded that it is appropriate to recommend to the Minister that the no costs jurisdiction of the WAIRC change. This is because, in the opinion of the Review, it will not necessarily lead to a more efficient, streamlined or fair industrial relations system.

2.2.17 Additional submissions 20

Whether, without removing the entitlement held by the parties listed in s 44(7)(a) of the IR Act to make the application specified in that subsection, the 2018 IR Act should contain a consistent set of single provisions for the WAIRC to issue a summons for a compulsory conference, as currently provided for in s 44 of the IR Act, and for the WAIRC to conciliate and arbitrate an industrial matter that is referred to it, as currently provided for in s 32 of the IR Act, and if so how that should be legislatively achieved.

233. It is unnecessary to canvas the submissions made upon this request in detail. The submissions were generally short and ambivalent. There was no particular enthusiasm for the advocation of any change to the existing terms of s 32 and s 44 of the IR Act to try and harmonise them. As stated by the AMWU it may in fact be difficult to harmonise them. As set out in a confidential employee association submission the sections set out two processes for different purposes and are used in different circumstances. The Review does not consider it necessary to recommend any change.

2.2.18 Additional submissions 21

Whether:

(a) The 2018 IR Act should include an amendment to s 84A(1)(b) of the IR Act to permit orders to be enforced by the party for whose benefit the order was made, in addition to the Registrar or a Deputy Registrar.

(b) The 2018 IR Act should contain a division equivalent to Part 5-1, Division 9 of the FW Act, about offences committed in and before the WAIRC.

234. This request for additional submissions was in two parts. Both proposals were supported by a confidential employee association, the AMWU, and the ECCWA.

Proposition 21(a) was supported by UnionsWA and Slater & Gordon, and the HSUWA, CFMEU, United Voice and WASU supported the UnionsWA submission. Proposition 21(a) was not supported by CCIWA.

235. With respect to proposition 21(b) it was supported by CCIWA, the AMWU and the ECCWA and the confidential employee association submission. UnionsWA did not support the proposition as it argued "it undermines the discretion of the WAIRC". UnionsWA's argument was later clarified to being that the Interim Report did not make a case that a division equivalent to Part 5-1 Division 9 of the FW Act is necessary for the operation of the WAIRC.

236. The Review was supportive of the insertion of a division equivalent to Division 9 of Part 5-1 of the FW Act because it is a protective measure designed to ensure that the appropriate respect for the WAIRC is maintained at all times and if there is a significant transgression there can be consequences.

237. The Chief Commissioner has, since the publication of the Interim Report, informed the Review that she is supportive of the proposal. In particular, the Chief Commissioner said the lack of provisions in the IR Act, like those in Division 9 of Part 5-1 of the FW Act, makes the management of some hearings and conferences more difficult; and that if the WAIRC could warn participants of the existence of these types of provisions and the possible consequences of their actions, it would be a helpful tool in the management of sometimes problematic situations.

238. The Review will therefore make a recommendation to this effect to the Minister.

2.2.19 Additional submissions 22

Whether the 2018 IR Act should include, in any industrial matter before the WAIRC, and subject to the overall discretion of the WAIRC, a right for any party to obtain discovery and inspection of relevant documents held in the possession, power or custody of any other party.

239. On the whole the submissions to the Review did not have much support for the proposition. The exceptions were an employee association and WASU that were very supportive of the recommendation, the ELC, the ECCWA and Slater & Gordon. Slater & Gordon submitted that it was well established that if a Court does not

have all relevant information it cannot achieve the objective of doing real justice between the parties. It submitted that the current discretion to make an order for discovery when it is considered to be just provides an encumbrance upon a party that should not be there.

240. By contrast others making a submission thought that the present law and practice provided an appropriate brake on the circumstances in which discovery might be ordered, so as not to encumber parties to provide documents in every case.

241. Overall, the Review is not persuaded that there is a sufficient support or need for change so as to make a recommendation to the Minister.

2.3 The *Owner-Drivers (Contracts and Disputes) Act 2007*

242. This issue has also been alluded to earlier. As set out in the Interim Report at [222] the Review did not intend to make any recommendations about the RFTIT unless persuasive submissions were made following the publication of the Interim Report. Following this, the TWU made a significant submission, directed to the substance of the provisions of the OD Act. As the submission is not directed to the operation, structure or efficiency of the WAIRC, when sitting as the RFTIT, the Review does not think it appropriate to deal with the issue, but will recommend the Minister provide the submission to the Minister for Transport, who has responsibility for the operation of the OD Act and may consider whether there ought to be any substantive amendment to the OD Act.

2.4 Recommendations

243. With respect to Term of Reference 1, the Review makes the following recommendations and observations:

4. In the Amended IR Act, the position of the President of the Western Australian Industrial Relations Commission (WAIRC) be abolished.

5. In the Amended IR Act, the role and powers of the President of the WAIRC be subsumed into the position of the Chief Commissioner of the WAIRC.

6. In the Amended IR Act, the qualifications for the office of the Chief Commissioner of the WAIRC and the Senior Commissioner of the WAIRC be amended so that:

   A person is not eligible to be the Chief Commissioner or the Senior Commissioner, unless they are a person who:

   (1) (a) Is a lawyer and has had not less than 5 years' legal experience as defined by s 9(1aa) of the IR Act; and

   (b) Has had significant experience in industrial relations law and/or practice; or

   (2) (a) Has approved academic qualifications as defined in s 21(1) of the *Legal Profession Act 2008* (WA) (the LP Act); and

   (b) Not less than the equivalent of 5 years' full-time experience as a member of the WAIRC, the Fair Work Commission (FWC), or another court or tribunal exercising industrial relations jurisdiction in Australia.

7. In the Amended IR Act, the Full Bench of the WAIRC be constituted by the Chief Commissioner,[72] as the Presiding Member and two other members of the WAIRC.

8. In the Amended IR Act, the Commission in Court Session of the WAIRC be renamed and constituted as the Full Bench.

9. In the Amended IR Act, the Industrial Appeal Court of Western Australia (IAC) be abolished, and in lieu thereof, the Amended IR Act include a right of appeal, on the ground that the decision involved an error of law, from a decision of the Full Bench of the WAIRC, or the Chief Commissioner when exercising jurisdiction under s 49(12), s 66 or s 72A(7) of the Amended

[72] Or the Senior Commissioner if the Chief Commissioner is unavailable or if the Full Bench is hearing an appeal against a decision of the Chief Commissioner.

IR Act, to the Court of Appeal of Western Australia, upon a grant of leave by a Justice of the Court.

10. (a) In the Amended IR Act, the jurisdiction of the Industrial Magistrates Court (IMC) is to be amended so that if a claim for the enforcement of a Western Australian Employment Standard (WAES),[73] State award, or other State industrial instrument is made to the IMC, the IMC has jurisdiction to deal with all enforcement proceedings and claims made by or on behalf of the employee against the employer including all claims by the employee or former employee for a denial of a contractual benefit.

    (b) In hearing and determining a claim by an employee or former employee for a denial of a contractual benefit, under recommendation 10(a), the claim is to be determined as if the claim was an industrial matter referred to the WAIRC under s 29(1)(b) of the IR Act.

11. The Amended IR Act provide for the dual appointment of WAIRC Commissioners to the FWC, as contemplated by s 631(2) of the *Fair Work Act 2009* (FW Act).

12. The Amended IR Act provide for the dual appointment of FWC members to the WAIRC, as contemplated by s 631(1) of the FW Act.

13. The Amended IR Act include an amendment so that the compulsory retirement age of the members of the WAIRC be increased from 65 to 70 years of age.

14. The Amended IR Act empower the WAIRC to regulate the conduct of registered industrial agents appearing before the WAIRC, by way of a Code of Conduct to be published by the WAIRC, that includes the entitlement of the WAIRC to, on notice to the agent and with the agent having the

[73] If and when enacted in accordance with recommendation [54] below.

opportunity to make submissions on the issue, suspend or revoke an agent's registration or withdraw the right of the agent to appear before the WAIRC, either generally or for a particular matter, occasion or hearing.

15. The Amended IR Act contain a provision that a disqualified person, as defined in s 3 of the LP Act, is prohibited from being a registered industrial agent or appearing as an agent in the WAIRC.

16. The Amended IR Act contain:

    (a) A "slip rule" for orders made by the WAIRC.

    (b) An amendment to the current requirement for a "speaking to the minutes" of orders, to give discretion to the WAIRC to dispense with a speaking to the minutes in a particular case if it is warranted in the opinion of the WAIRC.

    (c) An amendment to the requirement for a "speaking to the minutes" of orders that would permit the WAIRC to specify that unless parties indicate by a specified time that a speaking to the minutes is requested, that the WAIRC may issue the order in the terms of the minutes.

    (d) Power for the WAIRC to conduct conciliations by telephone, videolink or other electronic means if a member of the WAIRC decides it is in the interests of justice to do so.

17. The Amended IR Act is not to include any equivalent of the privative clause provisions contained in s 34(3) and s 34(4) of the IR Act, which purport[74] to provide that any decision of the WAIRC will not, subject to the IR Act, be "impeached" or subject to a writ of certiorari, or award, order, declaration, finding or proceeding liable to be "challenged, appealed against, reviewed, quashed or called into question by any court".

[74] The word purport is used, as the subsections may be contrary to the *Commonwealth Constitution*.

18. The Amended IR Act not include any equivalent of s 48 of the IR Act that provides for the establishment of Boards of Reference under awards made by the WAIRC.

19. (a) The Amended IR Act contain an amendment to s 46 of the IR Act so that the applications are heard and determined by the Full Bench of the WAIRC.

(b) The Amended IR Act contain an amendment to s 46 of the IR Act so that an industrial inspector may make an application to the WAIRC under the section, upon leave being granted by the WAIRC to do so and upon such conditions as the WAIRC may see fit to impose.

20. The denial of contractual benefits jurisdiction currently exercised by the WAIRC upon a referral under s 29(1)(b) of the IR Act:

(a) Continue to be so exercised, subject to (b).

(b) The Amended IR Act contain a provision that if the WAIRC does not have jurisdiction in any matter due to the contents of s 75 of the *Commonwealth Constitution*, an employee or former employee may make an application in the Magistrates Court of Western Australia, with the application being determined as if it were a matter referred to the WAIRC under s 29(1)(b) of the Amended IR Act.

21. (a) Subject to (b), the Amended IR Act not include any amendment to s 31 of the IR Act in relation to representation by a legal practitioner.

(b) In the Amended IR Act, s 31 of the IR Act is to be amended so that, unless otherwise ordered by the WAIRC, in any matter in which a public sector employer is a party or intervener, all parties or interveners are entitled to be represented by a legal practitioner who is an employee of that party or intervener.

22. Under the Amended IR Act, the WAIRC is to continue to be a no costs jurisdiction in all matters.

23. Subject to any amendments required by the recommendations contained in the response to Term of Reference 2, the Amended IR Act contain no amendments to s 32 and s 44 of the IR Act.

24. (a) The Amended IR Act contain an amendment to s 84A(1)(b) of the IR Act to permit orders to be enforced by any party for whose benefit the order was made, in addition to the Registrar or a Deputy Registrar.

(b) The Amended IR Act contain a Division to the same effect as Part 5-1, Division 9 of the FW Act, about offences committed in and before the WAIRC.

25. The Amended IR Act not contain any amendment to s 27(1)(o) of the IR Act insofar as it applies to orders the WAIRC may make about discovery, inspection, or production of documents.

26. The Minister for Commerce and Industrial Relations (the Minister) provide the submission from the Transport Workers' Union about substantive amendments to the *Owner-Drivers (Contracts and Disputes) Act 2007* (WA) to the Minister for Transport.

Chapter 3 Access to the Western Australian Industrial Relations Commission by Public Sector Employees

3.1 The Term of Reference

244. The second Term of Reference reads as follows:

> 2. Review the jurisdiction and powers of the Western Australian Industrial Relations Commission with the objective of examining the access for public sector employees to the Western Australian Industrial Relations Commission on a range of matters for which they are currently excluded.

As set out in the Interim Report there is a clear link between the first and second Terms of Reference. That is because the structure of the WAIRC is linked to its jurisdiction over public sector employees.

245. The Interim Report discussed in some detail who the public sector employees were within the State industrial relations system. It also considered how the access of public sector employees was restricted within the jurisdiction and powers exercised by the WAIRC. It also discussed and made proposed recommendations for further submissions and discussions on whether, and to what extent, that could and should change.

246. More specifically, the analysis contained in the Interim Report covered the following topics:

(a) Differences between the public sector and the private sector and the evolution of the public sector.[75]

(b) The definition of the public sector.[76]

(c) The definition of the public service.[77]

(d) The WAIRC constituent authorities.[78]

(e) The constitution of the PSA.[79]

---

75 Interim Report [380]-[381].
76 Interim Report [382]-[395].
77 Interim Report [396]-[403].
78 Interim Report [404]-[409].

(f) The constitution of the PSAB.[80]

(g) The Railways Classification Board.[81]

(h) The role of the Public Sector Commissioner.[82]

(i) The Public Sector Commissioner's instructions.[83]

(j) The public sector standards.[84]

(k) The *Public Sector Management (Breaches of Public Sector Standards) Regulations 2005*.[85]

(l) Access to the WAIRC by public sector employees.[86]

(m) The meaning of "government officer" in the IR Act.[87]

(n) The IR Act coverage of people employed by a public authority who are "not on the salaried staff".[88]

(o) Employees employed under the *Health Services Act 2016* (WA) (HS Act).[89]

(p) Police officers.[90]

(q) Prison officers and youth custodial officers.[91]

(r) State school teachers and TAFE lecturers.[92]

(s) Chief executive officers.[93]

---

79 Interim Report [410].
80 Interim Report [411].
81 Interim Report [412].
82 Interim Report [413]-[415].
83 Interim Report [416].
84 Interim Report [417]-[418].
85 Interim Report [419]-[421].
86 Interim Report [422]-[423].
87 Interim Report [424]-[434].
88 Interim Report [435]-[436].
89 Interim Report [437]-[447].
90 Interim Report [448]-[461].
91 Interim Report [462]-[468].
92 Interim Report [469]-[477].
93 Interim Report [478]-[479].

(t) Jurisdiction of the PSA.[94]

(u) Jurisdiction of the PSAB.[95]

(v) The PSAB and the IR Act.[96]

(w) The PSAB and the *Public Sector Management Act 1994* (PSM Act).[97]

(x) The PSAB and the HS Act.[98]

(y) Limits on the jurisdiction of the PSAB.[99]

(z) Public sector employees and the ordinary jurisdiction of the WAIRC.[100]

(aa) Jurisdiction under the IR Act for public sector employees who are not government officers.[101]

(bb) Jurisdiction under the PSM Act for public sector employees who are not government officers.[102]

(cc) Jurisdiction under the HS Act for employees who are not government officers.[103]

(dd) Jurisdiction under the PSM Act which is the same for government officers and public sector employees who are not government officers.[104]

(ee) Jurisdiction under the HS Act which is the same for government officers and non-government officers employed under the HS Act.[105]

(ff) Limits on the ordinary jurisdiction of the WAIRC.[106]

94 Interim Report [480]-[486].
95 Interim Report [487].
96 Interim Report [488]-[489].
97 Interim Report [490]-[491].
98 Interim Report [492]-[494].
99 Interim Report [495].
100 Interim Report [496].
101 Interim Report [497].
102 Interim Report [498]-[500].
103 Interim Report [501]-[503].
104 Interim Report [504]-[519].
105 Interim Report [520]-[524].
106 Interim Report [525].

(gg) Individual employee and union access to the WAIRC.[107]

(hh) Access to the WAIRC by individual government officers.[108]

(ii) Access to the WAIRC by an individual public sector employee who is not a government officer.[109]

(jj) Public sector union access to the WAIRC.[110]

(kk) Access to the WAIRC by public sector unions representing public sector employees who are not government officers.[111]

(ll) The Australian Medical Association (AMA).[112]

(mm) The WA Police Union (WAPU).[113]

(nn) Public sector employees and the powers of the WAIRC.[114]

(oo) Government officers and the powers of the WAIRC.[115]

(pp) The powers of the PSA.[116]

(qq) The powers of the PSAB.[117]

(rr) The powers of the WAIRC exercising ordinary jurisdiction over public sector employees who are not government officers.[118]

(ss) WAIRC powers with respect to both government officers and public sector employees who are not government officers.[119]

107 Interim Report [526].
108 Interim Report [527]-[529].
109 Interim Report [530].
110 Interim Report [531]-[533].
111 Interim Report [534].
112 Interim Report [535].
113 Interim Report [536].
114 Interim Report [537].
115 Interim Report [538].
116 Interim Report [539]-[541].
117 Interim Report [542]-[546].
118 Interim Report [547]-[549].
119 Interim Report [550]-[551].

(tt) The abolition of the constituent authorities.[120]

(uu) The definition of a government officer – "employed on the salaried staff".[121]

(vv) Use of s 32 and s 44 of the IR Act.[122]

(ww) Recruitment and promotion decisions and reviews of the merits.[123]

(xx) Termination due to redundancy and IR Act and PSM Act inconsistencies.[124]

(yy) Interaction between the IR Act and the HS Act and a typographical error.[125]

(zz) Limitations on the PSA and WAIRC to deal with matters related to public sector standards.[126]

(aaa) Unfair dismissal in the public sector.[127]

(bbb) Public sector employees referring matters to the WAIRC.[128]

(ccc) Access to the WAIRC for police officers under the *Police Act 1892* (WA).[129]

(ddd) Access to the WAIRC for unfair dismissal remedies where employment has been terminated on the basis of a negative Working with Children Notice, under the *Working with Children (Criminal Record Checking) Act 2004* (WA) (WWC Act).[130]

(eee) Restriction on representation by legal practitioners.[131]

(fff) Anti-bullying jurisdiction.[132]

120 Interim Report [552]-[558].
121 Interim Report [559]-[574].
122 Interim Report [575]-[581].
123 Interim Report [582]-[584].
124 Interim Report [585]-[590].
125 Interim Report [591].
126 Interim Report [592]-[611].
127 Interim Report [612]-[615].
128 Interim Report [616]-[618].
129 Interim Report [619]-[623].
130 Interim Report [624]-[626].
131 Interim Report [627].
132 Interim Report [628]-[632].

247. The Review attached to the Interim Report a number of diagrams to assist in understanding the complex interaction between the different types of public sector employees, the IR Act, the PSM Act and the HS Act.

248. For the same purpose, the Review also attaches these diagrams to this chapter. They depict:

(a) Access by a government officer to the PSAB under s 80I(1)(b) of the IR Act and s 78(1) of the PSM Act - **Attachment 3A - Figure 3A-1.**

(b) Access to the WAIRC under s 78(2) of the PSM Act by an employee who is not a government officer - **Attachment 3A – Figure 3A-2**.

(c) Access to the WAIRC under s 78(3) of the PSM Act by an employee against whom proceedings have been taken for a suspected breach of discipline or disobedience - **Attachment 3A – Figure -3A-3.**

(d) Access to the WAIRC under s 95(2) of the PSM Act by an employee aggrieved by a s 94 decision **- Attachment 3A – Figure 3A-4**.

(e) Access to the WAIRC under s 96A(2) of the PSM Act by an employee aggrieved by a decision made under regulations referred to in s 95A(2) of the PSM Act - **Attachment 3A – Figure 3A-5**.

(f) Access by a government officer to the PSAB under s 80I(1)(c) of the IR Act and s 172(2) of the HS Act - **Attachment 3B – Figure 3B-1**.

(g) Access to the WAIRC under s 172(4) of the HS Act by an employee who is not a government officer Act - **Attachment 3B – Figure 3B-2**.

(h) Access to the WAIRC under s 173(4) of the HS Act by an employee against whom proceedings have been taken for a suspected breach of discipline or disobedience - **Attachment 3B – Figure 3B-3.**

249. At [370]-[377] of the Interim Report the Review made some general comments about Term of Reference 2. Since publishing the Interim Report the Review has

conducted stakeholder meetings with public sector employers and unions and received submissions from public sector employers, unions, solicitors and a confidential submission from a person who wrote about problems relating to their own employment and the current PSM Act regime. These submissions will be referred to in more detail below. It is telling however, that none of the submissions sought to cavil with the comments made by the Interim Report as set out in [370]-[377].

250. It is appropriate to repeat what was there said, as underpinning the recommendations that should be made in the opinion of the Review.

> 370 In Western Australia the law with respect to public sector employment involves a mixture of statute law, the common law, awards and industrial instruments,[133] public sector standards issued by the Public Sector Commissioner and the Public Sector Commissioner's Instructions. Statutory regulation arises from different pieces of legislation, the most important of which are the PSM Act and the IR Act. There is other legislation that applies to distinct parts of the public sector that is also of importance, such as the *Health Services Act 2016* (WA) (HS Act), the *School Education Act 1999* (WA) (SE Act), the *Police Act 1892* (WA) (Police Act), the *Youth Offenders Act 1994* (WA) (YO Act) and the *Prisons Act 1981* (WA) (Prisons Act).
>
> 371 As the analysis of this chapter will illustrate, the law in Western Australia with respect to the regulation of public sector employment and the public sector jurisdiction of the WAIRC is bafflingly complex. There is a patchwork maze of provisions that lead only to confusion, uncertainty and the possibility, at least, for unfairness. This is quite contrary to the ideal of an accessible, fair and modern State system.
>
> 372 As will be set out, differently characterised public sector employees have different rights of access to the jurisdiction of the WAIRC. The decisions that they challenge vary, as does the remedies that can be granted. The "system" is further complicated by the existence of two "constituent authorities", set up under the IR Act, being the Public Service Arbitrator (PSA) and the Public Service Appeal Board (PSAB). These constituent authorities complicate the system by taking a slice of the jurisdiction covering the industrial and employment related matters of public sector employees, without, it seems to the Review, providing any concomitant benefit for the users of the system or the WAIRC. The existence of the constituent authorities provides logistical difficulties for the WAIRC, as will be later explained. Although some submissions to the Review have argued to the contrary, the preliminary opinion of the Review is that the constituent authorities add unnecessary complexities and uncertainties to an already problematic "system".
>
> 373 Additionally, there are divisions between the applications an individual public sector employee may make in the ordinary jurisdiction of the WAIRC, or to one of

[133] Including industrial agreements and enterprise orders under the IR Act.

the two constituent authorities, and those that only a registered organisation (union) may make on their behalf.

374 There are some parts of the public sector that, under particular pieces of legislation, have a separate regime involving the regulation of their employment – employees covered by the HS Act and police officers are two examples. Consequently, these employees have different coverage under the IR Act and the jurisdiction of the WAIRC applies differently to them.

375 Overall, the nature and extent of an employee's coverage by the IR Act and the capacity of an employee to refer a matter to or lodge an appeal with the WAIRC or a constituent authority depends upon whether the public sector employee is:

(a) A public service officer.

(b) A government officer as defined in the IR Act.

(c) An employee specifically excluded from the definition of a government officer in the IR Act, such as teachers and members of University academic staff.

(d) A person employed by a public authority who is not "on the salaried staff".

(e) An employee as defined in the HS Act (an HS Act employee).

(f) A police officer.

(g) Another employee whose employment is also regulated by other legislation, such as a prison officer and a youth custodial officer.

(h) A chief executive officer or chief executive, as defined in the PSM Act and the HS Act.

376 In the opinion of the Review, the above only needs to be set out to indicate the system is in a mess. In the preliminary opinion of the Review, the jurisdiction of the WAIRC and its constituent authorities, with respect to the public sector, needs wholesale change. The change needs to facilitate the existence of a simpler system that provides a more uniform access to the jurisdiction of the WAIRC.

377 The new system ought to be characterised by a commonality of rights to refer industrial matters and/or to appeal against decisions of an employing authority to the WAIRC, a uniformity of the processes the WAIRC may engage in, and the remedies that can be granted against referred industrial matters and challenged decisions.

251. As stated at [378] of the Interim Report the more difficult questions for the Review were what ought to be the nature and extent of the jurisdiction of the WAIRC, the remedies the WAIRC should be empowered to grant, and whether individuals, unions or both ought to be given some or all of the rights to access the jurisdiction of the WAIRC. As set out in the Interim Report, the Review sought, and has obtained, additional submissions on these issues.

252. The Interim Report then said that having regard to all of the above the Review was at present minded to propose the following recommendations to the Minister and seek further submissions on the following topics relevant to Term of Reference 2.

23. The Public Service Appeal Board (PSAB), the Public Service Arbitrator (PSA) and the Railways Classification Board be abolished.

24. (a) Subject to (b), the 2018 IR Act include a single system for public sector employers and employees to refer industrial matters to the WAIRC so that all employees who are currently subject to the jurisdiction of the PSA and the PSAB will now be subject to the ordinary jurisdiction of the WAIRC.

(b) The recommendation in (a) is subject to the prospect of there being a more limited jurisdiction for the referral of industrial matters involving a police officer, police auxiliary officer, Aboriginal police liaison officer or a special constable, in circumstances to be recommended following the receipt of additional submissions as requested below.

25. Subject to the request for additional submissions below, there be consequential amendments to the *Public Sector Management Act 1994* (WA) (PSM Act) and the *Health Services Act 2016* (WA) (HS Act) to allow government officers to refer industrial matters to the ordinary jurisdiction of the WAIRC.

26. In exercising the jurisdiction referred to in [24] above, the WAIRC have the jurisdiction and powers to make the same orders as it may make in exercising its jurisdiction in relation to the private sector.[134]

The Review seeks additional submissions on these issues arising from Term of Reference 2.

27. Whether, and if so to what extent, there should be a division between the industrial matters that a public sector employee may refer to the WAIRC, as opposed to those a registered organisation may refer to the WAIRC on the employee's behalf, which affect the employment of an individual public sector employee.

28. The extent to which a breach of a public sector standard by an agency under the PSM Act may be referred, challenged or appealed by a public sector employee or an organisation on their behalf, to the WAIRC, and the remedies that may be awarded by the WAIRC.

29. Whether, and if so to what extent, a police officer, police auxiliary officer, Aboriginal police liaison officer or a special constable and/or the WA Police Union on their behalf ought to be entitled to refer to the WAIRC an industrial matter of the type described in Schedule 3 clause 2(3) of the IR Act.

30. Whether the 2018 IR Act should include, for the benefit of both public and private sector employees, an entitlement to bring an application to the WAIRC to seek orders to stop bullying at work based on the model contained in the FW Act Part 6-4B "Workers bullied at work" and, if so, whether there ought to be any variations from that model.

[134] The restrictions that apply to divide the jurisdiction of the WAIRC from the jurisdiction of the Public Sector Commission, with respect to an alleged breach of the Public Sector Standards may or may not continue to apply (subject to further submissions on this issue as requested).

31. Whether proposed recommendation [25] should include the repeal of s 96A(1) of the PSM Act, and the amendment of s 96A(2) and s 96A(5)(b) of the PSM Act insofar as they restrict the rights of public sector employees to refer to the WAIRC a decision to terminate their employment under the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* (WA).

32. Whether the sections of the *Young Offenders Act 1994* (WA), the *Police Act 1892* (WA) and the *Prisons Act 1981* (WA), which contain rights of appeal to the WAIRC against removal decisions, should be abolished and replaced by an entitlement for an employee to make an application to the WAIRC for a remedy in respect of an alleged unfair dismissal, with the WAIRC having the same jurisdiction and powers to determine the application and award remedies as in the jurisdiction that applies to private sector employees.

33. Whether the jurisdiction of the WAIRC should be expanded to allow the WAIRC to make General Orders for public sector discipline matters, with the consequent repeal of s 78 of the PSM Act.

34. Whether, given the discussion in Chapter 3 of the Interim Report, the recommendations proposed in response to Term of Reference 2 above, and any submissions provided in answer to the other questions in response to Term of Reference 2 above, the Review should recommend to the Minister that the PSM Act be reviewed.

3.2 Analysis of Further Submissions

253. There were a total of 28 different submissions about Term of Reference 2 in the Interim Report. They were from State Government departments and agencies, public sector bodies, employer and employee peak body associations, unions, solicitors and the person referred to earlier. Nine submissions were from government departments or agencies, 11 were from unions or employee associations, or peak bodies, three were from employer peak bodies or associations, a submission was received from the Acting Public Sector Commissioner and there were submissions from Slater & Gordon, the ELC and the ECCWA. The confidential submission from the individual has been referred to earlier. Although it referred to their experiences, it has been taken into account to the extent that it reflects upon systemic issues. Of these, submissions from one employee association, three government departments and one employer association were confidential.

254. The departments who made public submissions were the Department of Health, the Department of Justice, the Department of Communities, DWER and the Department of the Premier and Cabinet (DPC). A joint public submission was also

received from the Public Transport Authority and the Main Roads Commission. Employer bodies who made public submissions were CCIWA and the HIA.

255. The union peak bodies, unions and employee associations who made public submissions were UnionsWA, the AMWU, the CPSU/CSA, the HSUWA, the SSTUWA, the UFU, United Voice, the WASU, the WAPU and the WAPOU.

256. The submissions from the AMWU, the UFU and the WASU principally supported the submissions made by UnionsWA and the CPSU/CSA. In turn, UnionsWA expressed the general submission that it supported the position on matters within the Terms of Reference that were expressed by its "public sector affiliates". United Voice made the general submission that it supported the submissions made by UnionsWA and the CPSU/CSA.

257. In the opinion of the Review, the best way to set out, analyse and consider the submissions received is by reference to each of the proposed recommendations and requests for additional submissions contained in the Interim Report.

3.2.1 Proposed Recommendation 23

The Public Service Appeal Board (PSAB), the Public Service Arbitrator (PSA) and the Railways Classification Board be abolished.

258. This recommendation was generally supported by all parties who made a submission about it. These were the Department of Health, DWER, the Department of Communities, the Public Transport Authority and the Main Roads Commission, the AMWU, the CPSU/CSA, the HSUWA (abolition of the PSAB only), the SSTUWA, UnionsWA, the UFU, United Voice, the WASU, the WAPOU, the ELC and the ECCWA. It was also supported by a confidential submission from an employee association.

259. A confidential submission from a government department said the jurisdiction of the PSC was framed having regard to the existence of the constituent authorities in their current form. Accordingly, the integrated nature of PSM Act provisions may not lend itself to isolated or standalone amendments. The same submission warned that providing for government officers to refer industrial matters to the

ordinary jurisdiction of the WAIRC may have unintended consequences or complexities which may be detrimental to the efficient and effective operation of the public sector.

260. The first point is relevant to whether the PSM Act ought to be amended, which is later referred to. The second point is noted and will be considered later in this chapter.

261. The submission from the CPSU/CSA agreed with the transfer of the jurisdiction of the PSA into the general jurisdiction of the WAIRC, and noted its support for the proposal to abolish the PSA in the Green Bill.

262. Differently from the other unions, the HSUWA argued that the PSAB should be abolished but its jurisdiction should be given to the PSA, which should be maintained as a constituent authority of the WAIRC. This was because the HSUWA submitted the PSA had developed an expertise in dealing with public sector matters and had a jurisdiction which was beneficial to their resolution. The HSUWA also submitted that abolishing the PSAB would require amendment of Part 11 of the HS Act. That issue is later referred to.

263. The general position of the unions was expressed in the submissions from the SSTUWA and UnionsWA in saying that the existing system is complex and sometimes confusing and it is unclear what benefit it provides that the general jurisdiction of the WAIRC could not.

264. The WAPOU supported the introduction of a single system of industrial regulation for public sector employees. It did however, note that it had previously supported prison officers having access to the PSAB and the PSA on the basis that the PSAB provides for expert members to hear industry specific matters and the PSA has extensive experience in the public sector. Whilst this is noted, the Review is of the opinion that Commissioners within the WAIRC either have or can be expected to readily obtain the relevant experience to deal with matters involving the public sector and prison officers in particular.

265. The contents of proposed recommendation 23 will form part of the recommendations to be made by the Review.

3.2.2 Proposed Recommendation 24

(a) Subject to (b), the 2018 IR Act include a single system for public sector employers and employees to refer industrial matters to the WAIRC so that all employees who are currently subject to the jurisdiction of the PSA and the PSAB will now be subject to the ordinary jurisdiction of the WAIRC.

(b) The recommendation in (a) is subject to the prospect of there being a more limited jurisdiction for the referral of industrial matters involving a police officer, police auxiliary officer, Aboriginal police liaison officer or a special constable, in circumstances to be recommended following the receipt of additional submissions as requested below.

266. This proposed recommendation was in two parts. The first part referred to public sector employers and employees generally whereas the second part referred to the issue of there being a more limited jurisdiction for the referral of industrial matters involving a police officer, police auxiliary officer, Aboriginal police liaison officer or a special constable. The second part of the proposed recommendation is discussed below in the context of the submissions received on this particular topic, as requested by the Review.

267. The first part of the proposed recommendation was supported by CCIWA as it has said it would begin to deliver a consistent framework within Western Australia. CCIWA reiterated that the most effective approach would be to refer the State's industrial relations powers for the private sector to the Commonwealth and retain the WAIRC to regulate WA public sector employment. As set out elsewhere, the Review notes that submission but reiterates that a consideration of the referral of the State's powers for the private sector to the Commonwealth is beyond the Terms of Reference of the Review.

268. The Department of Health affirmed its submission that there should be a single system for public sector employers and employees to refer industrial matters to the general jurisdiction of the WAIRC. It also submitted that the existing jurisdiction of the PSA, regarding "reclassification appeals" pursuant to s 80E(2)(a) of the IR Act, should be maintained and become part of the general jurisdiction of the WAIRC. The Review accepts that position. The sub-section reads:

(2) Without limiting the generality of subsection (1) the jurisdiction conferred by that subsection includes jurisdiction to deal with —

(a) a claim in respect of the salary, range of salary or title allocated to the office occupied by a government officer and, where a range of salary was allocated to the office occupied by him, in respect of the particular salary within that range of salary allocated to him; and

269. Proposed recommendation 24(a) was also supported by DWER and the Public Transport Authority and Main Roads Commission. The ELC also supported the recommendation subject to the proviso that employees should not lose their existing entitlements. That is consistent with the point made by the Department of Health with respect to reclassification appeals and already referred to.

270. The unions who made submissions on this proposed recommendation were generally supportive of it. The CPSU/CSA qualified that the jurisdiction currently exercised by the PSA should be preserved within the general jurisdiction because of the scope of the orders that can be made under s 80E(5) of the IR Act.

271. Section 80E(5) of the IR Act provides:

> Nothing in subsection (1) or (2) shall affect or interfere with the exercise by an employer in relation to any government officer, or office under his administration, of any power in relation to any matter within the jurisdiction of an Arbitrator, but any act, matter or thing done by an employer in relation to any such matter is liable to be reviewed, nullified, modified or varied by an Arbitrator in the course of the exercise by him of his jurisdiction in respect of that matter under this Division.

272. The Review accepts that this jurisdiction should also be held by the WAIRC when dealing with public sector employment matters.

273. UnionsWA submitted there should be a removal of the limitations on the jurisdiction of the WAIRC that prevent public sector workers from accessing the WAIRC to the same extent as private sector workers. This submission was adopted by the UFU, United Voice, the WASU and the AMWU. The recommendation was also supported by the WAPOU with the same qualification that it made, as referred to under proposed recommendation 23.

274. The HSUWA made a different submission, reiterating that it did not support the recommendation with respect to the PSA; and submitting instead that it should

retain its separate jurisdiction. The submission was based on the current jurisdiction of the PSA having been "carefully crafted" and having "a long history of serving all parties well". The HSUWA submitted it did not cause any inefficiency for the WAIRC as a whole, as long as there were dual appointments to the WAIRC and the PSA. It was also submitted that a minor amendment to the IR Act may be required to allow the Chief Commissioner to also be appointed as a PSA.

275. For reasons set out in the Interim Report, and consistently with the submissions made by other parties, the Review does not favour this course. Instead, and as acknowledged in the submission by the HSUWA, the jurisdiction of the PSA can be referred to the WAIRC with some elements of that jurisdiction being retained.

276. The HSUWA also referred to the powers of the PSAB under Part 11 of the HS Act with respect to government officers employed by health service providers. The submission said the PSAB deals with disputes regarding substandard performance and disciplinary matters including the termination of employment. The HSUWA noted that although s 29 of the IR Act would allow government officers to take unfair dismissal applications to the WAIRC, there is no equivalent jurisdiction in regard to substandard performance and disciplinary matters. The HSUWA seemed to be making the point that if the PSAB is abolished, then the WAIRC should be given jurisdiction to deal with substandard performance and disciplinary matters. The Review accepts that and agrees that jurisdiction should be transferred to the general jurisdiction of the WAIRC.

277. The PSC anticipated no problem with the proposed recommendation. It submitted the approach was consistent with changes to the PSM Act made through the *Workforce Reform Act 2014* dealing with the jurisdiction of the WAIRC (as opposed to any constituent authority), in relation to redeployment and redundancy, both voluntary and involuntary.

278. The Review will therefore make a recommendation in the term of proposed recommendation 24(a), noting that:

(a) The WAIRC jurisdiction should include the jurisdiction contained in s 80E(2) of the IR Act, but with respect to all public sector employees; and

(b) The powers the WAIRC may exercise in the jurisdiction are to include the powers currently set out in s 80E(5) of the IR Act.

3.2.3 Proposed Recommendation 25

Subject to the request for additional submissions below, there be consequential amendments to the *Public Sector Management Act 1994* (WA) (PSM Act) and the *Health Services Act 2016* (WA) (HS Act) to allow government officers to refer industrial matters to the ordinary jurisdiction of the WAIRC.

279. The proposed recommendation was supported by the Department of Health, DWER, the Public Transport Authority and the Main Roads Commission, the AMWU, a confidential employee organisation submission, the CPSU/CSA, UnionsWA, the UFU, United Voice, the WASU and the ELC. The HSUWA also referred to its original submission about removing the disciplinary and substandard performance provisions in Part 11 of the HS Act. The CPSU/CSA asserted that if appeals to the PSAB are abolished, the *Young Offenders Act* would need to be amended to reflect the move to the general jurisdiction of the WAIRC. However, in the respectful opinion of the Review, the submission is inaccurate. The *Young Offenders Act* makes no reference to the PSAB. Section 11(1C) of the *Young Offenders Act* states that the regulations may prescribe custodial officers for the purposes of s 76(1)(b) of the PSM Act. Regulation 53 of the *Young Offenders Regulations 1995* (WA) so prescribes. The Regulations also make no mention of the PSAB. Neither the *Young Offenders Act* nor its Regulations will therefore require amendment if the PSAB is abolished as the necessary amendments will be to the PSM Act.

280. Again, the PSC did not anticipate any issue with the adoption of this proposed recommendation.

281. The Review will make a recommendation in terms of proposed recommendation 25.

3.2.4 Proposed Recommendation 26

> In exercising the jurisdiction referred to in [24] above, the WAIRC have the jurisdiction and powers to make the same orders as it may make in exercising its jurisdiction in relation to the private sector.[135]

282. This proposed recommendation was about the jurisdiction and powers the WAIRC should have if it obtained and then exercised the jurisdiction referred to in proposed recommendation 25. This proposed recommendation was supported by DWER, the Public Transport Authority and the Main Roads Commission, the AMWU, a confidential employee association submission, the SSTUWA, UnionsWA, the UFU, United Voice, the WASU and the ELC. Again the PSC did not anticipate any issue with the adoption of the recommendation.

283. The Department of Health noted that the resolution of disputes should focus on "conciliation" and consideration should be given to whether the matter is in "the public interest" before proceeding to arbitration. It also submitted that if the PSA is abolished, consideration should be given to expanding the general jurisdiction of the WAIRC to ensure reclassification appeals can continue to be heard. That submission is accepted, as set out above.

284. The Department of Health also submitted that the present practice in relation to the operative dates regarding reclassification appeals should be preserved.

285. The HSUWA submitted that if the jurisdiction of the PSAB is referred to the WAIRC then all "unfair dismissal matters" should be heard "de novo" or "better still employers charging their employee [sic] with as [sic] workplace misdemeanour should be required to prove guilt and that the punishment fits the 'crime'".

286. The Review considers there is quite a lot wrapped up within that submission, and it may be unwise to be too overly prescriptive about the way in which the WAIRC ought to hear and determine cases of "unfair dismissal" if it is provided with an "unfair dismissal" type jurisdiction for all public sector employees. However, the following is noted:

---

[135] The restrictions that apply to divide the jurisdiction of the WAIRC from the jurisdiction of the Public Sector Commission, with respect to an alleged breach of the Public Sector Standards may or may not continue to apply (subject to further submissions on this issue as requested).

(a) The Supreme Court in *Titelius v Public Service Appeal Board* decided that an "appeal" to the PSAB under s 80I "required a re-hearing de novo on the basis of evidence freshly taken by the Board itself."[136]

(b) In an "unfair dismissal" case, the onus is on the employee to persuade the WAIRC that it is entitled to a remedy. A pre-requisite to that is establishing the dismissal was, in the terms of the legislation, "harsh, oppressive or unfair".[137]

(c) If a dismissal has been "unlawful" then that is relevant to whether the dismissal is unfair but it does not necessarily and in all cases mean that is so.[138]

(d) However, as very recently restated by Scott CC in *Landwehr v O'Neill*:[139]

> In a case of summary dismissal, the employer has an evidentiary burden to show that there is sufficient evidence to raise the factual matters upon which the employer relies as the reason to dismiss an employee. Once the employer establishes those matters, the onus moves to the employee to show that the dismissal for that reason was harsh, oppressive or unfair (***The Minister for Health v Drake-Brockman*** [2012] WAIRC 00150; (2012) 92 WAIG 203 [65] – [67] (Smith AP and Beech CC)).

(e) In cases based on misconduct, the misconduct the subject of the dismissal must generally be established by the employer. If it is not, then the dismissal will be, generally at least, unfair. Even if the employer does so, then the employee may, nevertheless, still establish the dismissal to be unfair, on some other basis.

(f) Some general principles of when a dismissal is unfair was described by EM Heenan J, in the IAC in *Garbett v Midland Brick Company Pty Ltd.*[140] as follows:

---

136 (1999) 21 WAR 201, [58]; [1999] WASCA 19, [58]. (There was an error in the citation of this decision in the Interim Report at footnote 337).

137 IR Act, s 23A.

138 See for example, *Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677, 679.

139 [2018] WAIRC 00320 at [12].

140 [2003] WASCA 36 at [71]-[73]; (2003) 129 IR 270, [71]-[73].

The references to "harsh, oppressive or unfair" dismissal in s 23, s 23A and s 29 should be understood as the use of essentially non-technical words designed to cover a range of situations where, while there is an overlap between them, the gist of each will go to differing matters. It has been said that no redefinition or paraphrase of the similar test "harsh, unjust or unreasonable" as it appeared in the Manufacturing Grocers' Award 1985 is desirable - *Bostik (Australia) Pty Ltd v Gorgevski (No 1)* [1992] FCA 209; (1992) 36 FCR 20 at 28 per Sheppard and Heerey JJ, which was cited with approval by McHugh and Gummow JJ in *Byrne & Frew v Australian Airlines Ltd* (*supra*) at 476. A dismissal may be harsh, oppressive or unfair notwithstanding that it did not constitute a wrongful dismissal at law. In other words, a harsh, oppressive or unfair exercise of the legal right to dismiss an employee may give rise to an entitlement for relief under s 23A, although this will not necessarily be the case. A full examination of the features of the particular case must always be undertaken to assess the nature and effect of the dismissal in its particular context. For one of many examples where the exercise by the employer of the right of dismissal at law was upheld, but the termination of employment was nevertheless held to be harsh, oppressive or unfair – see *FDR Pty Ltd & Ors v Gilmore & Ors*; *Gilmore v Cecil Bros & Ors* (1998) 78 WAIG 1099, IAC, especially per Kennedy J and per Anderson J.

Because there is such a wide variety of factors which may affect any individual case, no universal or exhaustive list of the circumstances which may constitute harsh, oppressive or unfair dismissal can be given. Often, however, the issue in a particular case will require a consideration of the length or quality of the employee's service, the culture of the workplace, the prospects for other employment of the individual employee, and the employer's treatment of past incidents and of other employees. Where misconduct is alleged or relied upon there will be a burden on the employer to demonstrate that the alleged incident did occur and also to evaluate any mitigating circumstances. Factors such as these going to the reasons for the particular dismissal are frequently referred to in the authorities in this area as matters of "substantive" fairness, as opposed to issues of "procedural" fairness which relate to the manner in which the employee was notified of the proposed termination, what opportunity, if any, he or she was given to respond and the time and method employed in effecting the termination. This distinction between substantive and procedural issues going to the question of whether or not a particular dismissal was harsh, oppressive or unfair can be useful in certain cases but it entails the danger of regarding the statutory test as having separate application and different meanings in different contexts. Such an approach must be rejected because, however the issue may arise, the decision for the Commission, or a court in any particular case, is simply whether the individual termination of employment was harsh, oppressive or unfair and that test must always be applied without any gloss. For a criticism of how the distinction between procedure and substance in this area is elusive and how it may be unhelpful and contrary to the true meaning of the statutory phrase, see McHugh and Gummow JJ in *Byrne & Frew v Australian Airlines Ltd* (*supra*) at 465.

In this State a test which has been adopted by the Commission, and approved by this Court, is to consider whether the dismissal amounted to an abuse of an employer's right to dismiss thus rendering the dismissal harsh or oppressive - *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 78 WAIG 3635; *Miles v*

> *Federated Miscellaneous Workers' Union of Australia, Hospital Service and Miscellaneous (WA) Branch* (1985) 17 IR 179; 65 WAIG 385, IAC and *Robe River Iron Associates v The Association of Draughting, Supervisory and Technological Employees, WA Branch* (1987) 76 WAIG 1104, IAC. In cases where the alleged harsh, oppressive or unfair nature of the dismissal relates to the procedure followed by the employer in effecting the termination of employment it has been held in this State that a failure to adopt a fair procedure by the employee [sic] can lead to a finding that the dismissal was harsh, oppressive or unfair - *Bogunovich v Bayside Western Australia Pty Ltd* (*supra*), but a lack of procedural fairness may not automatically have this result - *Shire of Esperance v Mouritz (No 1)* (1991) 71 WAIG 891IAC.

287. The Review is of the opinion that if there is a "transfer" of the "unfair dismissal rights" of public sector employees from the PSAB to the general jurisdiction of the WAIRC, and the jurisdiction is exercised within paragraphs (b)-(f) above, the employee's interests will be adequately protected, even if that may not be the same as a "de novo" hearing. The Review also notes that for present decisions of the PSA, s 80G(2) of the IR Act provides there is no right of appeal to the Full Bench. The Review considers that is anomalous and unfair and recommends all decision made by the WAIRC with respect to the public sector, be appealable to the Full Bench.

288. The HSUWA also emphasised that the PSA is not, by virtue of s 80G(1), restricted by s 39 of the IR Act, which operates in the general jurisdiction of the WAIRC, to orders made by the WAIRC. Section 39 applies to orders made under s 44, pursuant to s 44(13) of the IR Act. Section 39 of the IR Act provides:

> **39. When award operates**
>
> (1) An award comes into operation on the day on which it is delivered or on such later date as the Commission determines and declares when delivering the award.
>
> (2) Subject to subsection (3), the provisions of an award have effect on such day or days as is or are, respectively, specified in the award.
>
> (3) The Commission may, by its award, give retrospective effect to the whole or any part of the award —
>
> (a) if and to the extent that the parties to the award so agree; or
>
> (b) if, in the opinion of the Commission, there are special circumstances which make it fair and right so to do,
>
> but in a case to which paragraph (b) applies, not beyond the date upon which the application leading to the making of the award was lodged in the Commission.

> (4) For the purpose of subsection (3), an award or a provision of it has retrospective effect if and only if it has effect from a date earlier than the day on which the award is delivered.

289. The HSUWA submitted that when it comes to decisions that involve overturning or modifying a decision, an order of the PSA can, and often does, have effect from a date that significantly predates the lodgement of an application, and "always predates the decision and any order of the Arbitrator". The Review notes that this is reflected in the PSA Reclassification Appeals – Practice Direction, in a section headed "Operative Date", that provides: "The normal practice is that reclassifications are effective from the date on which the employee finally notified the employer that a reclassification was sought". The HSUWA submitted the effect of the PSA's modified jurisdiction in practice is that any industrial matter in dispute before the PSA that arises out of a decision of a public sector employer can be overturned or varied by the PSA with effect from the time and date the employer's decision was made. It was submitted the jurisdiction of the PSA encourages the parties to act in a "considered and civil manner" and encourages the parties to hold discussions. It was submitted the parties, with the assistance of the PSA, are able to take time in reaching a resolution with the result that most matters are resolved at the conference stage. It was submitted that "once the matter goes to Arbitration, the pressure is not on for a rapid hearing process". It was submitted this was because the unions are safe in the knowledge that the decision of the PSA can take effect from the date of the original decision of the employer should the PSA deem that fair and reasonable in the circumstances. It was submitted that without such a protection the "first action" of a union may be to lodge an application in the WAIRC before talking to the employer and to obstruct any conciliation in order to force a quick decision, unless the employer provides an enforceable undertaking that they agree to an effective date that is no later than the date of the application - or to simply resort to industrial action. Therefore, the submission of the HSUWA was that the "special jurisdiction" of the PSA needs to be transferred to the WAIRC with respect to government officers.

290. If it is an existing part of the jurisdiction of the PSA, that orders can be made to take effect from a date prior to the lodgement of the application; and this aids

industrial harmony, the Review does not see it as a difficulty if this remains. The HSUWA submission also raises the issue of early conciliation of disputes. If, as the Review recommends, all public sector matters are brought in the general jurisdiction of the WAIRC, then there will be the prospect of early conciliation under s 32 and/or s 44 of the IR Act.

291. The CPSU/CSA submitted that the PSA's jurisdiction should be preserved within the general jurisdiction because of the scope of the orders that can be made by reference to s 80E(5), cited above. With respect to unfair dismissal the CPSU/CSA sought the same rights for its members as other unions or private sector individuals have under the general jurisdiction. This would include a right to remedies like reinstatement and compensation.

292. There are two aspects to this submission. The first relates to s 80E(5) of the IR Act quoted above. The Review is of the opinion that in exercising its jurisdiction under the Amended IR Act the WAIRC ought to be possessed with the power to review, nullify, modify or vary a decision made by an employer, as has been the case for the PSA.

293. With respect to remedies such as reinstatement, re-employment and compensation in termination matters, the Review considers that the WAIRC ought to have the power to order these remedies when warranted in the particular circumstances of the case. As with the general unfair dismissal jurisdiction of the WAIRC referred to earlier, the precondition to being able to obtain these remedies should be that the dismissal was "harsh, oppressive or unfair". If that has been established, then the WAIRC ought to be able to order reinstatement, re-employment or compensation in the same way as it does in the private sector under s 23A of the IR Act. It may not always be reasonably practicable to order reinstatement. If, for example, there has been an unfair dismissal but, subsequent to that another person has filled the position that was held by the former employee, their reinstatement may not be reasonably practicable. In those instances, then compensation should be able to be ordered in accordance with

s 23A of the IR Act "for loss or injury caused by the dismissal". It may however, be practicable to order re-employment given the size of an agency or department.

294. The other procedural and substantive aspects of the general unfair dismissal jurisdiction of the WAIRC under s 23A, s 29 and s 29AA of the IR Act should also apply to the dismissal of public sector employees.

3.2.5 Proposed Recommendation 27

Whether, and if so to what extent, there should be a division between the industrial matters that a public sector employee may refer to the WAIRC, as opposed to those a registered organisation may refer to the WAIRC on the employee's behalf, which affect the employment of an individual public sector employee.

295. This was a request for additional submissions upon whether and to what extent there should be a division between the industrial matters a public sector employee may refer to the WAIRC as opposed to those a registered organisation may refer to the WAIRC on the employee's behalf, which affect the employment of an individual public sector employee.

296. A confidential submission from an employee association submitted in principle there should be no division between the industrial matters that an employee and those that a registered organisation may refer; albeit it noted that allowing such access "may result in an exponential increase in the workload of the WAIRC."

297. The ECCWA preferred there to be a division between those industrial matters an employee may refer as opposed to those a registered organisation may do so.

298. Generally, the union submissions were that there should be no change to the status quo. UnionsWA submitted that unions are recognised under the IR Act as a legitimate representative of employees and that should continue unchanged. The submission was supported by United Voice, the UFU, the WASU, the AMWU and the HSUWA.

299. The CPSU/CSA submitted there is no justification for open access for public sector employees to the WAIRC. It submitted that to do so may "open the floodgates" for unmeritorious cases and cause a "clogging of the system". It submitted that

reclassification appeals, claims of unfair dismissal and denial of contractual benefits claims by individual employees should be the exceptions. It was submitted the CPSU/CSA assesses each case on its merits to avoid unmeritorious cases going to the WAIRC. It was submitted that this acts as an important vetting process which prevents a large volume of cases from causing "excessive workload issues" at the WAIRC. The CPSU/CSA also submitted the dividing line is already quite clear. Individuals have no right to initiate disputes of a collective nature. They have a right to challenge their unfair dismissal or their redundancy if there is no valid reason and also to initiate a reclassification dispute under s 80E(2)(a) of the IR Act. It was submitted the current division was sufficient to meet the material needs of individual employees.

300. The CPSU/CSA submission was supported by statistics. It asserted that across Australia, union density in the public sector was 38.5 per cent as against the private sector of 10.1 per cent.[141]

301. The CPSU/CSA also cited information from the WAIRC that showed that the "aggregate number of union members in Western Australia with a stake in the public sector" totalled 131,538 members. It submitted that the "significance of this information is that public sector unions have a different profile from private sector unions in terms of their density, industrial disputation and access to the WAIRC". Accordingly, so the submission went, there was "no justification for permitting open access for all employees to the WAIRC; particularly in the public sector".

302. Similarly, the WAPOU opposed any change that would increase the scope of matters an employee (public sector or otherwise) may refer to the WAIRC without representation by a registered organisation. It was submitted that opening the scope would open the "floodgates of industrially inexperienced employees independently making applications to the WAIRC". It was submitted that applicants being represented by registered organisations assists with the "smooth

[141] The CPSU/CSA advised this was from an article "Three Charts On: The Changing Face of Australian Union Members", *The Conversation*, 5 July 2017.

and efficient running of the WAIRC, by providing a filter for credible, pursuable claims".

303. It is noteworthy that the Review has not received any submissions clamouring for any change to the present division; nor any reports of the "present filtering" system as described by the CPSU/CSA as not being effective. There are no reports the Review has received of people wishing to make claims before the WAIRC who have been prevented from doing so, unfairly, because of the actions of their public sector union.

304. The Review is inclined to accept the submissions made by the CPSU/CSA and the other unions who have made submissions on the point, for the reasons they have given.

305. An additional area of individuals referring matters to the WAIRC will be the anti-bullying jurisdiction which the WAIRC will obtain if the later recommendation to that effect is enacted by the State Government.

306. One issue that remains is that Department of Health employees (other than public servants) have, under the HS Act, entitlements as individuals to refer matters to the WAIRC. Part 5 of the PSM Act also provides individual employees (both government officers and non-government officers) with individual access to the WAIRC in relation to disciplinary and substandard performance decisions. These provisions also extend to State school teachers, prison officers and youth custodial officers by virtue of the legislation specific to their employment.

307. The Review is of the opinion that the public sector employees who are presently entitled to bring these types of claims to the WAIRC should continue to be able to do so, but, as discussed previously, there should be amendments so the claims are made to the general jurisdiction of the WAIRC. The Review later recommends that it is appropriate for there to be a review of the PSM Act and one area that may then come under consideration is whether Part 5 of the PSM Act is amended as part of a comprehensive overhaul of the engagement and management of public sector employees as a whole.

3.2.6 Additional submissions 28

The extent to which a breach of a public sector standard by an agency under the PSM Act may be referred, challenged or appealed by a public sector employee or an organisation on their behalf, to the WAIRC, and the remedies that may be awarded by the WAIRC.

308. Additional submissions were requested on the extent to which a breach of public sector standard by an agency under the PSM Act may be referred, challenged or appealed by a public sector employee or an organisation on their behalf to the WAIRC and the remedies that may be awarded by the WAIRC.

309. This is one of the more difficult issues to be encountered by the Review. There were a number of detailed and different submissions made on the topic. In general terms, the submissions made by departments advocated for the status quo, whereas the unions advocated for significant change.

310. A confidential submission from a large government department submitted the current system works effectively and has the benefit of a compulsory internal review system which "encourages compromise and negotiation". The preference of the department was for these matters to continue to be dealt with through the PSC breach process. It was submitted that having matters potentially heard by the WAIRC would be "untenable" for an agency of its size, given the number of employees it had. The department submitted it would significantly slow down the finalisation of recruitment, selection and appointment of employees. It was contended this would have a detrimental effect upon the department's ability to perform its functions. It was submitted that if appeals were able to be made to the WAIRC against appointment, it could slow down the work of agencies. It was submitted that if a claim was lodged, the settlement of a matter could take months and this may result in the preferred candidate accepting an employment offer elsewhere. It was submitted that public sector employers have significant challenges in competing with the private sector for the best possible applicants. It also opposed any move to have the merit of selection decisions considered by the WAIRC. Emphasis was placed upon the resources required to proceed with and defend actions in the WAIRC. It was also submitted that there appears to be no evidence the current process is not working.

311. Similarly, the Department of Health said that its preference was for the status quo to remain. It was concerned about there being an increased number of claims being made to the WAIRC. It referred to the fact that historically when the WAIRC had jurisdiction "over these matters", there were significant delays in the filling of public sector vacancies. It was submitted that decisions made by the PSC could be open to scrutiny by the WAIRC.[142] The Department said the PSC is an independent agency and is required under the PSM Act to provide oversight of the public sector and therefore its independence should be retained.

312. The Department of Communities also expressed reservations with the WAIRC having jurisdiction over matters relating to public sector standards. It considers that costs to the Department as well as employees will increase, a more adversarial approach to resolution will be created, the possible outcomes could be broadened, which may have a negative impact on the Department, and it will impede the ability to enact actions such as appointments given the timeframes experienced in the WAIRC in the past.

313. It further commented that a review of whether a proper process has been undertaken is quite easy to identify; however, trying to determine the merit of the matter – for example, was the right person appointed to the advertised position – is more difficult and could be considered rather subjective.

314. Another confidential submission from a government department referred to the requirements of Part 2 of the PSM Act being predicated on the integrity of the public sector being maintained through adherence to the principles and on the authority of the PSC to set standards and monitor compliance to ensure this occurs.

315. For similar reasons the Public Transport Authority and the Main Roads Commission also said the existing system should be retained.

---

142 The submission is not entirely clear. The Review considers that it means either that there could be a change to the existing system to allow for this "scrutiny", or that a breach claim would first go to the PSC and then a PSC decision could be referred to the WAIRC if the employee is unhappy with the decision. This would then mean the PSC decision is being scrutinised by the WAIRC.

316. The WA Police Force submitted that the PSC's existing oversight strikes an appropriate balance between the need for employers to make expedient decisions in a dynamic environment whilst still maintaining accountability for those decisions. There was a concern again expressed about significant delays caused by WAIRC conferences which would result in the "loss of preferred candidates due to the passage of time".

317. A confidential employee association submission was in support of breaches of public sector standards being able to be referred to the WAIRC, including via a s 44 conference under the IR Act. It also submitted the same remedies should apply in the general jurisdiction of the WAIRC, including the issuing of orders, determinations and monetary compensation as appropriate, as in the private sector.

318. The CPSU/CSA submitted this was an area that required urgent reform. It recommended the elimination of jurisdictional impediments to the WAIRC hearing breach of standard claims. It also submitted there should be a removal of s 23(2a) and s 80E(7) of the IR Act, or the non-inclusion of these sections in the 2018 IR Act, and consequential amendments to Part 7 of the PSM Act. These sub-sections provide:

> s 23(2a) Notwithstanding subsections (1) and (2), the Commission does not have jurisdiction to enquire into or deal with any matter in respect of which a procedure referred to in section 97(1)(a) of the *Public Sector Management Act 1994* is, or may be, prescribed under that Act.
>
> s 80E(7) Despite subsections (1) and (6), an Arbitrator does not have jurisdiction to enquire into or deal with, or refer to the Commission in Court Session or the Full Bench the following –
>
> (a) any matter in respect of which a decision is, or may be, made under regulations referred to in the *Public Sector Management Act 1994* section 94 or 95A;
>
> (b) any matter in respect of which a procedure referred to in the *Public Sector Management Act 1994* section 97(1)(a) is, or may be, prescribed under that Act.

319. The CPSU/CSA submitted that, given the importance of public sector standards to the overall integrity and functionality of the public sector, and the relative lack of

powers of employees to hold their employers accountable to these standards, reform was required. The CPSU/CSA submitted the inadequacies of the present regime are "well known". The CPSU/CSA criticised the existing regime providing a review only of process and not merit. Additionally, the CPSU/CSA said the recommendations of the PSC about a proven breach were unenforceable. The CPSU/CSA also submitted relief provided for a breach of standards was an inadequate remedy. It was also submitted that there is no avenue for escalating breaches of the employment standards to the WAIRC at present where an agency refuses to follow a recommendation of the PSC in relation to an established claim.

320. The CPSU/CSA also submitted the Fielding Review and the Whitehead Review expressed concerns about the deficiencies in the current system and recommended reform of the breach of standards process.

321. The CPSU/CSA was also concerned that the PSC does not have the power to overturn an appointment where there is evidence that the decision of the employer is not merit based. It reiterated however, that its main concern was with respect to decisions involving forced transfers, acting on higher duties or secondment where the decision is not merit based. The union submitted amendments should be made to give power to the WAIRC to intervene on the merits of the case. The CPSU/CSA reiterated however that it did not want a return to the system of promotion appeals.

322. The HSUWA submitted the WAIRC should be given jurisdiction to review the application of the standards and the Public Sector Commissioner's instructions but have no role in the making of those standards and instructions. It submitted that in relation to the employment standard the jurisdiction to review should go to the correct application of the employment procedure but not to the question of merit. That is, not the question of whether or not a particular applicant was the best applicant for the job. The PSC, as standard-maker, it was submitted, should not be the reviewer of the application of the standards. The HSUWA submitted the Review's proposed recommendation removed significant inefficiencies in the way in which grievances under the PSM Act are currently handled. That is, it would

allow for the process of a quick conference in the WAIRC leading to "acceptable resolutions" in a high proportion of cases. The HSUWA submitted in the absence of an effective and independent system that enables the application of the standards etc to be scrutinised, the standards do not fully serve their role.

323. Not dissimilarly, the SSTUWA said that the system of "appeals" in relation to a breach of public sector standards is largely ineffective as a worker cannot generally achieve an enforceable order, even when the employer is found to have breached a standard. It said it would not object to the jurisdiction of the WAIRC in public sector matters being expressed in a way that did not disturb the Public Sector Commissioner's authority to develop public sector standards. It did not see any difficulty in the WAIRC determining disputes about standards which would be "conceptually and practically" a better system than the present one. It was submitted that to do this would not "open the floodgates" as the WAIRC was readily able to distinguish genuine industrial disputes as against non-industrial contests; "about, for example, the relative merits of individuals involved in an otherwise sound selection process".

324. UnionsWA made the broad submission that there should be no restriction on what the unions could bring to the WAIRC. That submission did not deal with the detail of this issue which, to be fair to UnionsWA, it left to its affiliate public sector unions to make submissions about.

325. The WAPOU submitted there should not be any impediment on the PSC in making standards or issuing instructions but it was not appropriate for the PSC to hear breach claims on the standards or instructions it had issued. The WAPOU submitted that it would be more appropriate for the WAIRC to consider alleged breaches. It was submitted the WAIRC should only "consider breaches in the application of the PSC Standards or Instructions and not consider the merits of the decisions made through the application of the PSC Standards or Instructions. For example, it is appropriate for the WAIRC to consider if there has been a breach in the application of the Employment Standard but not appropriate for the WAIRC to

go to the merit selection decision an employer has made to make an appointment".

326. The ELC made a consistent submission. It supported there being a division between the role of the PSC in setting standards and instructions and the WAIRC being able to oversee potential breaches of the standards and instructions and provide remedies where possible. The ECCWA made a not dissimilar submission.

327. Slater & Gordon submitted the WAIRC should have the jurisdiction to enquire into or deal with employees attempting to obtain relief in respect of the breaching of public sector standards. It submitted that save for abolishing the PSC, a public sector employee or an organisation on their behalf should be able to bring such a matter to the WAIRC only after the matter has been dealt with by the PSC at first instance. With respect, that is not entirely correct as there could be the division of powers referred to by the WAPOU and other unions.

328. The PSC noted that if a recommendation was made as posited, it would require the repeal of Part 7 of the PSM Act and would have significant ramifications for the overall functions and responsibilities of the PSC. That is because a major role of the PSC is to monitor and report on compliance with the standards generally. It was submitted that if non-compliance was taken away from adjudication by the PSC and placed with the WAIRC it is "difficult to see how the PSC could effectively and independently perform this task". It submitted this would involve a fundamental change to an "integrated and holistic approach to oversight which had been in place for almost 25 years" since the *1992 Report of the Royal Commission into the Commercial Activities of Government and Other Matters, Part II* (underlining in original). The PSC also submitted:

(a) Breach claim regulations provide for non-employees to lodge breach claims against the Employment Standard. This provides for the PSC to consider claims against this Standard by members of the community applying for positions.

(b) The current process provides for agencies to address any issues in the first instance as part of correcting practices and addressing the concerns of their employees.

(c) As part of the PSC's compliance assistance role under s 21(1)(d) of the PSM Act, "while not all breach claims may result in a breach determination, the PSC is able to make recommendations as part of improving practices".

329. The Review is of the opinion that it is time to change the way in which public sector employees may make challenges about a breach of the standards. Despite the assertions of most of the public sector employers that the Review received submissions on thinking otherwise, the Review considers that the system is in need of repair, to make it more effective for employees to bring and have resolved genuine claims of a breach of standard. The Review believes, in any event, that some of the concerns of the public sector employers that have been cited can be accommodated in the changes to the system that the Review envisages. The Review considers it would be preferable if breach of standard claims could be made to the WAIRC and not the PSC, if there is dissatisfaction after they have been dealt with by the agency/employer. There should be a time limit upon which matters can be dealt with by the agency and then if the employee is dissatisfied with any lack of action or the result they should, through a registered industrial organisation, be able to bring an application to the WAIRC to deal with the industrial matter constituted by the dispute. The Review envisages the time limit for the matter being dealt with by the agency should be 21 days. This proposal will not involve any duality of jurisdiction with the PSC. The PSC will, under the proposed changes, no longer deal with claims of alleged breaches. The PSC will continue to set the standards and issue instructions and in an overall way monitor compliance, and report on compliance to the Parliament in annual reports. It can continue to monitor compliance by audits and annual agency surveys as it does now. However, matters involving alleged breaches of standards are in the opinion of the Review better dealt with by the WAIRC if they cannot be resolved at agency level. After an application is filed the WAIRC will be able to assess whether there is merit in the application and provide conciliation and if necessary, arbitrate. If

the WAIRC is of the opinion that the matter is trivial it may dismiss it under s 27(1)(a) of the IR Act.

330. If a breach of the standards has been established, the WAIRC should be empowered to provide remedies. The remedies should include being able to declare, where the relevant standard has not been complied with, that a particular person not be appointed to a position and that the process for appointment recommence. If the breach of the standard has caused identifiable and quantifiable loss or injury then the WARC should be empowered to order compensation. Whether this has occurred will be a question of fact, to be proved by or on behalf of the applicant in the particular case.

331. The jurisdiction should be exercised within the general jurisdiction of the WAIRC. The Review does not think that providing this jurisdiction to the WAIRC will undermine the intent of the *1992 report of the Royal Commission into the Commercial Activities of Government and Other Matters, Part II*. It needs to be remembered that the Royal Commission report is now 26 years old. It was a response to a particular set of happenings largely in the 1980s. Additionally, what is suggested by the Review does not in any way attempt to decrease the integrity or accountability of public sector employment and agencies, but to enhance it. The Review recommendation simply involves a recognition that challenges about the application of the standards are better determined by a different body than the PSC, as the body that sets the standards and advises departments and/or agencies on how to comply with them.

332. If the recommendation was adopted the Review would expect it to be in the interests of each public sector agency/employer to try and resolve disputes by employees about the application of the standards. The Review would anticipate further devolution of the resolution of employee problems to the particular department or agency that employs them. The system proposed by the Review will hopefully encourage that. If, however, an employer and employee cannot resolve the issue then the WAIRC is well placed to receive an application made on

behalf of the employee and provide conciliation and arbitration as may be required in a particular case.

333. The Review also makes the following comments. The transferring of breach of standards claims from the PSC to the WAIRC will enable the PSC to focus on its role of setting standards of ethics and management for the public sector without needing to be involved in what is largely a process driven review function. As set out above, the PSC will still monitor and report on compliance with the standards. The transferring of breach claims to the WAIRC would provide aggrieved public sector employees with the prospect of having their concerns reviewed by a third party body which is an "independent umpire"; as opposed to having them reviewed by PSC, which is the body that set the standards in the first place, and indeed, which provides guidance to agencies on how to apply the standards. That is likely to be a more independent process in the opinion of the Review. If a case is meritorious then the fact that it is heard and determined by the WAIRC may well have a positive impact upon the agency and the public sector as a whole, in allowing for the correction of errant processes. On the other hand, where claims of little substance are lodged with the WAIRC, they may be resolved via conciliation or in an appropriate case, summary dismissal.

334. From the information provided to the Review, the public sector has about 110,000 full time equivalents or 140,000 employees. The number of breach of standard claims has remained relatively constant in the last 10 years or so at about 150 to 190 each year. Of these about half are resolved at the agency level leaving about 75-85 to be "resolved" by the PSC. There are on average only a few cases each year where the claims are upheld. As set out in the Interim Report there were none upheld in the 2016-2017 year.[143] The low use of the system may well also suggest it is viewed as an ineffective means of achieving redress. The submissions from the CPSU/CSA certainly endorse that view.[144]

[143] Interim Report [606].
[144] For example see Interim Report [606].

335. In the opinion of the Review, the transfer of breach of standard claims to the WAIRC seems not only to be warranted as a preferred model but sits comfortably with the terms of reference of the Public Sector Commission Review, to be later referred to. The Public Sector Commission Review has as one of its aims to ensure that the PSC takes a leadership role with a contemporary public sector focus. The transfer of the breach of standards jurisdiction to the WAIRC will not diminish this role, and may well enhance it, in the opinion of the Review.

336. The Review also makes these points about the jurisdiction recommended to be provided to the WAIRC:

(a) The recommendation being made by the Review does not involve a recommendation of a change to the standards themselves. The content of the standards will remain the province of the PSC.

(b) The suggested changes do not involve any recommended return to the "promotion appeals" jurisdiction of the past, which as explained in the Interim Report achieved little and is not supported by any of the stakeholders.

(c) If the claim relates to an alleged breach of the standards in relation to the appointment of a public sector employee, a department or agency should have the right to seek an interim order that the position be able to be filled, which the WAIRC should be empowered to grant if the justice of the particular case required it. This could allay some of the concerns addressed in the confidential submission made by the government department, cited earlier.

3.2.7 Additional submissions 29

Whether, and if so to what extent, a police officer, police auxiliary officer, Aboriginal police liaison officer or a special constable and/or the WA Police Union on their behalf ought to be entitled to refer to the WAIRC an industrial matter of the type described in Schedule 3 clause 2(3) of the IR Act.

337. Schedule 3 clause 2(3) of the IR Act provides:

> Despite sub clause (2), an Arbitrator does not have jurisdiction to enquire into or deal with, or refer to the Commission in Court Session or the Full Bench, any matter relating to or arising from the transfer, demotion, reduction in salary, suspension from duty, removal, discharge, dismissal or cancellation of the appointment under the *Police Act 1892* of a police officer, police auxiliary officer or Aboriginal police liaison officer or, in the case of a special constable, the cancellation under that Act of the constable's appointment.

338. With respect to this issue there were opposing views expressed by the WAPU and the WA Police Force. The WAPU generally supported the deletion of the clause so that its members have access to the WAIRC on the matters referred to in the clause. The ECCWA also supported that view.

339. The WAPU identified three particular areas of importance, being transfers, demotions and promotions, and the cancellation of appointments for police auxiliary officers (PAOs). The latter point does not relate to clause 2(3), but is worthy of consideration and has been responded to in detail by the WA Police Force, as referred to below.

340. With respect to transfers, the union acknowledged that it was unlikely that the WA Police Force would accept the WAIRC having the power to override transfer decisions. However, the WAPU sought amendments to the IR Act to ensure that decisions were more transparent and consistent than at present. The WAPU argued that transfers should be removed from clause 2(3), with the WAPU and/or the concerned police officer being able to refer any transfer decision to the WAIRC to determine if it was a harsh, oppressive or unfair decision. The WAPU submitted the impact of a transfer decision on a police officer's family, health and fitness ought to be included in the assessment. Then, the WAPU submitted, if the WAIRC determines the transfer to be harsh, oppressive or unfair the WAIRC should be empowered to ask the WA Police Force to review the decision. In that sense, what was sought was a kind of supervisory jurisdiction.

341. With respect to demotion and promotion, the WAPU submitted that except for extraordinary operational requirements the WA Police Force should be required to meet the "equity and merit" principles in the employment standard of the PSC. The WAPU recommended demotion be removed from clause 2(3), and that any

promotion-related decisions be able to be referred to the WAIRC to determine if breaches of the public sector standard equity and merit principles had occurred, and if the WAIRC determined a breach has occurred, it could ask the Commissioner of Police to review the decision. It was submitted the review of promotion decisions would greatly assist in improving transparency and fairness.

342. Returning to the point about PAOs, as mentioned the WAPU concern is not strictly about clause 2(3). However, the WAPU submitted that more than 330 PAOs were employed in the WA Police Force up until the end of 2017. The WAPU said they perform a vital role within the WA Police Force including providing custodial duties at the Perth Watch House. However, it was submitted that unlike their sworn counterparts, PAOs have no avenue of appeal over any "dismissal" via a removal by the Commissioner of Police.

343. Section 23(4)(f) of the *Police Act* gives the Commissioner power to remove a police officer from the Force either by dismissal (for sworn officers) or by cancellation of appointment (for PAOs). Under s 33P, sworn officers have the right to appeal their removal to the WAIRC on the grounds of it being harsh, oppressive or unreasonable. It was submitted that no similar avenue was available for PAOs making them "far more vulnerable to unfair dismissal." The WAPU submitted that PAOs should be able to seek redress against any "unfair dismissal"; arguing that, "if PAOs can be subject to removal by the Commissioner, it is only fair that [they] have the same protections as their sworn counterparts."

344. The WA Police Force did not accept that the PAOs did not already have this right, for the following reasons:

(a) Section 38G of the *Police Act* provides for the appointment of PAOs and at section 38G(4) provides:

> Subject to Part IIB, the Commissioner may at any time cancel the appointment of a police auxiliary officer.

(b) The cancellation of the appointment of a PAO is therefore subject to the provisions of Part IIB – Removal of members.

(c) Section 33K provides that for the purposes of Part IIB a "member" includes a "police auxiliary officer".

(d) Section 33K further provides that for the purposes of Part IIB "removal from office" includes the "cancellation of the appointment of a police auxiliary officer under section 38G(4)", even if that cancellation is not included as a "removal action" under s 33K of the *Police Act*.

(e) Section 33P(1) provides an appeal right in the following terms:

> A member who has been removed from office by or as a result of removal action taken in accordance with section 33L may appeal to the WAIRC on the ground that the decision of the Commissioner of Police to take removal action relating to the member was harsh, oppressive or unfair.

(f) Whilst s 33K does not include the cancellation of PAO appointment within the definition of "removal action" (for the purposes of Part IIB), "this has long been accepted as a drafting oversight given the clear intentions of the legislation."

(g) For the removal from office for a PAO as a disciplinary outcome under s 23, a separate (and existing) appeal right exists under s 33E to appeal to the Police Appeal Board.

345. Accordingly, the WA Police Force submitted that there is an existing right for PAOs to appeal the cancellation of their appointment to the WAIRC (in the case of s 38G(4) which requires compliance with Part IIB) or to the Police Appeal Board (in the case of a s 23 disciplinary outcome). It submitted both of these appeal mechanisms were appropriate.

346. Dealing with the PAO issue first, with respect, whilst the WA Police Force construction of the legislation may be correct, the PAOs should not have to rely on implications and understandings based on a "drafting oversight" to establish that they have an important right to appeal against any cancellation of their appointment.

347. The Review will recommend to the Minister that there be an amendment to the *Police Act* to make express reference to PAOs having the right to appeal against any cancellation of their appointment on the same grounds as for the dismissal by sworn officers under that section. This will probably be best effected by a change to the description of "removal action" in s 33K to include the cancellation of appointment of a PAO.

348. On the other topics, and by way of general background, the WA Police Force submitted as follows. Section 5 of the *Police Act* provides that the "Commissioner of Police shall be charged and vested with the general control and management of the Police Force" of Western Australia. The WA Police Force also contended, the powers of a police officer are considerable when compared to other citizens and include the power to detain, enter and search private property and use lethal force.

349. The WA Police Force submitted, at all times the authority of a Police Force and the police officers who serve the Crown need legitimacy. It argued that legitimacy can be described as "a property of an authority or institution that leads people to feel that that authority is entitled to be deferred to and obeyed".[145] The argument continued that, in order to maintain the legitimacy of the WA Police Force, it is crucial that the Commissioner of Police maintains the power to properly deploy and manage police officers.

350. The WA Police Force referred, in its submission, to the seven matters that were excluded from the current jurisdiction of the PSA under clause 2(3) and made submissions about each of them.

351. Given the contentions of the WAPU, the submissions about promotion and demotion and transfers are of particular significance.

352. The WA Police Force made submissions about the Police Appeal Board (PAB) that is constituted under Part IIA of the *Police Act*. This is because the PAB may, under

[145] Sunshine & Tyler 2003, 'The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing', *Law & Society Review*, 37(3) 513-548.

s 33E of the *Police Act*, hear appeals against demotions, suspension and discharge, when applied as disciplinary punishments.

353. The WA Police Force submitted that the PAB consists of a magistrate, a person appointed by the Commissioner of Police and a member of the WA Police Force elected under the *Police Appeal Board (Election) Regulations 2007*.

354. The WA Police Force informed the Review that in the opinion of the Commissioner of Police the PAB functions well, with relevant representation, and there is no need for it to be replaced by a different appeal body. In the two years from 2016 to 2017 there was only one appeal made to the PAB appealing the penalty (not the charges themselves). This appeal was dismissed by the PAB and the penalty upheld.

355. The WA Police Force submitted the specialist knowledge of police operations and criminal law that comes from the composition of the PAB is important in many matters that come before it. The WA Police Force submitted these matters:

> …do not necessarily readily lend themselves to adjudication by an industrial relations commissioner of the Western Australian Industrial Relations Commission (WAIRC) whose expertise is in industrial relations (but not necessarily law). For example, an allegation that a police officer failed to perform and carry out his duty in a proper manner by failing to comply with investigative doctrines and the requirements of the *Criminal Investigation Act 2006* would not be a matter readily within the expertise of an industrial relations commissioner.

356. The WA Police Force also submitted that when Schedule 3 of the IR Act was inserted by the *Industrial Relations Amendment Act 2000*, the legislature made a deliberate decision not to give the PSA any jurisdiction relating to the exercise of any disciplinary power under s 23 of the *Police Act* by the Commissioner of Police.[146] The WA Police Force submitted it remains inappropriate for the WAIRC to exercise any such jurisdiction and the functioning of the PAB is sound.

357. In response, the WAPU accepted the PAB and s 23 worked well in some matters, but referred to the March 2016 Report of the Legislative Assembly Community Development and Justice Standing Committee (the Committee) about

[146] See Hansard of the Legislative Council on 16 November 2000, 3270.

performance management within the WA Police Force, entitled "How do they Manage?", in which the Committee acknowledged the submission of the WAPU and concession by the then Commissioner of Police that s 23 of the *Police Act* was rarely used for disciplinary purposes; and that, instead, misconduct matters were dealt with by using a Managerial Intervention Model. The WAPU argued this model was flawed, as evidenced by findings made by the Committee and by the Supreme Court in *Bekker v Commissioner of Police.*[147] It argued a "more stringent quality assurance process is needed" and so the WAIRC "should be able to arbitrate". Without meaning in any way to downplay the importance of the concern of the WAPU as to these issues, it is beyond the scope of the Review to consider the intricacies of how disciplinary measures are dealt with by WA Police. The Review does not see any reason however to recommend any changes to s 23 of the *Police Act* or the existence, composition or jurisdiction of the PAB, as part of the workplace regulation of police officers. The Review accepts the submission of the WA Police Force that the constitution of the PAB is appropriate, given the circumstances of employment and engagement of police officers as a particular subset of public sector employees in Western Australia.

358. The WA Police Force also referred to the power of suspension under s 8 of the *Police Act*. This is a power to suspend (without pay) any non-commissioned officer or constable. The suspension power under s 8 is exercisable at will, without notice and for any reason.[148]

359. Although there is no requirement for procedural fairness to be accorded to an officer prior to being suspended under s 8 of the *Police Act*, the power of suspension is, however, subject to review by the Supreme Court, if the decision to suspend was not made honestly and in a bona fide pursuit of the purpose of the powers.[149]

360. As submitted by the WA Police Force the power of suspension granted to the Commissioner of Police under s 8 of the *Police Act* is unlike a power normally

147 [2017] WASC 376. The WAPU referred to pages 66, 67 and 71 of the Committee Report.
148 *Menner v Commissioner of Police* (1997) 74 IR 472.
149 *Menner*, 475-476.

given to an employer in respect of an employee. The WA Police Force submitted "it reflects the reality that police officers are officers in a disciplined force and the Commissioner of Police, in fulfilling his statutory charge to control and manage the WA Police Force, may need to exercise particular powers in respect of police officers that are not generally available to employers. It is not the type of power that members of the WAIRC would be accustomed to considering". The WA Police Force said the Commissioner of Police considers it remains appropriate for the Supreme Court, rather than the WAIRC, to have supervisory jurisdiction over his power to suspend officers under s 8 of the *Police Act* given the special and extraordinary powers police officers hold and exercise.

361. Furthermore, it was contended the Commissioner of Police does not use the power of suspension, under either s 8 or s 23 of the *Police Act*, without significant cause and only where deemed absolutely necessary. It was submitted that the Commissioner has suspended only 36 officers using this method in the three-year period from 2015 to 2017.

362. Having regard to the information and submissions provided and made by the WA Police Force the Review does not think it appropriate to recommend any change to that regime.

363. With respect to transfers the WA Police Force referred to s 14 of the *Police Act* that provides that police officers are "liable, if required" to "perform" their "duty" "in any part of [Western Australia] or elsewhere…"

364. The WA Police Force informed the Review that there are 210 police sites in Western Australia and almost 6,500 police officers. It was contended that in fulfilling his statutory duties, the Commissioner of Police invokes tenure arrangements (with minimum and maximum lengths) throughout policing positions to ensure movement throughout the State. This movement provides, in the submission of the WA Police Force, for:

(a) A well-rounded policing experience for police officers, with exposure to all forms of policing without becoming one-dimensional in their specialty.

(b) Less desirable deployments/locations are able to be filled, and the difficulties and hardships experienced by officers in these deployments are short-lived and shared amongst the entire WA Police Force through transfer/rotation.

(c) Highly desirable deployments/locations are not held on an ongoing basis by a select few.

(d) A diminished ability for police officer corruption to occur, due to police officers not becoming too entrenched in a position to be influenced in their activities.

(e) Respite from exceedingly distressing and confronting daily duties (for example, murder scenes) that occur in some positions.

365. The WA Police Force submitted it was "absolutely critical" for the community's safety that the Commissioner of Police have an unfettered power to transfer police officers in order to provide proper police services throughout the State. It was submitted that if even a proportion of annual transfers[150] were "appealed" to the WAIRC, the transfer process and ongoing movement of police officers would effectively be halted and would significantly affect the Commissioner's ability to fulfil his statutory duty to provide police services. It was submitted there was an appropriate internal grievance process for dealing with transfers. It was also submitted that if police officers could refer transfer matters to the WAIRC, this would put them in a more advantageous position than other public sector workers, who could not.

366. The Review is impressed by this submission and also notes that the submission of the WAPU was not that the WAIRC have full oversight over transfer decisions by the Police Commissioner but have a right to review the decisions and to ask the

[150] There were 3,346 transfers in 2017.

Police Commissioner to reconsider the decision if found to be harsh. With respect, although the submission demonstrates the concern of the WAPU for the position of its members when facing what must at times be the difficult situation of transfers, the Review accepts that the present situation ought not to change for the reasons given by the WA Police Force. The Review also notes that given the contents of s 14 of the *Police Act*, it is, with respect a known component of the occupation of being a police officer that transfers may be required of an officer by the Commissioner.

367. The submissions provided by both the WAPU and the WA Police Force have been of assistance to the Review. In particular, the WA Police Force submissions have impressed upon the Review that police officers are a subset of the public sector where the particular circumstances of their work, role and engagement have the effect that they should remain subject to a different set of industrial regulation than other public sector employees.

368. Accordingly, the Review does not recommend any change to the terms of clause 2(3) of Schedule 3 of the IR Act at this point in time.

3.2.8 Additional submissions 30

Whether the 2018 IR Act should include, for the benefit of both public and private sector employees, an entitlement to bring an application to the WAIRC to seek orders to stop bullying at work based on the model contained in the FW Act Part 6-4B "Workers bullied at work" and, if so, whether there ought to be any variations from that model.

369. As set out in the Interim Report, this issue emerged because of submissions from stakeholders about Term of Reference 2. However, if consideration was to be given to an "anti-bullying" jurisdiction in the WAIRC, it made no sense for it not to be considered to apply to the private sector as well. Accordingly, the request for additional submissions, although not solely within the rubric of this Term of Reference, applied to both public and private sector employees. The Review has not received any submission to the effect that it was inappropriate to consider the jurisdiction for the private sector as well.

370. In general terms, the support in favour of the change that led to the request for additional submissions, was reinforced by submissions received in response to the Interim Report. This was not however universal. The HIA as well as a confidential submission from an employer association did not support the proposal. The HIA submitted the regulation of bullying was more appropriately contained in workplace health and safety legislation. It was submitted that the argument was supported by the workplace bullying report, "Workplace Bullying – We Just Want it Stopped", which identified several existing avenues of recourse an alleged victim of workplace bullying could take, which may result in multiple actions in multiple jurisdictions. It was submitted the Explanatory Memorandum to the Fair Work Amendment Bill 2013, did not seek to address the situation. The HIA pointed out they had made submissions in response to the Bill regarding its concerns about the use of the term "worker" being too broad and that "reasonable management" action should not constitute "workplace bullying". It was submitted that under the FW Act the FWC could make any order, which could also apply to people other than the employer, such as the worker and visitors to the workplace and be based on behaviour outside the workplace. It was also submitted it was unclear whether the Federal anti-bullying jurisdiction was having the desired effect, with not even 1 per cent of applications resulting in the issuing of stop bullying orders during the 2016-2017 period. The HIA cautioned against the move without further more detailed consultation and consideration.

371. By contrast CCIWA supported the WAIRC having such a jurisdiction. It was submitted that it would achieve important alignment with national system employers and employees to establish a common standard within Western Australia. It was submitted that if the issue proceeded further, the 2018 IR Act should replicate the FW Act provisions to deliver consistency for both workplace relations frameworks in Western Australia and to therefore send employees and employers exactly the same messages on acceptable conduct.

372. A confidential submission from a State Government department asserted that if the jurisdiction was inserted into the IR Act it would involve a duplication with provisions under the *Occupational Safety and Health Act 1984* (WA) (OSH Act).

The department did not support duplicate processes. It was submitted the department had policies to deal with bullying through "grievance processes" and then "appeals" to the PSC, and that was the appropriate and preferred option. It was submitted the departmental Code of Conduct and disciplinary policy for the investigation of alleged breaches of the code provided for a robust, supportive and transparent process. It was also submitted that if the proposal was implemented it could lead to findings of bullying without adequate investigation. The department did not elaborate on this broad proposition.

373. The Public Transport Authority and Main Roads Commission joint submission also did not support the recommendation. It asserted OSH legislation required management of bullying in the workplace and the public sector Code of Ethics and agency Codes of Conduct also provide oversight of employee behaviour that does not occur in the private sector. The submission was not accompanied by any information about whether, for example, employers in the Federal arena have codes of conduct or policies.

374. The unions who made submissions on the issue supported the WAIRC having a "stop bullying" jurisdiction. A confidential submission from an employee association was also supportive of the proposal. The HSUWA asserted that if bullying matters were able to be brought to the WAIRC it would provide an incentive for employers to better address the issue.

375. The SSTUWA also supported an anti-bullying jurisdiction similar to that of the FWC, although it submitted there were cases where it would be inappropriate to constrain the powers of the WAIRC in the way that the FWC's powers appear to be constrained. Specifically, it submitted:

(a) If it is established that there has been bullying of a worker who has since left the workplace, there could still be a reasonable concern that there continues to be a risk in the workplace for current or future workers.

(b) It is possible that a worker who has been subjected to bullying may have a reasonable belief the bullying may continue, despite leaving the workplace, given the prevalence of social media.

(c) There may be occasions where a worker who has been bullied and left the workplace may reasonably look to the WAIRC to order the employer to take suitable steps to remedy the situation; order the removal of derogatory comments or make an order for reasonable health care expenses.

376. United Voice submitted the proposed recommendation should be included as a recommendation in the Final Report. It submitted the anti-bullying provisions in the FW Act appear to be providing some relief to employees from bullying. It said the union's experience with the FWC bullying jurisdiction has been that it has acted as a deterrent, promoting [sic] employers to act quickly in response to bullying allegations. Further, the legislation has afforded clarity as to what legally constitutes bullying and what does not, which aids in making an application. It also submitted that the FWC has not been overwhelmed by anti-bullying complaints. Accordingly, it was argued, this should, to some extent, mitigate against concerns of some stakeholders about the negative impact on business of an anti-bullying jurisdiction.

377. The WAPOU made a very substantial submission to the Review on this issue before the publication of the Interim Report. It made it clear that it stood by that submission. That will be later referred to in some detail.

378. UnionsWA supported the WAPOU submission and said the anti-bullying jurisdiction should be extended to public and private sector employees. It was submitted that anti-bullying claims are matters that ought properly be dealt with by way of conciliation at first instance. It submitted that inserting a new anti-bullying provision within s 29(1)(b) of the IR Act would ensure that anti-bullying claims are classed as an industrial matter for the purposes of being captured by s 32 of the IR Act, which would allow the WAIRC to endeavour to resolve the

matter by conciliation at first instance. It was submitted this would accord with the objects of the IR Act. The UnionsWA submission was supported by the AMWU, the UFU and the WASU.

379. The ELC supported the introduction of an anti-bullying jurisdiction but noted there were limitations within the FW Act and recommended the model be varied to allow a bullied worker to make a complaint even after they had been dismissed or resigned, with the worker being able to seek compensation for the bullying.

380. The Review has some difficulties with that proposal on the basis that it is getting close to giving the WAIRC jurisdiction to award damages for workplace injuries or illness. These claims for damages are dealt with by the District Court of Western Australia. The Court has developed a specialist jurisdiction in dealing with such claims and it is difficult to see that that WAIRC is similarly equipped to deal with them. That aspect of the ELC submission is thus not supported.

381. The ECCWA also supported an anti-bullying jurisdiction.

382. Slater & Gordon also agreed with the proposed recommendation and referred to the submission it had provided to the Review on behalf of the WAPOU, in December 2017, that contained a list of 16 recommendations that could fill "gaps discovered" when dealing with bullying claims in the Federal jurisdiction.

383. The December 2017 WAPOU submission referred to the private sector jurisdiction of the WAIRC and submitted that, in addition to the unfair dismissal and denial of contractual benefits jurisdiction, a "new provision should be inserted at section 29(1)(b) to allow for an employee to bring a 3rd type of industrial matter to the Commission, a claim seeking an anti-bullying order. The referral should be to a single Commissioner sitting as the Commission." The WAPOU further submitted "Anti-bullying claims are matters that ought properly be dealt with by way of conciliation at first instance. Inserting a new anti-bullying provision at section 29(1)(b) would ensure the anti-bullying claim is classed as an "industrial matter" for the purposes of being captured by section 32 of the IR Act which would allow

the Commission to endeavor to resolve the matter by conciliation at first instance."

384. The WAPOU submission asserted that the "anti-bullying jurisdiction will inevitably create additional work for the WAIRC, however the additional work will not be burdensome on the WAIRC as the matters dealt with by Commissioners sitting alone have dropped in recent years". This point was made by reference to the statistics of the matters dealt with by the WAIRC from 2012-2013 to 2015-2016.

385. The WAPOU submission referred to a paper delivered by Bull DP of the FWC in November 2017 to the effect that "the FWC received approximately 700 to 800 bullying applications per year. Of those, Bull DP estimated that only about 50 applications were made or filed in Western Australia by Federal system employees."[151] The WAPOU therefore argued that given "that the Federal system covers a greater number of employees than the Western Australian state system, it is reasonable to foreshadow that the number of bullying applications that will be made by Western Australian state system employees to the WAIRC will be significantly lower than 50 per year." The Review accepts the reasoning in the submission.

386. As to the anti-bullying jurisdiction of the FWC, the WAPOU informed the Review that a total of 695 applications for an order to stop bullying were finalised in 2016-2017 by the FWC; 171 applications were withdrawn early in the case management process; 125 applications were withdrawn before proceedings; 188 applications were resolved during the course of proceedings; 151 applications were withdrawn after a conference or hearing and before a decision and 60 applications (9 per cent) were finalised by a decision.

387. Therefore, so the submission went, a majority of matters in the Federal anti-bullying jurisdiction are resolved without the need to make an order.

---

151 Presentation entitled "The Anti-bullying jurisdiction of the Fair Work Commission" given at UnionsWA Industrial Officers and Lawyers Network Conference, November 2017.

388. The WAPOU submission then reviewed the FWC anti-bullying jurisdiction in some detail and set out 16 "recommendations" with respect to the jurisdiction proposed for the WAIRC. These were:

> Recommendation 1
>
> A new anti-bullying provision be inserted at section 29(1)(b) of the IR Act.
>
> Recommendation 2
>
> IR Act should allow an anti-bullying conference be held at first instance.
>
> Recommendation 3
>
> IR Act should define "worker" to apply for the purposes of the proposed anti-bullying regime. The definition of "worker" should be broader than the definition of "Employee" in the IR Act.
>
> Recommendation 4
>
> IR Act amendments should allow alleged bullying behavior which occurred prior to the proposed commencement of the IR Act anti-bullying provisions to be taken into account.
>
> Recommendation 5
>
> IR Act amendments should require the WAIRC to deal with a bullying application within 14 days of such application being made.
>
> Recommendation 6
>
> The IR Act amendment or Explanatory Memoranda should express that bullying is not a "once off" incident; that it is an objective test; and how close in time incidents must be before they fall outside of the "repeated" concept.
>
> Recommendation 7
>
> The IR Act amendments should express whether the conduct extends to non-employees.
>
> Recommendation 8
>
> The IR Act amendments should express that actual harm to health and safety is not required to be proved by the claimant.
>
> Recommendation 9
>
> The IR Act or Explanatory Memoranda should outline a non-exhaustive list of examples of when bullying may occur with consideration of previous FWC decisions. This would obviate a need in some circumstances for the WAIRC to decide what bullying actually is.
>
> Recommendation 10
>
> The IR Act amendments should express that the worker must have made attempts to resolve the issue internally or via external means. The Explanatory Memoranda could explain what constitutes "attempts". The IR Act should also require any anti-bullying orders be consistent with interim or final decisions of the matter being dealt with internally or externally.
>
> Recommendation 11

The IR Act amendments should expressly exclude reasonable management action. The Explanatory Memoranda could provide that this includes reasonable disciplinary matters, sub-standard performance processes or feedback.

Recommendation 12

The IR Act amendments should express that an order involving continued employment is not in contravention of the prohibition to award pecuniary penalties.

Recommendation 13

The IR Act amendments should expressly allow the WARC to make any order it considers appropriate other than a monetary order or reinstatement to employment. The regulations or explanatory memorandum can list examples.

Recommendation 14

The IR Act amendments should express that if a worker is no longer employed by the employer or attends the workplace, an anti-bullying application cannot be made. If the alleged bully or bullies are no longer at the workplace, an anti-bullying application cannot be made.

Recommendation 15

The IR Act amendments should deal with an appeal of an order.

Recommendation 16

The IR Act should expressly deal with contravention of an anti-bullying order.

389. The Review has found this list of proposed recommendations to be helpful in focusing on the type of anti-bullying jurisdiction that is required in Western Australia for the private sector employment covered by the State system and for the public sector. There are some of these proposed recommendations however, that the Review thinks need commenting upon.

390. With respect to recommendation 3, the Review is not convinced that there should be a separate touchstone for access to the WAIRC, with respect to the anti-bullying jurisdiction, from the other jurisdictions exercised by the WAIRC. Accordingly, the Review does not think a separate definition of the workers who can access the anti-bullying jurisdiction of the WAIRC should be included in the Amended IR Act. The anti-bullying jurisdiction should be able to be accessed by all employees to be covered by the Amended IR Act, in accordance with Chapter 5 of the Final Report. Consistently with this, with respect to the WAPOU proposed recommendation 7, the Review is of the opinion that the jurisdiction should not extend to people being able to make a claim who are not covered by the Amended IR Act at a workplace; if it should extend to any situation at a workplace – so that if

an employer brings a contractor on site, and the contractor is engaging in bullying that is not resolved by the employer at the workplace, then the employee being bullied could make a claim to the WAIRC. With respect to WAPOU proposed recommendation 12, the issue was explained in the WAPOU submission: "A live question is whether the FWC being able to make an order involving continued employment is in itself, due to the fact the worker will continue to receive remuneration, amount [sic] to a pecuniary penalty? This is a question that has not received judicial consideration however if the FWC was unable to order continued employment, then this would go against the essence of the legislative regime. For the elimination of doubt and litigation, the new proposed IR Act anti-bullying regime should express that an order involving continued employment does not fall foul of any express legislative prohibition on awarding pecuniary penalties." The Review accepts that should apply to the proposed anti-bullying jurisdiction.

391. With respect to the WAPOU proposed recommendations 15 and 16, the Review is of the opinion that the ordinary rights of appeal and provisions of the Amended IR Act for the enforcement of orders should apply.

392. Overall, the Review considers that the WAIRC should be provided with an anti-bullying jurisdiction containing the proposed recommendations set in the WAPOU submission, subject to the comments made above.

393. With respect to some of the arguments made against the WAIRC being provided with such a jurisdiction, that were set out earlier, the Review makes these points:

(a) The fact that bullying may be a health and safety issue does not mean that it is not also an "industrial matter" and is not something that the WAIRC should not be able to enquire into and deal with, consistently with the objects of the IR Act. Although WorkSafe could investigate these matters, providing an employee with a specific right to make an application to the WAIRC and to give the WAIRC jurisdiction and powers to be able to deal with the issue is a direct way to try to combat a workplace problem that can have serious consequences.

(b) The anti-bullying jurisdiction will not cut across public sector or private sector "Codes of Conduct" but will be an adjunct to them; to allow for possible redress when the Code of Conduct has been activated but does not succeed in dealing with the situation. If a matter is before the WAIRC prematurely or without substance, then the WAIRC may use its powers under s 27 of the IR Act to dismiss the application.

(c) As submitted by the HSUWA the fact that anti-bullying matters can be brought before the WAIRC provides an additional incentive for agencies to resolve such issues.

(d) The Review also notes the submissions made by the SSTUWA. However, the Review is not of the opinion that the WAIRC needs any additional jurisdiction to deal with the matters cited. This is because if a bullied employee has left the employment of the department, but there remains a bullying culture at the workplace, then there would be an "industrial matter" that could be brought to the WAIRC, by a registered organisation under s 29(1)(a) of the IR Act, as it presently exists.

394. Earlier, the Review mentioned the submission from a person who referred to their own employment difficulties including bullying. Insofar as it touches upon matters relevant to the Review, the submission raised concerns about the following:

(a) Bullying by an immediate supervisor and associated safety concerns which were not appropriately investigated (as a workplace hazard) by the applicable department.

(b) A lack of timeliness in, and adequacy of, the investigation by the department that it had breached the grievance resolution standard. It was alleged the employee was required by the department to submit the grievance several times and that it took nine months to investigate the grievance; including an independent investigation.

(c) A three month investigation by the PSC into the (unsuccessful) breach allegation of the grievance resolution standard; allegations of unfair "patronage" that the department received from the PSC and a lack of oversight of the PSC's integrity.

(d) Overall, difficulty in "navigating the system".

395. Whilst the Review is of course in no position to consider the merits of what was contained in the submission, it does somewhat highlight the benefits of a more direct and simpler method of being able to deal with assertions of bullying and alleged breaches of PSC standards, that are to be reflected in the recommendations to be made by the Review.

3.2.9 Additional submissions 31

Whether proposed recommendation [25] should include the repeal of s 96A(1) of the PSM Act, and the amendment of s 96A(2) and s 96A(5)(b) of the PSM Act insofar as they restrict the rights of public sector employees to refer to the WAIRC a decision to terminate their employment under the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* (WA).

396. This request for additional submissions referred back to proposed recommendation 25 and asked whether that should include the repeal of s 96A(1) of the PSM Act and the amendment of s 96A(2) and s 96A(5)(b) of the PSM Act insofar as they restrict the rights of public sector employees to refer to the WAIRC a decision to terminate their employment made under *the Public Sector Management (Redeployment and Redundancy) Regulations 2014* (WA).

397. The PSC commented on this issue. It emphasised that the approach to the management of redeployment and redundancy of the public sector is clearly a matter of policy for determination by the Government of the day. It said the current arrangement reflects the previous Government's policy objective, which was to deal with and resolve such matters within a clearly set and defined timeframe. The PSC said the Government had determined that providing options at the point of termination to review or revisit issues leading up to that stage would leave open a clear avenue to draw out or extend unacceptably the finite (six month) time frame for dealing with registered employees.

398. With respect, that is not necessarily so. The review of such a dismissal could be structured in a way which would allow for an application to the WAIRC after the dismissal has been implemented and which would allow the WAIRC to provide redress in a situation where the dismissal was decided to be harsh, oppressive or unfair. That could occur, for example, where unfair processes were applied before the termination of an employee. Compensation could be provided for in an appropriate case, as well as reinstatement or re-employment. Re-employment is included because involuntary redundancy can arise out of a situation where an office, post or position has been abolished. It would not, therefore, be possible for a person to be reinstated to an abolished position but they could be re-employed elsewhere in the department or agency. This would not therefore hold anything up but simply allow redress to occur if a case was established before the WAIRC.

399. That analysis also defrays a point made in a confidential departmental submission which suggested that the repeal would involve the WAIRC making determinations on restructuring and possibly lead to circumstances in which the WAIRC could act to prevent restructuring and reform. It was submitted it could potentially "clog up the WAIRC, slow public sector reform and become a vehicle for unions to stymie reforms they disagree with". That would not be likely in the opinion of the Review if the process previously described was introduced.

400. Similarly, the Department of Health opposed the repeal of s 96A(1) of the PSM Act. It submitted it was specifically introduced to facilitate involuntary redundancy of employees, surplus to requirements. It was submitted it was an integral part of the department's policy to find and retain high quality staff while allowing "the movement on of staff who are not competent or are surplus to requirements". It was submitted therefore that s 96A(2) and s 96A(5)(b) of the PSM Act should not be amended.

401. By contrast, DWER was supportive of the proposed recommendation. So too was the Public Transport Authority and Main Road Roads Authority joint submission.

402. The CPSU/CSA also submitted the Review should recommend the elimination of jurisdictional impediments to the WAIRC acting to hear redeployment and redundancy matters by repealing s 80E(7) of the IR Act.

403. UnionsWA submitted that public sector employees ought to be able to "object" on the grounds of genuine redundancy. That submission was supported by the HSUWA, the UFU, United Voice and the WASU.

404. The ELC supported the expansion of the jurisdiction of the WAIRC to hear redeployment and redundancy matters where employment has come to an end, and any relevant amendments to the PSM Act to facilitate this.

405. The Review considers that public sector employees ought to be able to make an "unfair dismissal" application to the WAIRC even when they have been dismissed due to a redundancy and under the present regulations. The Review notes however that it would be a rare case, if any, where such an application would be successful if the regulations had been complied with. If a claim was made, however, this should not prevent the dismissal from taking effect, absent an order to the contrary being made by the WAIRC. That way, the workings of the department/agency may continue, unless and until an order of the WAIRC provides otherwise.

3.2.10 Additional submissions 32

Whether the sections of the *Young Offenders Act 1994* (WA), the *Police Act 1892* (WA) and the *Prisons Act 1981* (WA), which contain rights of appeal to the WAIRC against removal decisions, should be abolished and replaced by an entitlement for an employee to make an application to the WAIRC for a remedy in respect of an alleged unfair dismissal, with the WAIRC having the same jurisdiction and powers to determine the application and award remedies as in the jurisdiction that applies to private sector employees.

406. The principal submissions on this question were received from the WA Police Force, the CPSU/CSA, and the WAPOU. Ancillary submissions supportive of the idea contained within the question were received from the ECCWA, the WASU, United Voice, the UFU, UnionsWA, the HSUWA and the AMWU.

407. A very belated submission was received from the Department of Justice. The Review, not without some reluctance, decided to take the submission into account. This was mainly as the submission did provide the thoughts of the Department on an issue that was of particular significance to it, and about which the Review wished to receive its submission. Additionally, the Review understands the lateness of the provision of the submission was not due to recalcitrance but a bureaucratic oversight. Whilst that does not reflect particularly well on the Department, it does not mean that the submission is not worthy of being taken into account.

408. There were no specific submissions on the question provided by the WAPU.

409. It is appropriate to deal with the issue by reference to the three pieces of legislation referred in the question.

410. The Interim Report set out the process for a police officer to appeal against their removal from office to the WAIRC under s 33P of the *Police Act*; and the way in which the appeals are determined.[152] As stated in the Interim Report, s 33P of the *Police Act* provides that if a "member" is removed from office by or as a result of a "removal action" the "member" may appeal to the WAIRC on the ground that the decision of the Commissioner of Police to take the removal action was harsh, oppressive or unfair. An appeal so instituted is to be heard by the WAIRC as constituted by not less than three Commissioners, at least one of whom shall be the Chief Commissioner or the Senior Commissioner. This is different from the ordinary jurisdiction of the WAIRC, where an "unfair dismissal" case is heard by a single Commissioner or, presently, in PSAB cases, where the PSAB is constituted as described in the Interim Report.

411. The WA Police Force opposed the suggestion that appeals from removal for loss of confidence should be treated in the same way as an unfair dismissal application by an employee. The WA Police Force submitted there is a distinct difference between a removal from office for loss of confidence effected by the

[152] Interim Report [457] – [461].

Commissioner and the dismissals that may befall other public sector employees. It was submitted there is a special relationship between the Commissioner and police officers not replicated in other positions.

412. The WA Police Force submitted the current provisions within the legislation sets the right balance between the need for the Commissioner of Police to be able to remove police officers in whom there is a loss of confidence and giving those police officers a right of appeal.

413. The WA Police Force also submitted it remains appropriate for appeals to be determined by three members of the WAIRC. The WA Police Force had no objection, however, to any interlocutory matters arising on appeal being dealt with by a single member of the appeal bench as previously recommended in the *Report on Part IIB of the* Police Act 1892 *Pursuant to the Review Conducted Under s 33Z of the Act.*

414. The Review does not recommend any substantive change to the existing system of appeals against removals from office of police officers, particularly given there is no WAPU submission that this ought to occur. The Review does think however that there is no reason why the jurisdiction could not be exercised by a single member of the Commission, with a right of appeal to the Full Bench under s 49 of the IR Act. Whilst appeals against removal decisions are of course significant, for the Commissioner, the officer and the public, there are many decisions that are of significance, to the individual employers and employees involved, or a group thereof, or the public as a whole, that are heard by single Commissioners. The Review does not think there needs to be a special bench of three to determine s 33P of the *Police Act* appeals, and will so recommend to the Minister. If this amendment is effected, it will create a more streamlined process for the WAIRC in dealing with these matters.

415. Issues relevant to prison officers and youth custodial officers under the *Prisons Act* and the *Young Offenders Act* respectively, were discussed in the Interim Report at

[462] – [468].[153] At [468] the Review said that according to the submission then provided by the Department of Justice, youth custodial officers were regarded as "government officers". The position is supported by the Juvenile Custody Officers Award[154] being drafted on the basis that juvenile custodial officers are "government officers". Additionally the Department of Corrective Services Youth Custodial Officers' General Agreement 2014[155] was drafted on the basis that it applies to an "employee" that in turn is defined to mean "government officer as defined in the [IR Act], classified as a Youth Custodial Officer, Unit Manager or Senior Officer". Each of these employees is to receive a salary under the Agreement. Additionally, "group workers" as the Review understands youth custodial officers were formally called, were treated as "government officers" by both parties in the decision of *Civil Service Association of Western Australia Inc. v The Director General, Department of Justice and Another.*[156] The application before the WAIRC was "in relation to eight employees of the Hon Attorney General employed as Group-Workers at the Killara Youth Support Centre," and it was "agreed between the parties that the employees are all government officers pursuant to s 80C of the Industrial Relations Act".[157]

416. With respect to the question posed in the request for additional submissions, the CPSU/CSA submitted the *Young Offenders Act* subjects youth custodial officers to the disciplinary regime of the PSM Act and then allows for appeals to the PSAB against adverse findings and penalties. It submitted that if appeals to the PSAB are abolished, then the *Young Offenders Act* would need to be amended to reflect this. This point has been discussed at [276].

417. The CPSU/CSA also submitted the *Young Offenders Act* subjects youth custodial officers to the "loss of confidence process, which has the capacity to fast track dismissals for serious breaches of discipline, and limits the scope of any challenge to the dismissal in the WAIRC."

153 The *Young Offenders Act* was in error cited as the "Youth" Offenders Act at [462] of the Interim Report.
154 See clause 1.4 of the Award.
155 See clauses 3.1(g) and 10 of the Agreement.
156 [2003] WAIRC 08325; (2003) 83 WAIG 1481.
157 Reasons for decision of Beech SC [1]-[2].

418. The CPSU/CSA said it had opposed these provisions of the *Young Offenders Act* in 2013 and 2018 on the grounds they were unnecessary, procedurally unfair, and the rationale for "loss of confidence" was inappropriate in the context of youth detention. It was also submitted that as the provisions have not been invoked since they had come into force they are either superfluous or redundant as a disciplinary tool.

419. The CPSU/CSA noted the WAPOU has also consistently opposed the "loss of confidence" legislation.

420. The WAPOU supported the proposal advanced in the question. It argued that subdivision 3 of the *Prisons Act* should be abolished.

421. The WAPOU submitted that claims that a special relationship exists, as a result of the Chief Executive Officer's (CEO) direct command over prison officers and "higher reliance upon their integrity, honesty, competence, satisfactory performance and good conduct", has no basis. It was submitted there is no legal principle that prison officers have a special relationship with their CEO; the idea is a "construct designed to justify unreasonably harsh removal powers. Prison Officers are simply public employees", the WAPOU contended.

422. The WAPOU also said the appeal mechanisms contained in the *Prisons Act* are sub-standard. It argued the "likelihood of a successful appeal against removal is limited by the fact only a 'loss of confidence must be established', rather than demonstration of misconduct or guilt". It was argued this was a "much lower standard", than would otherwise apply in a claim for "unfair dismissal".

423. The WAPOU also made a number of submissions criticising the nature and extent of the jurisdiction to appeal to the WAIRC including the basis on which the decision is to be determined, the procedures (including when "new evidence" can be admitted) and remedies.

424. The WAPOU also submitted the *Prisons Act* provisions do not seek to protect the prison officer's interests about restrictions on the publication of information, during an appeal.[158]

425. Overall the WAPOU contended that s 107(4)(b) of the *Prisons Act* (which deals with public interest and public confidence when determining an appeal) should be repealed. It submitted that in any such appeal the determining factor should be whether the removal decision was harsh, oppressive or unfair.

426. The Department of Justice argued that the provisions in the *Prisons Act* and the *Young Offenders Act* not be abolished as they, together with WAIRC decisions, may provide an effective tool in setting a "confidence standard by which the conduct of officers can be measured". It also pointed out the loss of confidence provisions have yet to be tested and therefore their operation in practice cannot be measured. It also acknowledged the specific expertise the WAIRC has obtained with respect to police officers and said it is more likely than not that the WAIRC would adopt the same approach with respect to prison officers and youth custodial officers, and that this would reflect the special nature of those roles. The Department also contended that where it was found that the removal action was harsh or oppressive, the remedies provided in the legislation take into account the unique circumstances of these officers.

427. The Review has considered the opposing submissions. It understands the point that as the provisions have not as yet been tested before the WAIRC, it is somewhat difficult to assess whether and to what extent they are effective in practice. However, it needs to be noted that the provisions are modelled on those with respect to police officers under the *Police Act*. Those provisions were developed having regard to the particular relationship between the Commissioner of Police and police officers, historically and legislatively; and the particular position that police officers hold in the community. The Review does not think the same considerations apply with respect to youth custodial and prison officers. The Review accepts that they are, in effect, public sector employees, even though they

158 *Prisons Act* s 110G.

have a job that has particular peculiarities and difficulties and which might in some respects and at particular times have some affinity with police officers and the relationship between police officers and the Commissioner of Police. Generally however, the relationship between the CEO and youth custodial and prison officers is not, in the opinion of the Review, of the same ilk to that of a police officer and the Commissioner of Police. The Review does not see any good reason for these public sector employees to be denied the opportunity to assert that a loss of confidence removal was "harsh, oppressive or unfair" in the same way as other employees are able to do with respect to termination. The Review does not see why there should be any requirement to take into account the "public interest" when determining a removal decision appeal, as presently occurs under s 107(4)(b) of the *Prisons Act* and s 11CI(4)(b) of the *Young Offenders Act*. If there are particular aspects of the nature of the employment that have an impact upon the removal, in the particular circumstances of the case, then that can be taken into account by the WAIRC.

428. The WAIRC should also be able to deal with issues about the publication of evidence in accordance with its general powers to do so, and in doing so would be expected to have regard to the rights of the former employee as well as the public interest. In hearing and determining the claim the WAIRC should generally be able to make the same orders as in other unfair dismissal proceedings involving public sector employees, for reinstatement, re-employment or compensation. The Review notes that there are some differences in the orders that can be made by the WAIRC in hearing an appeal under the *Prisons Act* and the *Young Offenders Act* as opposed to under the IR Act. The *Prisons Act* and the *Young Offenders Act* contain a maximum compensation payment equivalent to 12 months' remuneration that can be awarded in a loss of confidence removal case, whereas the maximum that may be ordered under the IR Act for an unfair dismissal case is the equivalent to six months' remuneration. In the interests of the attainment of a commonality of rights and remedies across the public sector the compensation for officers engaged under the *Prisons Act* and the *Young Offenders Act* should also have a 6 months' remuneration cap. Under s 110E(2) of the *Prisons Act* and

s 11CP(2) of the *Young Offenders Act* the WAIRC can order that the removal from office was of no effect. That is, in substance, the same as reinstatement. That remedy will still be available if the prison officers and youth custodial officers are subject to the general jurisdiction of the WAIRC with respect to loss of confidence removals.

3.2.11 Additional submissions 33

Whether the jurisdiction of the WAIRC should be expanded to allow the WAIRC to make General Orders for public sector discipline matters, with the consequent repeal of s 78 of the PSM Act.

429. The submissions received in response to this question were not detailed, although UnionsWA, United Voice, the UFU, the WASU, the AMWU, a confidential employee association submission, the ELC and the ECCWA all supported the proposition contained in the question. The Public Transport Authority and Main Roads Commission opposed the proposition.

430. The PSC submitted the proposition would be consistent with the proposed abolition of the constituent authorities. However, it submitted that to the extent that s 78 relates to decisions made in the context of redeployment and redundancy arrangements, under s 78(3) and s 78(4), "retention of the associated 'limiting' provision may need to be factored in".

431. The HSUWA expressed some confusion in what the question referred to but indicated that if it meant to refer to the repeal of Part 5 of the PSM Act, it supported that proposal. The HSUWA submitted Part 11 of the HS Act would also need to be repealed to fully effect any such recommendation. The HSUWA submitted there was no evidence supporting the excessively complex provisions of Part 11 of the HS Act as providing a more adequate way of dealing with things.

432. In reconsidering this issue the Review can see why the question being phrased in the way it was may have caused confusion. The Interim Report, on the issue of s 51A of the IR Act, was intending to reflect the terms of a submission made by the CPSU/CSA in its December 2017 submission that: "The CSA is seeking the repeal of s 78 PSM Act, but the retention of s 51A IR Act for the Commission to make

general orders for public sector discipline. The benefit of this would be uniformity, and a more streamlined and efficient structure of the WAIRC."

433. The retention of s 51A does not necessarily require, as the request for additional information suggests, that s 78 of the PSM Act be repealed. Issues of "discipline" in the public sector which can result in a person being suspended, disciplined or terminated are contained in Part 5 of the PSM Act (and Part 11 of the HS Act). Section 51A of the IR Act provides the WAIRC with the power to make a "Public Sector Discipline" General Order dealing with suspension and the like, that could apply to public sector employees who are not already covered by provisions under another Act dealing with suspension, discipline and termination and which provides appeal rights; see s 51A(4). In other words, this provides the WAIRC with the scope to regulate public sector discipline where it is not already regulated. As set out elsewhere, Part 5 of the PSM Act does not cover all public sector employees and so a General Order could be made to cover those who are not covered by Part 5 of the PSM Act (or Part 11 of the HS Act). This issue has been earlier considered. As there mentioned, the Review considers that Part 5 of the PSM Act may need to be broadly amended but that can await a more general review of the PSM Act. That is not to say however, as has been earlier stated, that the Review does think the regime for interaction between the IR Act and the PSM Act is not in need of amendment, in accordance with the recommendations contained in this Chapter of the Final Report.

434. The Review is of the opinion that there is benefit in a general review of the PSM Act as is addressed below.

3.2.12 Additional submissions 34

Whether, given the discussion in Chapter 3 of the Interim Report, the recommendations proposed in response to Term of Reference 2 above, and any submissions provided in answer to the other questions in response to Term of Reference 2 above, the Review should recommend to the Minister that the PSM Act be reviewed.

435. Following the publication of the Interim Report, the Government announced on 9 April 2018, the commencement of a review of the functionality of the PSC to be undertaken by Ms Carmel McGregor PSM (the Public Sector Commission Review).

More specifically, Ms McGregor was appointed to review the PSC's capability, functions, structure and performance and recommend any changes necessary to ensure the PSC has the ability to meet the Government's reform objectives and future challenges. This announcement followed the final report of the independent Service Priority Review for the Government. That Review recommended a long term blueprint for the State Government.[159]

436. The Review has met with Ms McGregor to discuss the possible dovetailing of the present Review and the Public Sector Commission Review. From discussions with Ms McGregor the Review does not believe that recommendations contained within the Interim Report and/or Final Report or a proposal that the PSM Act ought to be generally reviewed, will conflict with the process of, or undermine the Public Sector Commission Review.

437. That is consistent with a submission from the DPC which referred to the Public Sector Commission Review and indicated the Public Sector Commission Review may recommend changes that could be required to the PSM Act to support longer term public sector reform. The DPC submitted that whilst reporting timelines might not align, it encouraged the Review to consider the relevant recommendations made in recent independent reviews. It also submitted that any Government consideration of public sector recommendations from the present Review will necessarily be shaped by the broader public sector reform program and the Public Sector Commission Review. That is, of course, accepted.

438. The proposition that there should be a general review of the PSM Act was supported by DWER, a confidential submission from a government department and the Public Transport Authority and Main Roads Commission joint submission. That submission also referred to the Public Sector Commission Review and said it may be prudent for that part of the present Review, which deals with the interplay between the powers of the PSC and the WAIRC to be deferred. Whilst the Review notes this submission there has been no indication by the Minister that this aspect

[159] The Terms of Reference of the Public Sector Commission Review may be found at https://www.dpc.wa.gov.au/ProjectsandSpecialEvents/Pages/Public-Sector-Commission-Review.aspx.

of the work of the Review should be deferred. As mentioned earlier, as suggested by the DPC the Review has met with Ms McGregor. The Review does not see any need to defer its consideration of the issues before it, pending the Public Sector Commission Review.

439. UnionsWA submitted that specific parts of the PSM Act ought to be reviewed, in accordance with the position taken by the CPSU/CSA. These parts were:

(a) Part 3A – The Public Sector Commissioner.

(b) Part 5 – Substandard performance and disciplinary matters.

(c) Part 6 – Redeployment and redundancy of employees.

(d) Part 7 – Procedures for seeking relief in respect of breach of public sector standards.

440. It was submitted that any review of the PSM Act should be carried out in full consultation with the public sector unions. This position was supported by the WASU, the UFU, the HSUWA, United Voice and the AMWU.

441. The ELC stated the proposed changes to the IR Act in relation to public sector employees were significant and noted the considerable interaction between the IR Act and the PSM Act in the governance of public sector employees. It submitted that, given this, it would be prudent to review the PSM Act.

442. The PSC said the mooted changes to the jurisdiction of the WAIRC with respect to public sector employees may need to be considered and progressed within the broader context of an overall review of the PSM Act and the role it establishes for the PSC. It submitted that if fundamental changes are to be made to the scope of the PSC's monitoring of compliance with standards through the removal of the PSM Act Part 7 relief procedures, it considered the overall role of the PSC under the PSM Act would need to be revisited and adjusted. It also submitted that pursuing associated changes to the role of the PSC would need to have regard to the Public Sector Commission Review. As stated, this latter point is accepted.

443. It appears to the Review however, that it is apparent that, subject to what is contained in the Public Sector Commission Review, it would be timely and appropriate for there to be a general review of the PSM Act.

444. The Review will make a recommendation to this effect.

3.3 Access to WAIRC for Unfair Dismissal Remedies where Employment has been Terminated on the Basis of Negative Working with Children Notice

445. As set out in the Interim Report, the SSTUWA made submissions about the WWC Act. Pursuant to s 22 of the WWC Act, an employer must not employ a person in child-related employment unless they have the requisite assessment certificate as required by the WWC Act. If, however, a person is dismissed from their employment for this reason, the WWC Act, by s 41, precludes the dismissed employee from making an application to the WAIRC for a remedy in relation to an alleged "unfair dismissal". The SSTUWA asserted that there can be significant injustices to a State school teacher who has received an interim negative WWC notice because of allegations being made against them and cannot bring an application to the WAIRC in respect of their dismissal, even if the basis for the interim negative WWC notice is an allegation that turns out not to be proved when the matter goes to Court.

446. In the Interim Report, the Review said the embargo on seeking a right to make a claim for unfair dismissal is obviously the product of a combination of policy considerations in the context of the WWC Act, from which it can be gleaned, the best interests of children are paramount.[160]

447. The Review said in the Interim Report that it intended to try to ascertain additional information about the reasons for the embargo, referred to in the previous paragraph, from the Department of Education, before addressing the issue in the Final Report of the Review. The Review has endeavoured to do this and obtained some additional information.

[160] The example of s 3 of the WWC Act was provided in the Interim Report.

448. In its submissions upon the Interim Report, the CPSU/CSA asserted the issue was not only relevant to school teachers but also to other fields of public sector employment, such as medical work, child protection, juvenile detention and social work.

449. In trying to ascertain more about the section under consideration the Review has been referred to the decision of the IAC in *Brett v O'Neill.*[161] The decision confirms the plain meaning of the legislation - that a person cannot bring an unfair dismissal application if they have been dismissed because of the terms of the WWC Act. The decision also sets out that if a person has been issued with an interim negative notice or negative notice under the WWC Act, then the Director General of the Department of Education regards the employee as having repudiated their contract of employment, as they cannot do the duties required of the position, so that they can be dismissed from employment on that basis. The Review understands that if a WWC certificate is reinstated for a teacher, then they can seek re-employment with the Department of Education. That does not however entirely deal with the concern expressed by the SSTUWA in the submission referred to earlier.

450. The Review was also informed that in November 2011, a review of the operation and effectiveness of the WWC Act was commenced by a Western Australian public service officer. The Review was undertaken in order to assist the Minister for Child Protection to fulfil her obligations under section s 47 of the WWC Act. It was published in July 2012 under the title, *Review of the Working with Children (Criminal Record Checking) Act 2004*. Issues relating to s 41 of the WWC Act were not discussed in the review.

451. The present Review has considered the second reading speech and the explanatory memorandum when the WWC Act was introduced into Parliament. There was however no real discussion of the present issue. The explanatory memorandum explained the effect of s 41(3) of the WWC Act but not the purpose of the embargo.

161 [2015] WASCA 66.

452. The Review is not really satisfied that there exists a good reason why, in all cases, there needs to be an embargo upon the exercise of the unfair dismissal jurisdiction of the Commission. It is another matter of course whether any such application would be successful. However, the Review is not entirely comfortable with simply recommending the repeal of the subsection, given it is probably part of a coordinated policy position and the Review does not think that it has received detailed enough submissions about this to appropriately make a substantive recommendation. The Review will recommend that the Minister give consideration to investigating whether it is appropriate for the Government to repeal the provision of the WWC Act that contains the embargo upon making an unfair dismissal application.

3.4 Recommendations

453. With respect to Term of Reference 2 the Review makes the following recommendations and observations:

27. In the Amended IR Act, the Public Service Appeal Board (PSAB), the Public Service Arbitrator (PSA) and the Railways Classification Board be abolished.

28. (a) The Amended IR Act, subject to (b), include a single system for public sector employers and employees to refer industrial matters to the WAIRC so that all employees who are currently subject to the jurisdiction of the PSA and the PSAB will be subject to the ordinary jurisdiction of the WAIRC.

(b) In the Amended IR Act, clause 2(3) of Schedule 3 of the IR Act is to continue to apply to the referral of industrial matters involving a police officer, police auxiliary officer, Aboriginal police liaison officer or a special constable.

29. There be consequential amendments to the *Public Sector Management Act 1994* (WA) (PSM Act) and the *Health Services Act 2016* (WA) (HS Act) to allow government officers to appeal against disciplinary decisions or findings to the ordinary jurisdiction of the WAIRC.

30. In the Amended IR Act, in exercising the jurisdiction referred to in [28] above, the WAIRC will have the jurisdiction and powers to make the same orders as it may make in exercising its jurisdiction in relation to private sector industrial matters, with these variations:

    (a) The WAIRC is to have the jurisdiction and powers that currently may be exercised by the PSA in s 80E(2) of the IR Act.

    (b) The WAIRC may make as part of the order to be made, that the order apply from a date prior to the lodging of the application before the WAIRC.

    (c) The WAIRC is to have the jurisdiction and powers that currently may be exercised by the PSA in s 80E(5) of the IR Act.

31. Under the Amended IR Act, and subject to any specific recommendations to the contrary, the division between the industrial matters a public sector employee may refer to the WAIRC, as opposed to those a registered organisation may refer to the WAIRC on the employee's behalf, which affect the employment of an individual public sector employee, are to remain as they are at present under the IR Act.

32. The Amended IR Act is to include a provision permitting a registered organisation to refer an industrial matter to the WAIRC on the behalf of an individual employee that alleges that there has been a breach by an employer of a public sector standard[162] set under the PSM Act, in these circumstances:

    (a) Notice of the breach must have first been given to the employer, by the organisation or the affected person, with the employer having twenty-one (21) days to resolve the alleged breach to the satisfaction of the organisation or person.

[162] It is not part of this recommendation that the WAIRC have any jurisdiction to set or change the standards, or have any "promotion appeals" jurisdiction, as it has in the past.

(b) Subject to (c), if the alleged breach is about the appointment of a person to an office, post or position, the appointment is to not take effect unless and until the matter has been determined by the WAIRC.

(c) The WAIRC may, if the justice of the case requires, make an order under (b) before the final determination of the industrial matter.

(d) In determining the industrial matter constituted by the alleged breach, the WAIRC may, in addition to any other orders it may make:

(i) Order compensation for any loss or injury caused by the breach.

(ii) Order that any process that was the subject of the breach be recommenced by the employer.

(iii) Order that a particular person not be appointed to a particular office, post or position.

33. The *Police Act 1892* (WA) be amended so as to ensure that police auxiliary officers may appeal to the WAIRC against any removal decision made against them.

34. The Amended IR Act is to include an entitlement for all public and private sector employees to bring an application to the WAIRC to seek orders to stop bullying at work, based on the model contained in the FW Act Part 6-4B "Workers bullied at work", subject to:

(a) Section 29(1)(b) of the IR Act is to be amended so that an application for an anti-bullying order may be referred by an employee to the WAIRC as an industrial matter.

(b) Subject to (c) the WAIRC shall first endeavor to resolve the industrial matter by conciliation within fourteen (14) days of the application being made.

(c) The Amended IR Act contain a definition of bullying that:

(i) Provides a non-exhaustive list of examples of what constitutes bullying.

(ii) Sets out that bullying is not constituted by a single incident.

(iii) Sets out that whether bullying has occurred is to be determined by an objective test.

(iv) Sets out that actual harm to health and safety is not necessary to establish that bullying has occurred.

(v) Sets out that reasonable management actions by or on behalf of an employer or by another employee, does not constitute bullying, including the reasonable management of disciplinary matters or substandard performance.

(d) In determining the industrial matter, the WAIRC may make any order it thinks fit to resolve the industrial matter, save and except any monetary order, order of compensation or pecuniary penalty.

(e) Any order made may be enforced in like manner as any other order made by the WAIRC.

(f) The determination of the industrial matter by an order may be subject to an appeal to the Full Bench of the WAIRC under s 49 of the IR Act.

35. Section 96A(1) of the PSM Act be repealed and there be consequential amendments to s 96A(2) and s 96A(5)(b) of the PSM Act so that a public sector employee may refer to the WAIRC as an industrial matter under s 29(1)(b) of the IR Act, a decision to terminate their employment under the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* (WA).

36. The sections of the *Young Offenders Act 1994* (WA) and the *Prisons Act 1981* (WA), which contain rights of appeal to the WAIRC against loss of confidence removal decisions, be repealed and replaced by an entitlement for an employee to refer their removal to the WAIRC under s 29(1)(b) of the IR Act, with the WAIRC having the same jurisdiction and powers to determine the application and award remedies as in the jurisdiction that applies to private sector employees and other public sector employees.

37. Section 33P of the *Police Act* be amended so that an officer's appeal against their removal to the WAIRC may be heard by a single Commissioner, with a right of appeal by the parties to the Full Bench of the WAIRC.

38. The PSM Act be generally reviewed with respect to the regulation and termination of employment of public servants and public sector employees.

39. The Minister give consideration to the issue of whether s 41(3) of the *Working With Children (Criminal Record Checking) Act 2004* (WA) ought to be amended to permit the making of an application to the WAIRC for a remedy in respect of a dismissal from employment.

Attachment 3A Access to the WAIRC under the *Public Sector Management Act*

Figure 3A-1. Access by a government officer to the PSAB under s 80I(1)(b) of the *Industrial Relations Act* and s 78(1) of the *Public Sector Management Act*

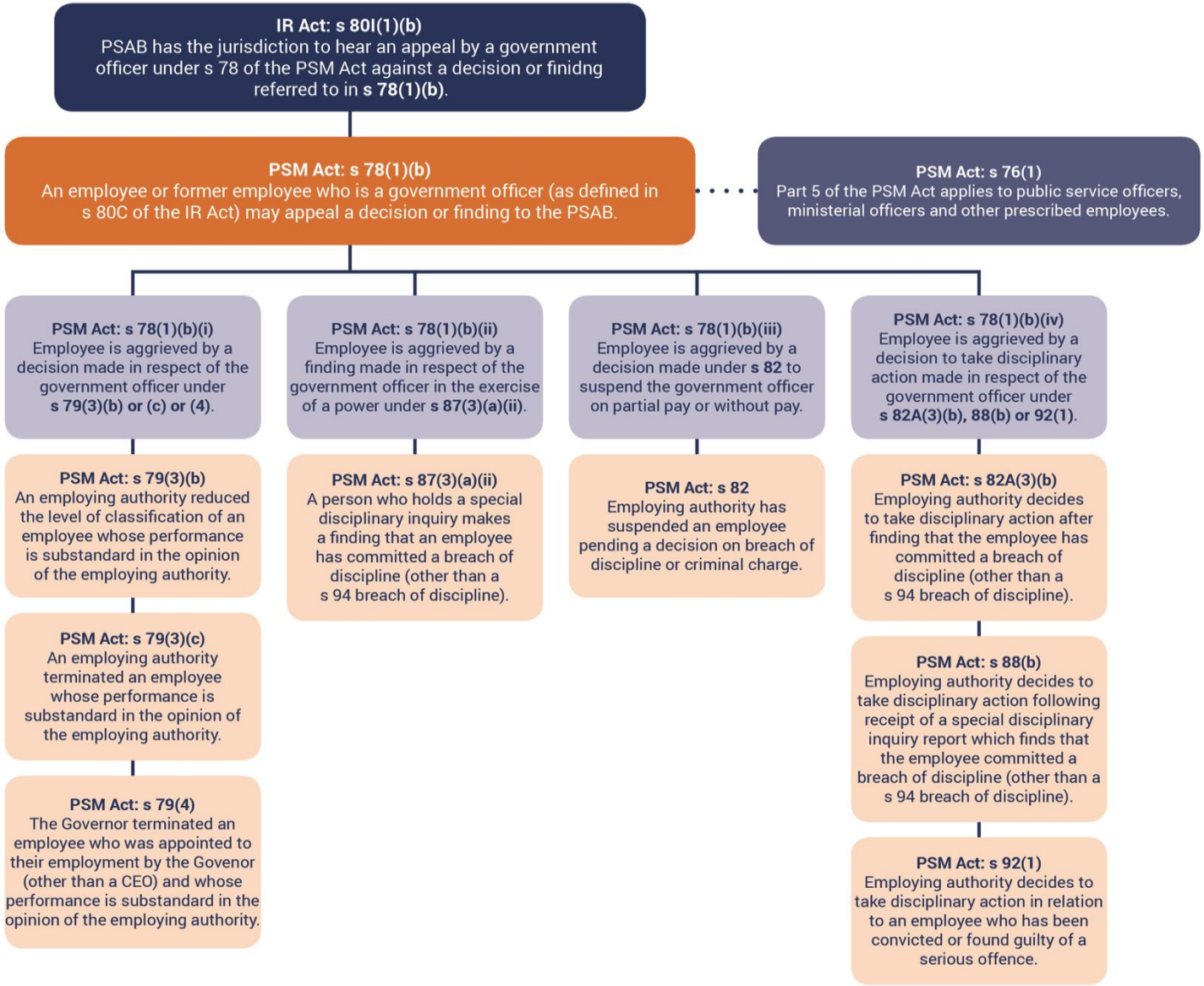


Figure 3A-2. Access to the WAIRC under s 78(2) of the *Public Sector Management Act* by an employee who is not a government officer

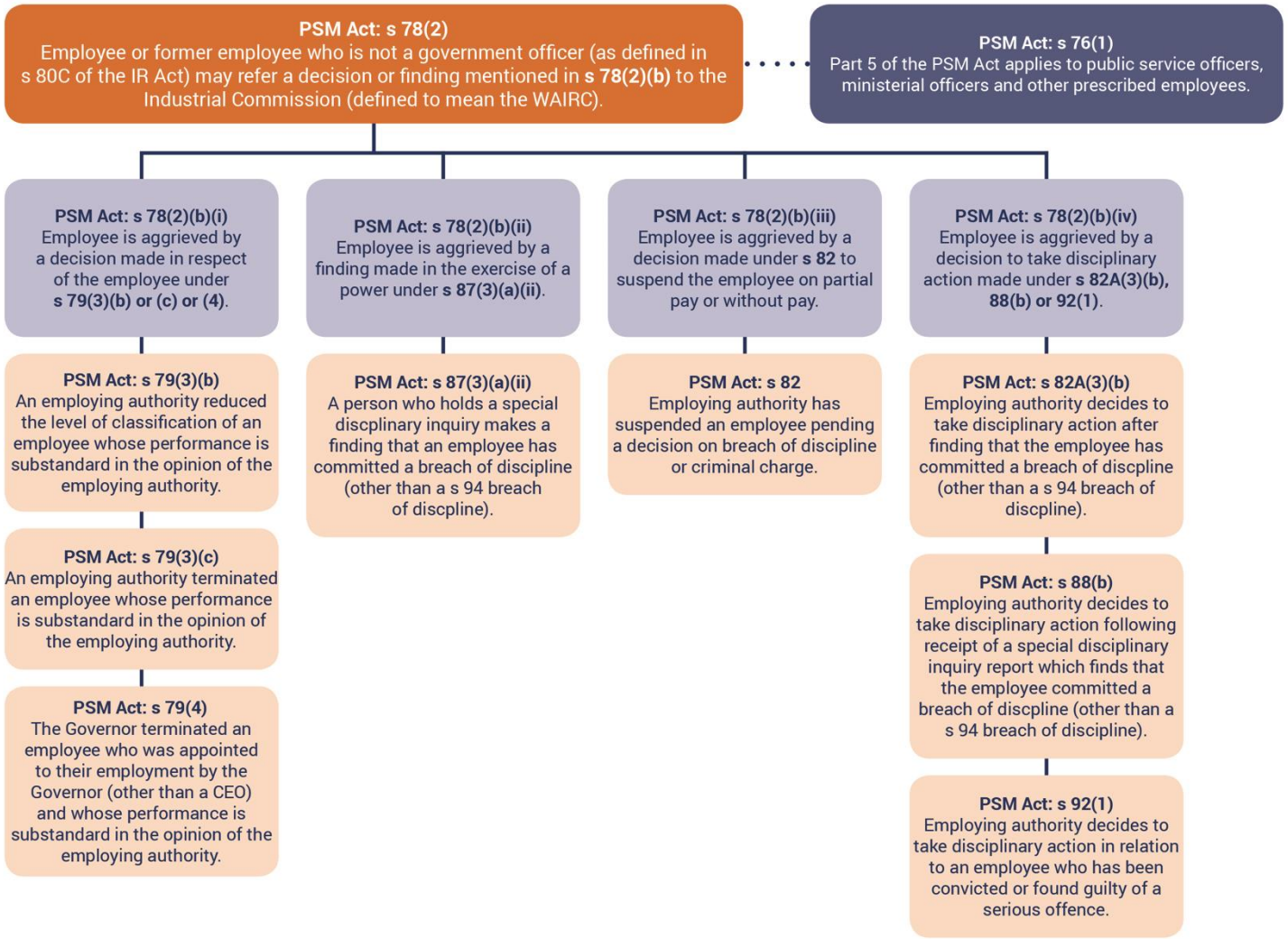


Figure 3A-3. Access to the WAIRC under s 78(3) of the *Public Sector Management Act* by an employee against whom proceedings have been taken for a suspected breach of discipline or disobedience

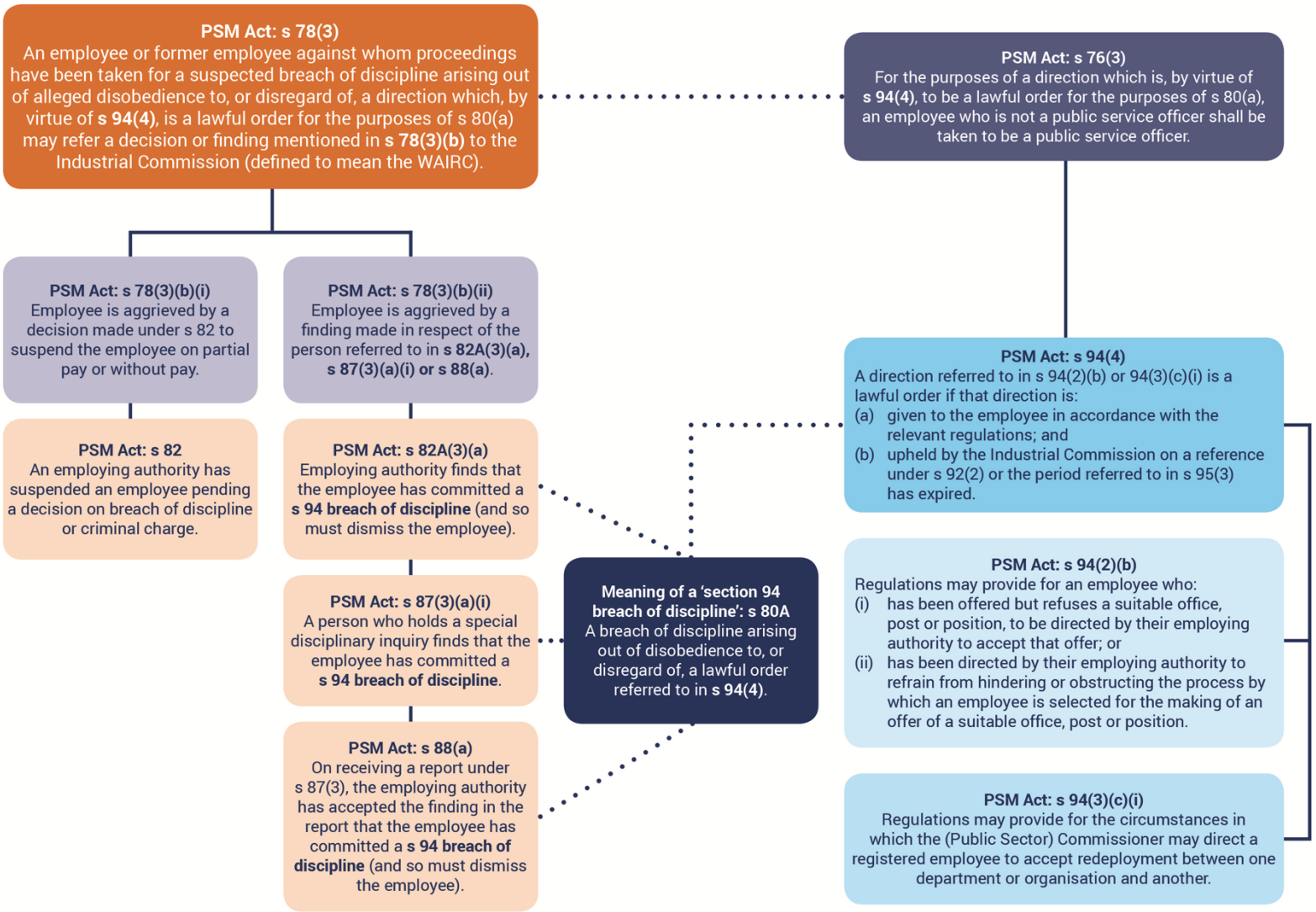


Figure 3A-4. Access to the WAIRC under s 95(2) of the *Public Sector Management Act* by an employee aggrieved by a s 94 decision

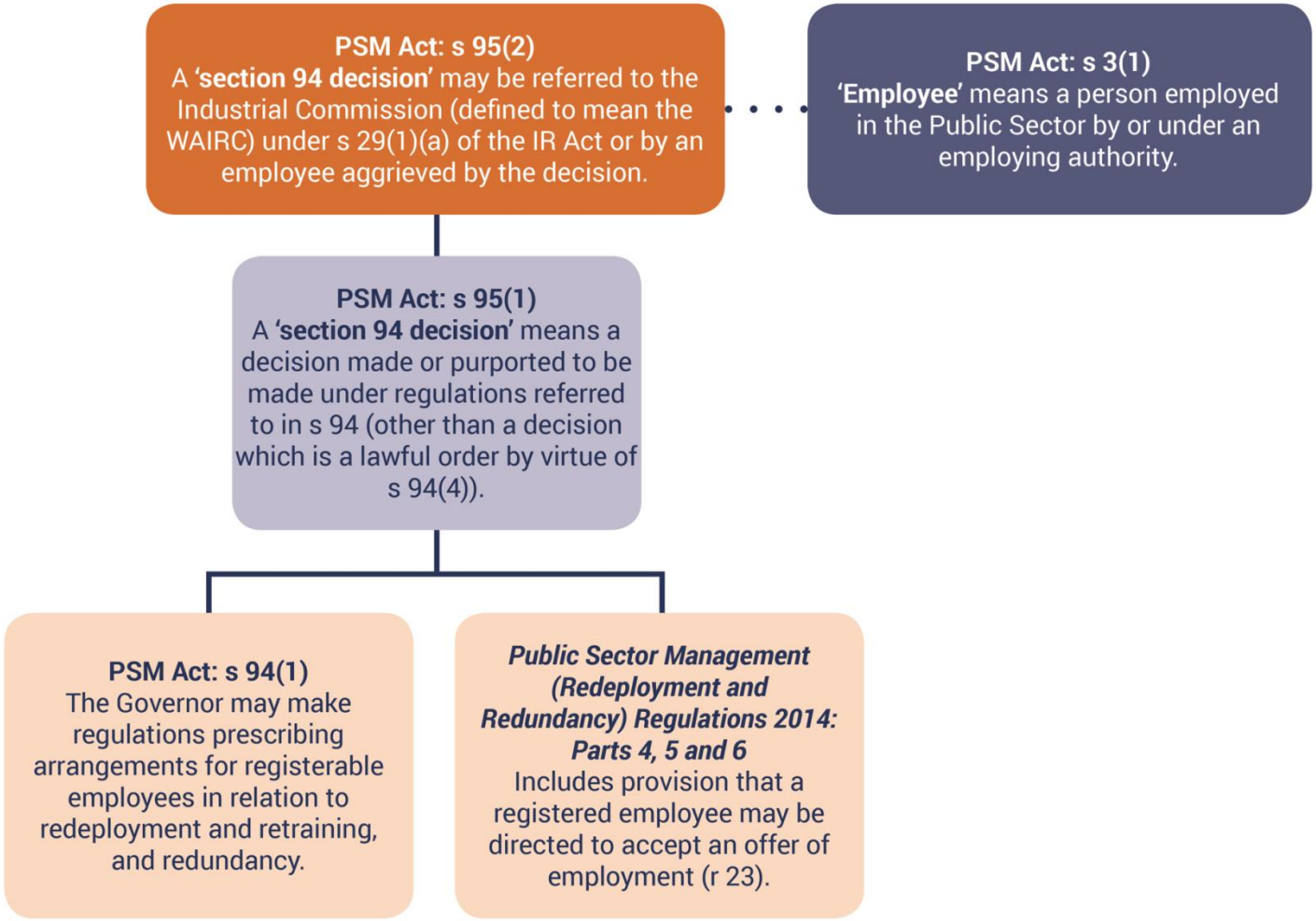
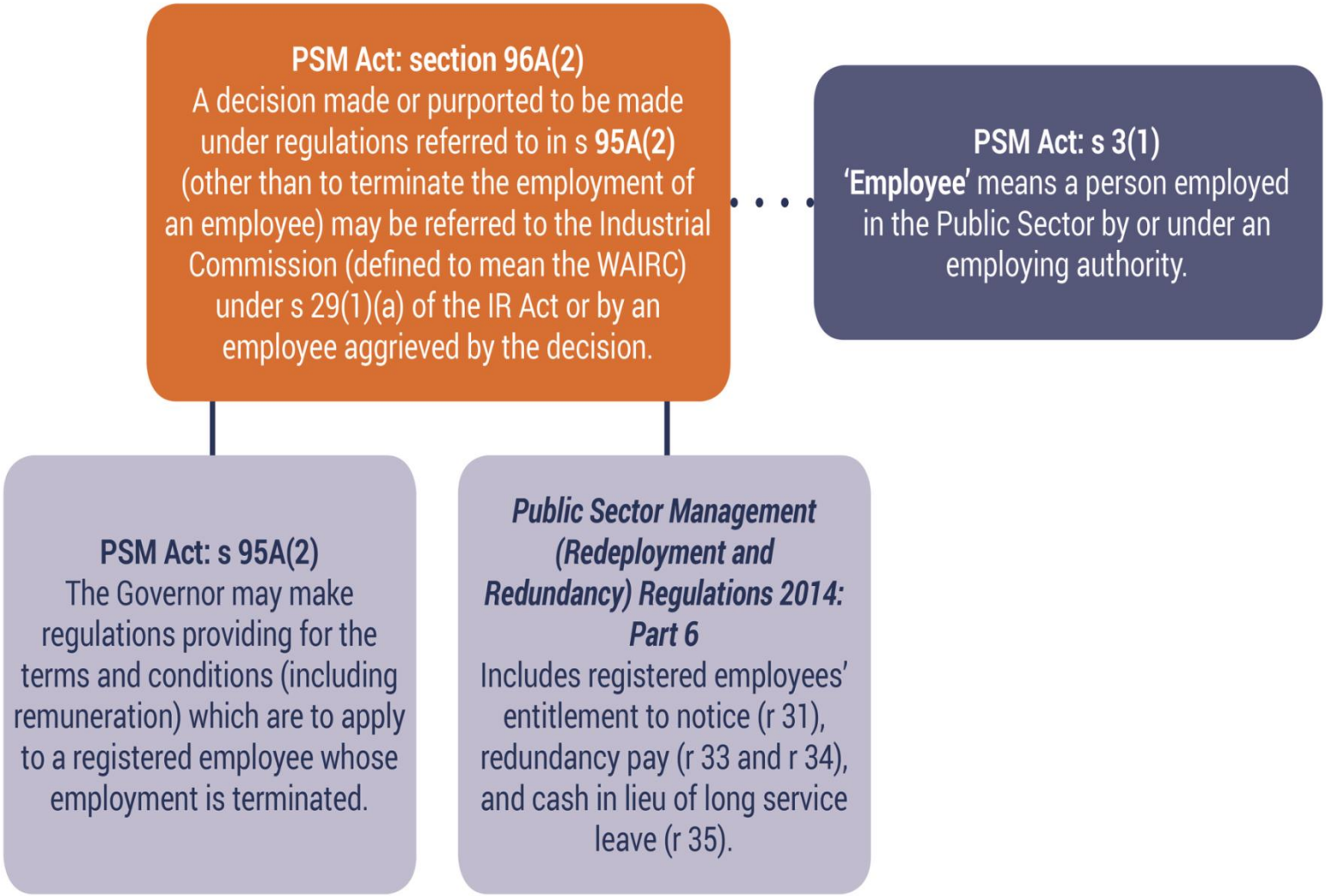


Figure 3A-5. Access under the PSM Act to the WAIRC under s 96A(2) of the *Public Sector Management Act* by an employee aggrieved by a decision made under regulations referred to in s 95A(2)



Attachment 3B Access to the WAIRC under the Health Services Act

Figure 3B-1. Access by a government officer to the PSAB under s 80I(1)(c) of the *Industrial Relations Act* and s 172(2) of the *Health Services Act*

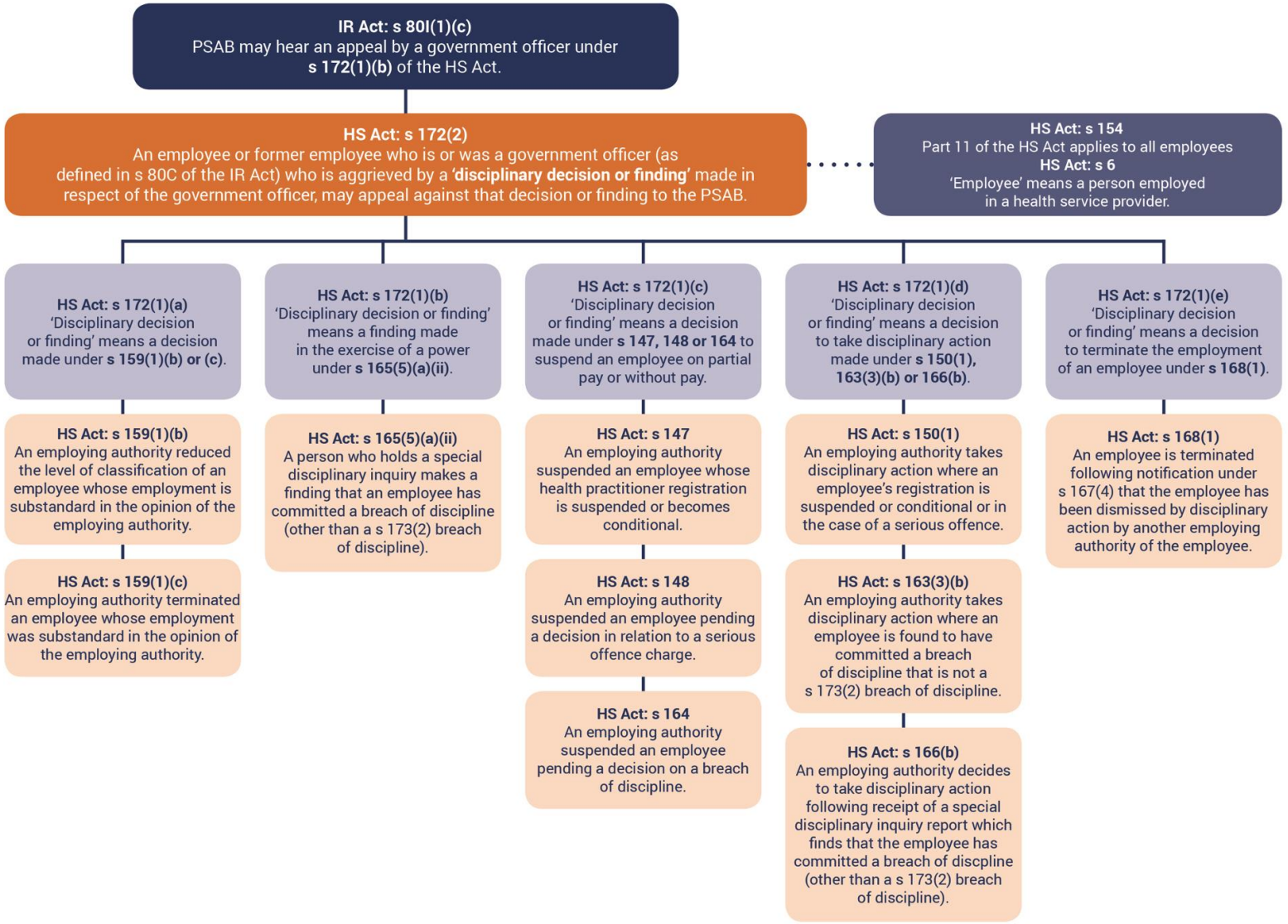


Figure 3B-2. Access to the WAIRC under s 172(4) of the *Health Services Act* by an employee who is not a government officer

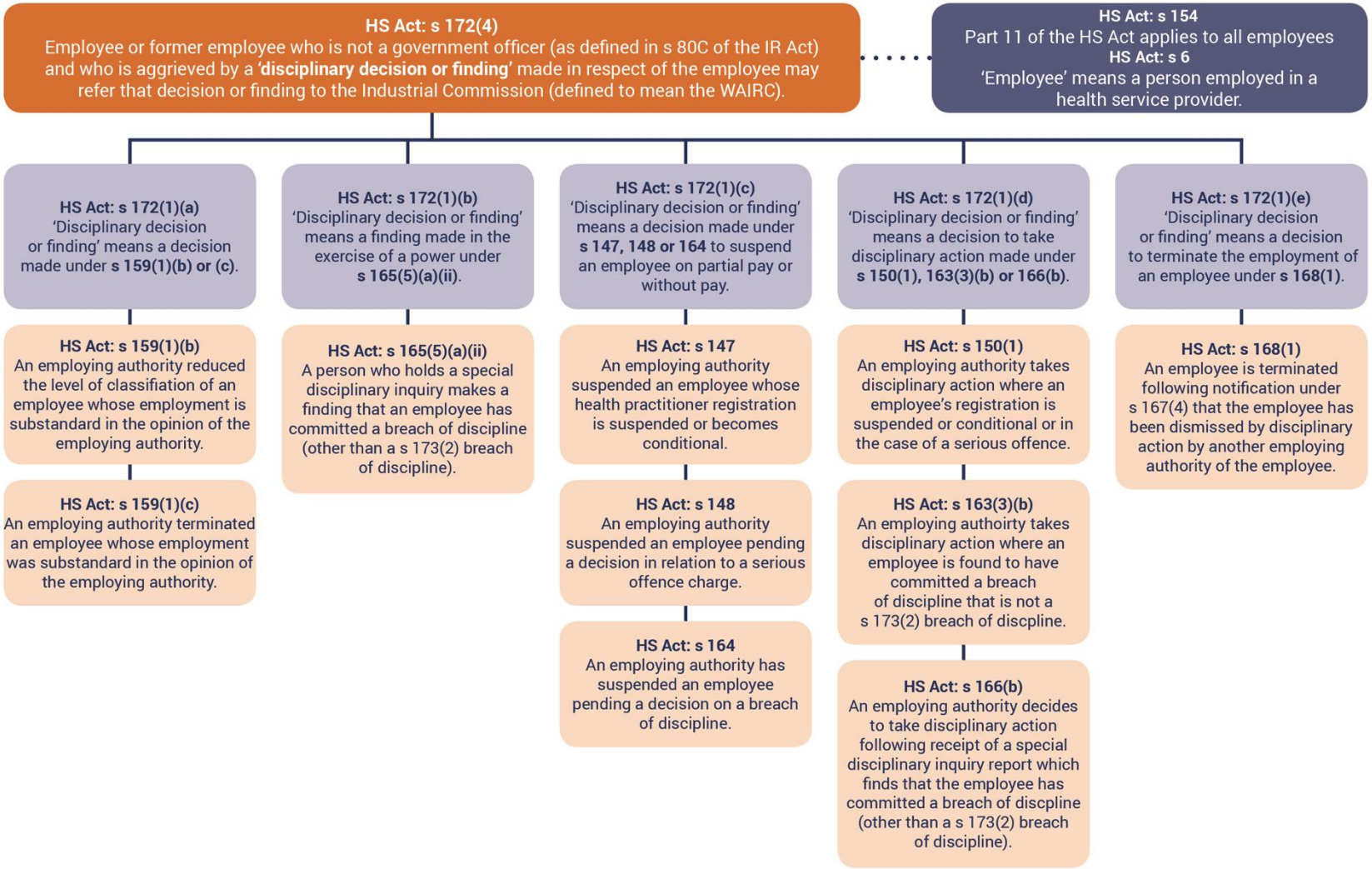
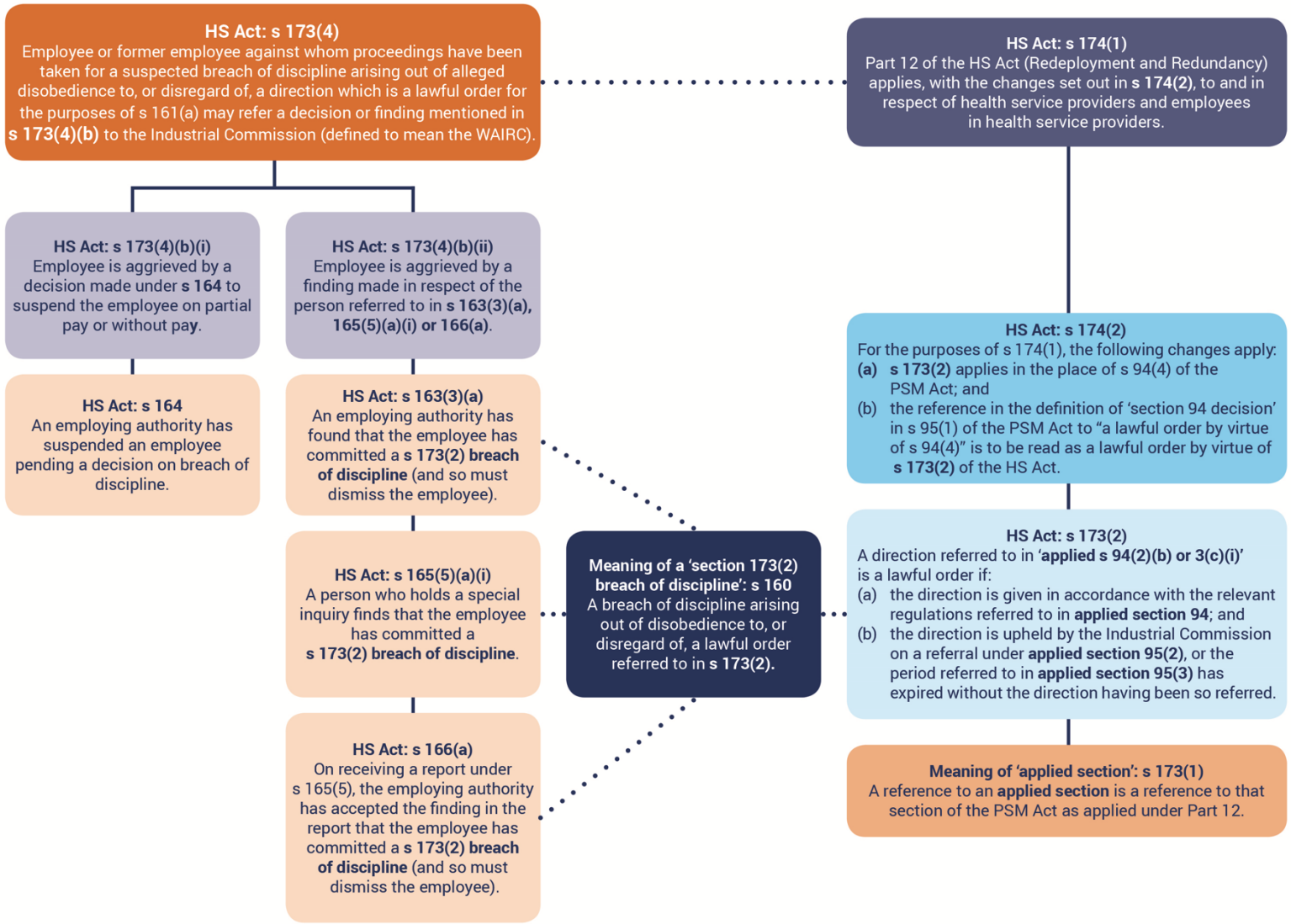


Figure 3B-3. Access to the WAIRC under s 173(4) of the *Health Services Act* by an employee against whom proceedings have been taken for a suspected breach of discipline or disobedience



Chapter 4 Equal Remuneration

4.1 The Term of Reference

454. The third Term of Reference reads as follows:

> The Ministerial Review of the State Industrial Relations System is to consider and make recommendations with respect to the following matters…
>
> 3. Consider the inclusion of an equal remuneration provision in the *Industrial Relations Act 1979* with the objective of facilitating the conduct of equal remuneration cases and other initiatives in the Western Australian Industrial Relations Commission.

455. As set out in the Interim Report the construction of this Term of Reference was relatively straightforward. The Review was to consider whether an equal remuneration provision ought to be included in the IR Act, which will have the effect of facilitating equal remuneration cases in the WAIRC.

4.2 The Interim Report

456. As set out in the Interim Report, the preliminary opinion of the Review was that an equal remuneration provision ought to be included in the IR Act to enhance the prospect of the making of equal remuneration orders by the WAIRC. It was the interim position of the Review that doing so would, hopefully, have an impact upon the equalisation of remuneration between genders in Western Australia. It was also the preliminary opinion of the Review that the equal remuneration provision ought to be based upon the legislative model operating in Queensland.

457. Accordingly, as part of the Interim Report, the Review set out as proposed recommendations 35 and 36, the following:

> 35. The 2018 IR Act is to include an equal remuneration provision based upon the model in the Industrial Relations Act 2016 (Qld).
>
> 36. The 2018 IR Act is to include a requirement that the WAIRC develop an equal remuneration principle to assist parties in bringing or responding to applications brought pursuant to the equal remuneration provision.

458. As set out in the Interim Report the preliminary opinion of the Review was based upon the nature and extent of the Gender Pay Gap (GPG) in Western Australia and because to date there have been inadequate procedures, or the use of

procedures, within the WAIRC to facilitate doing something about it. Additionally, the Review contended that if any equal remuneration provision is included in the IR Act it is likely to increase awareness of the issue and enhance discussion and hopefully a trend towards diminishing the GPG in Western Australia. As set out in the Interim Report, the preliminary opinion of the Review was generally supported by the submissions made to the Review up to that time.

459. In the Interim Report of the Review, the following were set out in some detail:

(a) An outline of the relevant issues.[163]

(b) The nature and extent of the GPG in Australia and Western Australia.[164]

(c) The current legislative and industrial framework in Western Australia relevant to gender pay equity.[165]

(d) A review of the Industrial Relations (Equal Remuneration) Amendment Bill 2011, introduced by the Hon Alison Xamon MLC (Greens WA) and of other legislative issues.[166]

(e) Pay equity research and proposals for reform.[167]

(f) The current Federal framework.[168]

(g) Information about the role of the Federal Workplace Gender Equality Agency (WGEA).[169]

(h) Federal parliamentary inquiries.[170]

(i) The equal remuneration provision in Queensland.[171]

163 Interim Report, [640]-[641].
164 Interim Report, [642]-[644].
165 Interim Report, [645]-[655].
166 Interim Report, [656]-[664].
167 Interim Report, [665]-[674].
168 Interim Report, [675]-[679].
169 Interim Report, [680]-[681].
170 Interim Report, [682]-[688].
171 Interim Report, [689]-[695].

(j) The equal remuneration provision in New South Wales.[172]

(k) A summary of cases arising from the Queensland and New South Wales equal remuneration provisions.[173]

(l) A summary of the Federal Social and Community Services Equal Remuneration case.[174]

(m) A summary of the Federal Childcare Equal Remuneration case, which was dismissed by the FWC on 6 February 2018 because of a lack of evidence of an appropriate male comparator industry.[175]

(n) An analysis of the Western Australian State Social and Community Services case.[176]

(o) A summary and analysis of the submissions made to the Review.[177]

(p) Proposed Recommendations.[178]

4.3 Submissions upon the Interim Report

460. Public submissions upon this Term of Reference and the Interim Report were made by CCIWA, Community Employers WA (CEWA), the DWER, vegetablesWA, the AMWU, the CPSU/CSA, the HSUWA, the SSTUWA, UnionsWA, United Voice, the WAPOU, the WASU, the ECCWA, the ELC and Western Australian Council of Social Service Inc (WACOSS). There was also a confidential submission made by an employer association. This has been considered by the Review but there will be no public identification of the stakeholder who made it.

461. Generally, and consistently with the submissions made to the Review before the publication of the Interim Report, there was widespread support for the recommendations included in the Interim Report. Without descending into detail,

172 Interim Report, [696]-[698].
173 Interim Report, [699]-[708].
174 Interim Report, [709]-[716].
175 Interim Report, [717]-[725]; Application by United Voice and the Australian Education Union [2018] FWCFB 177.
176 Interim Report, [726]-[732].
177 Interim Report, [733]-[750].
178 Interim Report, [751]-[752].

the recommendations were supported by the submissions from the DWER, vegetablesWA, the ECCWA and WACOSS. UnionsWA and affiliate unions also strongly supported the recommendations of the Interim Report. Opposition to the proposed recommendations was provided in a submission by CCIWA. There was also an employer association that provided a confidential submission which is later summarised.

462. CCIWA maintained the view provided to the Review in its initial written submission that there "should be no move towards including equal remuneration provisions into the IR Act, or for the facilitation of equal remuneration cases at the State level". CCIWA also reiterated that it "does not believe that equal remuneration will be effectively realised through the facilitation of equal remuneration cases and other activities of the WAIRC" and that such cases "would be unlikely to achieve pay equality".

463. By way of elaboration CCIWA submitted:

(a) Even the best run and determined equal remuneration or pay equity cases cannot make a difference in such a small jurisdiction for the private sector.

(b) Given the limited extent of the coverage by the State system, the ability to address pay equity/equal remuneration through industrial legislation would be of limited effect. Where sectors are particularly vulnerable, the State Government could and should remedy the situation by direct action.

(c) Pay equity/equal remuneration is most effectively addressed through other initiatives.

(d) As the dominant cohort covered by the State system is the public sector, the most significant impact on pay equity/equal remuneration rests with the WA Government.

(e) The WGEA provides internal and external resources to assist employers to develop policies and strategies for gender equality. The 2015 Review of the Industrial Relations Framework in Queensland recognised that the

reports from employers affected by the *Workplace Gender Equality Act 2012* (Cth) (WGE Act) have been "instrumental in providing the impetus for change in some workplaces".

(f) Continued progress is more effectively achieved through cooperative initiatives and programs with business and the WA Government could deliver business driven change rather than "imposed outcomes".

464. It is noted by the Review that the above submission did not reflect any opposition by CCIWA to measures being taken to reduce the GPG. CCIWA reiterated that it would welcome the opportunity to "partner" with the State Government on the development of an "innovative strategy to deliver promotion and other initiatives to the WA business community". It also submitted that as the private sector cohort covered by the State system was dominantly award reliant and comprised of small and micro businesses, sole traders, partnerships and trusts, the award system already enforces equal pay for work of equal value. It also submitted the proposed recommendations of the Review about the consolidation and modernisation of the State's award system on the basis of industry and occupation could facilitate greater support by and from awards towards securing gender pay equity.

465. CCIWA submitted that if there was to be a recommendation for equal remuneration provisions in the IR Act, they should reflect Part 2-7 of the FW Act as that would "continue the legislative alignment of minimum standards between the national and State jurisdictions and maintain consistency within WA for all employers and employees". CCIWA noted the *Industrial Relations Act 2016* (Qld) (Qld IR Act) only applied to State and local government employees given the Queensland government's referral of legislative powers on industrial relations for the private sector to the Commonwealth. Accordingly, the Qld IR Act only applied to State and local government employees representing approximately 14 per cent of the Queensland workforce. It stated the WA public sector was comparable and constituted approximately 12 per cent of the workforce of Western Australia.

466. The confidential submission by an employer group said that consideration should be given to the benefits of the equal remuneration provisions mirroring the Queensland model, being applied to employees of unincorporated and typically small employers, particularly in respect of orders for wage increases and allowances. The submission contended that a committee should be formed to consider the practical benefits and potential consequences of the proposed recommendations in circumstances where the provision would be likely to apply to small businesses. That submission did not seek to comment upon equal remuneration as it might apply to employees of the WA Government.

467. The most detailed submissions on behalf of unions, on this issue, were provided by UnionsWA and United Voice. UnionsWA supported the inclusion of an equal remuneration provision in the Amended IR Act based upon the model in Queensland. UnionsWA submitted:

(a) The experience of affiliates of equal remuneration order (ERO) applications under the FW Act is that they are lengthy, costly and protracted. The requirement for a predominantly male comparator industry is widely acknowledged as being unduly limiting on an application, because it fails to consider the historical, institutional and cultural undervaluation of feminised work and how industrial standards and benchmarks have been set in Australia. By contrast, the Queensland ERO system under the Qld IR Act does not require male comparators in order to establish undervaluation on a gendered basis.

(b) The proposed recommendation ensures that the provision is available and not subject to the State Wage Order, which increases the protection of the principle. The current provisions in the State Wage Order are insufficient as they have not resulted in any practical outcomes to reduce pay inequity.

(c) The proposed recommendation will enable public sector unions to initiate equal remuneration cases for classifications predominantly occupied by

females such as dental clinic assistants, child protection workers and social trainers.

(d) The provision should include a requirement for equal remuneration provisions in State awards and agreements.

468. United Voice also strongly supported the proposed recommendation. It submitted that although "equal remuneration and the gender pay gap are not analogous, equal remuneration will go some way to closing the gender pay gap by addressing the gender-based undervaluation of certain industries".

469. United Voice also reiterated, consistently with the submission made by UnionsWA, that equal remuneration order applications under the FW Act were lengthy, costly and protracted. Emphasis was again placed upon the prerequisite for having a male comparator. United Voice submitted it was a "retrograde step". The Queensland equal remuneration order system was therefore favourably compared in that "equal or comparable value" in the Qld IR Act had not been interpreted to require a comparator industry. United Voice submitted:

> As highlighted by the success of the Queensland ECEC[179] and Dental Assistants EROs[180] the Queensland ERO is clearly preferable to the FW Act ERO primarily because there is no requirement for a male comparator industry.

470. United Voice then noted that the majority of submissions made in the Interim Report were in favour of an equal remuneration provision and preferred the Queensland model over the Federal model.

471. The UnionsWA submission was also supported by affiliate unions the WAPOU, the HSUWA, AMWU and the WASU.

472. The CPSU/CSA also agreed with proposed recommendation 35 and said the current provision in the State wage Order was insufficient and had not resulted in any practical outcomes to reduce pay inequity. It reiterated the potential benefits of an equal remuneration provision to public sector "classifications predominantly occupied by females". The submission provided the examples of dental clinic

179 Early Childhood Education and Care.
180 Equal Remuneration Orders.

assistants, child protection workers and social trainers. The CPSU/CSA submission reiterated its support for the Queensland.

473. The SSTUWA supported the inclusion of an equal remuneration provision in the IR Act because:

(a) The GPG in WA is significantly higher than the national average.

(b) To the extent that there is any mechanism to address the issue within the current State industrial relations system that had not been effectively used to date.

(c) The inclusion of an equal remuneration provision within the IR Act would be consistent with public policy objectives to reduce inequities in the labour market.

474. As stated earlier both WACOSS and the ELC supported the proposed recommendations. The ELC also said, consistently with the submission from UnionsWA, that the Amended IR Act include a requirement to ensure awards and agreements provided equal remuneration, broadly similar to the requirement in the Qld IR Act. The ELC also submitted, the:

> Queensland Industrial Relations Commission issued an equal remuneration principle in 2002,[181] which appears to have provided valuable guidance to parties involved in applications under equal remuneration provisions in the Queensland jurisdiction since its issue.

4.4 Earlier submissions and information

475. In addition to the submissions provided upon the Interim Report, the Review has continued to take note of the submissions provided to the Review prior to publication of the Interim Report and also the other sources of information considered up to that point in time.

476. In particular, the Review repeats that in 2004, Dr Trish Todd and Dr Joan Eveline from the University of Western Australia were commissioned by the then Minister for Employment Protection to conduct an independent review of the GPG in

[181] Queensland Industrial Relations Commission, Equal Remuneration Principle, 29 April 2002.

Western Australia. As noted in the Interim Report, the report on the review of the GPG in Western Australia (Todd & Eveline Review) was tabled in State Parliament in November 2004. It provided 34 recommendations on strategies to address the GPG. One of the key recommendations of that review was the inclusion of an equal remuneration part in the IR Act to allow the WAIRC to hear applications to achieve gender pay equity in awards and the inclusion of a requirement for employers to demonstrate that they have taken account of gender issues in relation to remuneration in registering industrial agreements and employer-employee agreements. Attachment 4B to the Interim Report sets out in tabular form the Todd & Eveline Review recommendations and whether or not they had been implemented, not implemented or partially implemented. The suggested changes to the IR Act have not been implemented. In the opinion of the Review, the position taken in the Todd & Eveline Review supports the notion that the suggested recommendations contained in the Interim Report are long overdue.

4.5 Developments since the Interim Report

477. There have, not unexpectedly, been developments since the publication of the Interim Report. On 21 March 2018 Ms Sally McManus, the Secretary of the Australian Council of Trade Unions (ACTU), made a speech to the National Press Club that addressed the FWC decision to dismiss the Childcare Workers' Equal Remuneration case. Ms McManus said that the case demonstrated that current Australian laws were not capable of addressing the GPG for people in female dominated industries and that action was required to "fix the broken pay rules".

478. This followed the ACTU making a submission to the Senate Future of Work and Workers Inquiry in February 2018. The ACTU submission was that a concerted policy response was required to address the pervasive GPG. It was submitted that the pay gap results in even greater inequity in retirement incomes as women have an average superannuation balance that is $140,000 less than that of men upon retirement. The submission said that women over 55 are at higher risk of homelessness due to a lack of superannuation and an inability to obtain

sustainable employment, which results in them falling back on to an inadequate social security system.[182]

479. On 27 March 2018 United Voice arranged a national day of action in support of the childcare workers' claims for a 30 per cent pay increase and better working conditions.[183] It was reported that over 6,500 workers across Australia walked off the job to draw attention to claims for equal pay for early educators.

480. More specifically, to Western Australia, on 29 March 2018 Hon. Alison Xamon MLC (Greens) introduced the Industrial Relations (Equal Remuneration) Amendment Bill 2018 into the Legislative Council. The Bill was in the same form as the Bill previously introduced by Ms Xamon in October 2011. The contents of that Bill were summarised in the Interim Report. Essentially, the Bill seeks to amend the IR Act to provide for the WAIRC to issue equal remuneration orders.

481. In the second reading speech accompanying the Bill, Ms Xamon said the following:[184]

> A strong legislative basis for pay equity is essential to reducing Australia's gender pay gap and to supporting female workforce participation and Western Australia has, very slowly, been making progress towards this. Formal recognition of the principle of equal remuneration for work of equal value was introduced into the Industrial Relations Act 1979 in 2002 when amendments inserted a new principle object into the act "to promote equal remuneration for men and women for work of equal value."
>
> In 2006 the Labour Relations Legislation Amendment Act 2006 introduced section 50A, which enabled the Western Australian Industrial Relations Commission to determine minimum wages whilst having regard to a new set of specified criteria, including that wage orders "provide equal remuneration for men and women for work of equal or comparable value". However, the current legislative provisions remain inadequate. For example, although a greater proportion of women than men are paid the minimum wage and it is vitally important that consideration be given to equal remuneration when setting the minimum wage, the capacity for this mechanism to be used to address the issue of the gender pay gap more broadly is obviously limited. The authority of the Western Australian Industrial Relations Commission to hear pay equity cases also remains in question, which is the principal reason I am introducing this bill. The Industrial Relations (Equal Remuneration) Amendment Bill 2018 makes clear the authority of the commission to hear such cases.
>
> …
>
> I would like to provide a bit of background for the need for this bill. At 22.8 per cent,

182 ACTU Submission to the Senate Select Committee on the Future of Work and Workers Inquiry, February 2018.

183 A pay claim for an additional 35 per cent was rejected by the FWC in February 2018.

184 Western Australia, *Parliamentary Debates*, Legislative Council 29 March 2018, (Alison Xamon) E1415-1417.

WA has the largest gender pay gap in Australia. For every dollar earned by a man in WA, a woman will earn 77c. For each week of full-time ordinary work a woman will receive $373.50 less than a man. These are appalling statistics. Of great concern to me is that, despite recognising the issue for decades, successive governments have failed to make any real inroads into reducing WA's gender pay gap. One of the reasons for the continuing failure to address the state's gender pay gap is a persistent and fundamental lack of awareness and understanding about the existence and nature of the gap. There is a common misconception that a significant amount of responsibility for the gap lies in the characteristics of our resources sector. Our appalling gender pay gap cannot be solely explained away by WA's resources sector and the relatively small numbers of women employed in that sector. The mining industry accounts for only around six per cent of employment in WA so the mining industry is only a small part of the story. Pay inequity is present at all skill and income levels across industries. That being said, some sectors have higher gender pay gaps than the average, such as the finance and retail sectors. This, again, is only a small part of the problem. Reasons for the gender pay gap are complex and multifaceted and include unsupportive working arrangements and over representation of women in casual and non-career part-time employment. A significant portion of the gap is caused, not by pay differentials within industries, but by the highly segregated nature of Western Australia's workforce, and the fact that women and men tend to work in different industries.

Perhaps the most significant cause of the persistent lack of pay equity is the disparity that occurs between traditionally male or traditionally female jobs, and the devaluing of that work undertaken by women. This is clearly evident in the characteristics of our social and community services sector. The sector employees around 83 per cent women and 17 per cent men. There is a raft of reasons why workers in the community sector earn so much less than others, even when their jobs require similar levels of expertise or training as workers in the public sector or other fields. But fundamentally it is about the cultural devaluation and poor industrial protection of work traditionally viewed as being "women's work".

Women are in effect being penalised for caring for the most disadvantaged within our community; we need to remove this penalty. Recognition of the fact that employees in the social and community services sector have for too long been undervalued and underpaid was recently provided by the landmark finding by Fair Work Australia that for employees in this sector, "there is not equal remuneration for men and women workers for work of equal value by comparison with state and local government employment."…

We need to remove the persistent barriers within our industrial relations system that prevent us addressing the issues of pay equity on a state level. Western Australia has the largest gender pay gap of any state or territory. We have a moral responsibility to ensure that those workers covered under the state industrial relations system are not being paid lower wages because of longstanding undervaluing of work traditionally viewed as "women's work". We should be leading the other states in our efforts to address the issue because we are currently running last and have the most work to do.

Any equity protection for Australian working women is a patchwork of commonwealth, state and territory laws and policy instruments in both the industrial relations and anti-discrimination arenas. I believe it is important within the extremely complicated overlap of industrial systems that all Western Australian workers are afforded the same level of protection in regard to pay equity.

Western Australian women constitute a higher proportion of casual workers, and are

> more likely to be working under minimum employment conditions and be engaged in low-paid occupations and industries. They are under-represented in senior and decision-making roles across business, government and the community. Western Australian women continue to experience workplace discrimination on the basis of sex, pregnancy, potential pregnancy and family responsibilities. Women should not be paid less than men for doing work of similar value, and our laws should not allow the systemic undervaluing of women's work. We need to amend the Industrial Relations Act 1979 so that there is a remedy when this occurs.

482. The Review is of the opinion that the observations made by Ms Xamon in the second reading speech support the proposed recommendations contained in the Interim Report, even though Ms Xamon's Bill seeks to introduce equal remuneration provisions similar to those in the FW Act.

483. On 10 April 2018 Ms Xamon asked a parliamentary question regarding equal remuneration strategies. The question was answered by Hon. Alannah MacTiernan MLC on behalf of the Minister for Commerce and Industrial Relations. Ms MacTiernan said the Government will consider any equal remuneration strategies recommended by the Review.[185]

484. Relevant to some of the submissions made by CCIWA, on 13 May 2018 the Perth Now website published an article entitled "Gender Equality: Why WA is still a boys club". The article highlighted that only 10 women "run public companies" in Western Australia. The article referred to an analysis by Deloittes that found of the 638 companies listed on the ASX that are based in WA, only ten of these have female chief executive officers and only five have a female chair. The article quoted Ms Libby Lyons, the Director of the WGEA who "slammed WA's ingrained culture that has led to a lack of diversity in senior management ranks and a lack of transparency in the appointment of those positions". Ms Lyons was quoted as saying WGEA data shows that last year WA was the "worst performing state" and trailed the national average in regard to the GPG, flexible workplaces and domestic violence processes, and the proportion of female CEOs. The Hon. Simone McGurk MLA, Minister for Women's Interests in Western Australia, was reported as saying, in response, that "no "silver bullet" existed for gender equality

185 Western Australia *Parliamentary Debates* Legislative Council, Thursday 12 April 2018, E1961-1962.

and that all sectors needed to work together to "shift deeply embedded norms around gender"".

485. The facts and opinions contained within these articles also provide broad support for the proposed recommendations contained in the Interim Report.

486. The 2018 State Wage Case (SWC) was heard by the WAIRC on 23 May 2018. As mentioned below, just before the publication of the Final Report, the WAIRC handed down its decision on 13 June 2018.[186] The Review has not had the time to fully consider all of the implications of the SWC decision. It did however have the benefit of receiving the transcript of the hearing and also received a report on the hearing from the Secretariat. Issues were raised about the WAIRC receiving submissions about the currency of the wage fixing "Statement of Principles" including whether a separate equal remuneration principle should be developed. The WAIRC also invited submissions on whether, in light of the Review, the Principles ought to be amended at this time or await the outcome of the Review. UnionsWA and the Minister supported the development of a separate equal remuneration principle for inclusion in the Statement of Principles. CCIWA indicated it did not support any changes to the Statement of Principles at this point in time, given the Review may propose some major changes to the State IR system. The WAIRC indicated the Review was shortly to issue its final report, but also said that any legislative changes emanating from it could take some time to implement.[187]

487. The WAIRC also invited comment from the parties upon whether it should bring on an application for a General Order, of its own motion and outside of the SWC, to develop an equal remuneration principle through conciliation between the section 50 parties (and if necessary, arbitration). The WAIRC noted the Statement of Principles can only be amended once per year as part of the State Wage Order, but suggested that any equal remuneration principle developed through a separate General Order could be incorporated into the Statement of Principles at

186 2018 State Wage Order Reasons for Decision, 2018 WAIRC 00363.
187 APPL 1 of 2018, Transcript of State Wage Case - 23 May 2018 www.wairc.wa.gov.au.

a later date. The WAIRC has asked the Minister to have discussions with the section 50 parties about the process for developing an equal remuneration principle and to report back to it as soon as possible.

488. In its reasons for decision, the WAIRC at [263(a)] said:

> We intend to bring on an application of our own motion for the making of a General Order under s 50 of the Act. Its purpose will be to provide a mechanism for the development of a principle dealing with equal remuneration for men and women for work of equal or comparable value. We intend to then convene a conference of the s 50 parties and other interested persons and organisations, with a view to facilitating the development of a principle by agreement.

489. On this topic, the Review notes that in its submission, CCIWA said in relation to proposed recommendation 36:

> CCIWA submits that the establishment of an equal remuneration principle as provided for by recommendation 36 is best achieved as a consent principle.

490. This is a proactive move by the WAIRC, and is consistent with proposed recommendation 36. It does not however obviate the requirement for the Review to comply with the Term of Reference and make the recommendations it considers appropriate.

4.6 Analysis of Submissions

4.6.1 Proposed Recommendations 35 and 36

35. The 2018 IR Act is to include an equal remuneration provision based upon the model in the *Industrial Relations Act 2016* (Qld).

36. The 2018 IR Act is to include a requirement that the WAIRC develop an equal remuneration principle to assist parties in bringing or responding to applications brought pursuant to the equal remuneration provision.

491. Given its importance as a stakeholder in the WA industrial relations system, the Review has given close consideration to the submissions made by CCIWA. They do not however persuade the Review that proposed recommendations 35 and 36 of the Interim Report ought not to be the recommendations made by the Review.

492. It is correct, as CCIWA has asserted that the Government could have a proactive role, of its own volition, to deal with some equal remuneration issues. That does not mean however, in the opinion of the Review, that there is not a good case for

an equal remuneration provision being contained in the IR Act. The insertion of such a provision will allow individuals, groups of employees or unions to make applications to the WAIRC to try and address equal remuneration issues. They should be able to do so if they regard as inadequate any WA Government non-legislative pay equity strategies. The Review does not accept as a reason not to recommend an equal remuneration provision that the State Government could do something, independently, or additionally. Employees should, either individually, or through their unions be able to try and address equal remuneration issues themselves, before and with the assistance of the WAIRC.

493. Similarly, the Review is not persuaded by the CCIWA submission that, in effect, an equal remuneration provision is unnecessary because of the (relatively) small number of private sector employees in Western Australia who are governed by the State system. Those employees should not be excluded from the benefit that an equal remuneration provision may provide, because their employers are covered by the State system and not the Federal system. It should be noted that having an equal remuneration provision in the IR Act does not provide a direct benefit for State system employees but rather provides an avenue for making a claim that an award does not provide for equal remuneration for work of equal or comparable value. Even if, as CCIWA assert, that the presence of an equal remuneration provision in the IR Act may have a limited impact upon the particular employers and employees covered by the State system, that is not, overall, a good reason for not having such a provision given the materials assessed in the Interim Report and the overwhelming support for the provision from unions and other stakeholders who have made submissions to the Review.

494. Additionally, public sector employees should be able to obtain the benefit, in the way described above, of having an equal remuneration provision in the IR Act.

495. In the opinion of the Review the proposed recommendations contained in the Interim Report ought to be made to the Minister.

496. The Review has also given consideration to whether there ought to be included in the Amended IR Act a requirement to ensure that awards and agreements provide for equal remuneration in broadly the same way as the requirement in the Qld IR Act. The issue is also discussed in Chapter 7 about awards for the private sector in Western Australia. The Review does not think the review of State awards, there recommended, should include a requirement that each award ought to be amended to ensure that it provides equal remuneration for work of equal or comparable value as part of the award review process. That is because such a requirement could have the effect of slowing down what is intended to be a relatively expeditious exercise. That is not to say, however, that any new awards to be made outside of the award review process, and existing State awards, ought not to provide for equal remuneration. The equal remuneration provision proposed to be included in the Amended IR Act will provide a clear avenue for a range of parties to make an application to the WAIRC for an equal remuneration order for employees covered by a particular award.

4.7 Recommendations

497. With respect to Term of Reference 3 the Review makes the following recommendations and observations:

40. The Amended IR Act is to include an equal remuneration provision based upon the model in the *Industrial Relations Act 2016* (Qld).

41. The Amended IR Act is to include a requirement that the WAIRC develop an equal remuneration principle to assist parties in bringing or responding to applications brought pursuant to the equal remuneration provision.

Chapter 5 Definition of Employee

5.1 The Term of Reference

498. The fourth Term of Reference is as follows:

The Ministerial Review of the State Industrial Relations System is to consider and make recommendations with respect to the following matters…

4. Review the definition of "employee" in the *Industrial Relations Act 1979* and the *Minimum Conditions of Employment Act 1993* with the objective of ensuring comprehensive coverage for all employees.

499. The Interim Report set out the following about the meaning and the direction of the Term of Reference:

> 754. As set out below both the IR Act and the MCE Act exclude some employees from their coverage. The Term of Reference directs attention to those exclusions. The Term of Reference contains an objective of "ensuring comprehensive coverage for all employees". That could be achieved by an amendment to the IR Act and the MCE Act to remove the exclusions. The Review construes the Term of Reference to be an instruction to look at the exclusions and question and provide recommendations about whether they ought to continue. In referring to the objective of "comprehensive coverage" the Review gleans that the Minister's position is that, absent good reason, the IR Act and the MCE Act ought to apply to employees universally. That is understandable given the purpose and scope of the IR Act and the MCE Act.
>
> 755. For the constitutional reasons set out in chapter 1, there are limits to the employees that the State could legislate about in the IR Act and the MCE Act. The State can only legislate about the employers, employees and aspects of the employment relationship that remain after the operational scope of the FW Act is taken into account. That is of course not something the State can of itself do anything about.
>
> 756. If the Term of Reference were construed narrowly, the Review would not look at whether the coverage of the IR Act and the MCE Act ought to be extended to cover people who perform work for others but who are not excluded "employees" under the two Acts. However, in considering the scope of the Term of Reference the Review is guided by the observations made by the Minister to the Parliamentary Committee referred to in chapter 1. There, the Minister referred to the definition of employee as being an essential issue in modern society and made particular reference to the "gig economy" and "Uber drivers". Due to this the Review considers it within the Term of Reference to also consider whether there can and ought to be amendments to the legislation to provide for the gig economy.

500. As set out in the Interim Report the Term of Reference required the Review to examine the definitions of "employee" in the IR Act and the MCE Act. As also

there stated, the employees who are excluded from coverage under the IR Act and the MCE Act are, somewhat curiously, not identical.

5.2 The Interim Report

501. The Interim Report compared definitions of an "employee" in legislation in Western Australia, which can be broadly described as providing rights and protections for people who are engaged in doing work for others. The legislation covered was the IR Act, the MCE Act, the OSH Act, the LSL Act and the *Workers' Compensation and Injury Management Act 1981* (WA) (WCIM Act).

502. Due to its importance to this Term of Reference the Review includes this table again.

Table 5A Definitions of employee in legislation

Act	Definition
IR Act s 7	'employee' means — (a) any person employed by an employer to do work for hire or reward including an apprentice; or (b) any person whose usual status is that of an employee; or (c) any person employed as a canvasser whose services are remunerated wholly or partly by commission or percentage reward; or (d) any person who is the lessee of any tools or other implements of production or of any vehicle used in the delivery of goods or who is the owner, whether wholly or partly, of any vehicle used in the transport of goods or passengers if he is in all other respects an employee, but does not include any person engaged in domestic service in a private home unless — (e) more than 6 boarders or lodgers are therein received for pay or reward; or (f) the person so engaged is employed by an employer, who is not the owner or occupier of the private home, but who provides that owner or occupier with the services of the person so engaged.
MCE Act s 3	'employee' means a person who is an employee within the meaning of the IR Act, but does not include a person who belongs to a class of persons prescribed by the regulations as persons not to be treated as employees for the purposes of this Act.

Act	Definition
Minimum Conditions of Employment Regulations 1993 Sch 1 prescribes "Persons who are not employees for the purposes of the Act"	**1. Persons paid wholly by commission** Persons whose services are remunerated wholly by commission or percentage reward. **2. Piece workers** Persons whose services are remunerated wholly at piece rates. **3. Persons with disabilities in supported employment** Persons — (a) who receive a disability support pension under the *Social Security Act 1991* of the Commonwealth; and (b) whose employment is supported by "supported employment services" within the meaning of the *Disability Services Act 1986* of the Commonwealth. **4. Volunteers etc**. Persons who are not entitled to be paid for work done by them but who receive some benefit or entitlement in relation to the work. **5. National Trust (WA)** Persons appointed under section 22(1) of the *National Trust of Australia (W.A.) Act 1964* to carry out the duties of wardens in relation to property that is managed, maintained, preserved, or protected, whether solely or jointly, by the National Trust of Australia (W.A.).
OSH Act s 3	'employee' means — (a) a person by whom work is done under a contract of employment; or (b) an apprentice [In certain parts of this Act the meaning of employee is extended to include contractors and labour hire arrangements]
LSL Act s 4 LSL Act s 4(3)	'employee' means, subject to subsection (3) — (a) any person employed by an employer to do work for hire or reward including an apprentice; (b) any person whose usual status is that of an employee; (c) any person employed as a canvasser whose services are remunerated wholly or partly by commission or percentage reward; or (d) any person who is the lessee of any tools or other implements of production or of any vehicle used in the delivery of goods or who is the owner, whether wholly or partly, of any vehicle used in the transport of goods or passengers if the person is in all other respects an employee. Where a person is, by virtue of — (a) an award or industrial agreement; (b) an employer-employee agreement under Part VID of the *Industrial Relations Act 1979* or other agreement between the person and his employer; or (c) an enactment of the State, the Commonwealth or of another State or Territory, entitled to, or eligible to become entitled to, long service leave at least equivalent to the entitlement to long service leave under this Act, that person is not within the definition of "employee" in subsection (1).

Act	Definition
WCIM Act s 5	**worker** does not include a person whose employment is of a casual nature and is not for the purpose of the employer's trade or business, or except as hereinafter provided in this definition a police officer or Aboriginal police liaison officer appointed under the *Police Act 1892*; but save as aforesaid, means any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise and whether the contract is expressed or implied, is oral or in writing; the term **worker**, save as hereinbefore provided in this definition, includes a police officer or Aboriginal police liaison officer appointed under the *Police Act 1892*, who suffers an injury and dies as a result of that injury; the term **worker** save as aforesaid, also includes - (a) any person to whose service any industrial award or industrial agreement applies; and (b) any person engaged by another person to work for the purpose of the other person's trade or business under a contract with him for service, the remuneration by whatever means of the person so working being in substance for his personal manual labour or services, and any reference to a worker who has suffered an injury shall, where the worker is dead, include a reference to his legal personal representative or to his dependants or other person to whom or for whose benefit compensation is payable. *[The term employee is not defined in this Act]*
FW Act s 15 (1) FW Act; s 12	**Ordinary meanings of employee and employer** A reference in this Act to an employee with its ordinary meaning: (a) includes a reference to a person who is usually such an employee; and (b) does not include a person on a vocational placement. Note: ss 30E(1) and 30P(1) extend the meaning of **employee** in relation to a referring State. **"Vocational placement"** means a placement that is: (a) undertaken with an employer for which a person is not entitled to be paid any remuneration; and (b) undertaken as a requirement of an education or training course; and (c) authorised under a law or an administrative arrangement of the Commonwealth, a State or a Territory.

503. As referred to in the Interim Report the Minister wrote an opinion piece that was published on the website of *The West Australian* newspaper, on 6 October 2017 and also made comments in Parliament on 18 October 2017.[188] On those occasions the Minister said the exclusions under the IR Act and the MCE Act mean

[188] Western Australian Parliamentary Debates, Legislative Assembly, 18 October 2017, PQ No. 545, p 27.

that Western Australia does not comply with the International Labour Organization Protocol of 2014 to the *Forced Labour Convention 1930* (the ILO Protocol), which requires that specific labour laws apply to all workers and all sectors of the economy.[189] The Minister pointed to the exclusions in the Western Australian legislation as being a barrier to the Commonwealth Government ratifying the Protocol and has said this is one reason for the present review of the definition of an "employee".

504. Accordingly, the Review set out in the Interim Report the background to and some of the ILO Protocol.

505. The Review then considered and analysed the following:

(a) Statutory definitions of employee.[190]

(b) International implications of exclusion under the ILO process.[191]

(c) The IR Act and MCE Act exclusion of domestic service workers.[192]

(d) The MCE Act exclusion of commission based and piece workers.[193]

(e) The MCE Act exclusion of persons with disabilities in supported employment.[194]

(f) The MCE Act exclusion of volunteers.[195]

(g) The MCE Act exclusion of certain employees of the National Trust of Australia (WA).[196]

(h) Issues relating to coverage by the IR Act and MCE Act for people who are working without or contrary to the terms of a visa under the *Migration Act 1958* (Cth) (the Migration Act).[197]

189 ILO, PO 29 – Protocol of 2014 to the *Forced Labour Convention, 1930* available at www.ilo.org.
190 Interim Report, [757]-[761].
191 Interim Report, [762]-[781].
192 Interim Report, [782]-[822].
193 Interim Report, [830]-[837].
194 Interim Report, [838]-[868].
195 Interim Report, [869]-[872].
196 Interim Report, [873]-[879].

(i) Issues relating to coverage by the IR Act and MCE Act for people employed in Western Australia by a foreign state or consulate.[198]

(j) Issues relating to coverage by the IR Act and MCE Act for people who are employed as sex workers.[199]

(k) Issues relating to coverage by the IR Act and MCE Act for people employed in the "gig economy".[200]

506. The Interim Report then set out the following proposed recommendations, for submission and discussion purposes and these specific requests for additional submissions:

37. The 2018 IR Act not exclude from its coverage any employee whose place of work is the private home of another person, presently referred to as "any person engaged in domestic service in a private home" in s 7(1) of the IR Act.

38. The 2018 IR Act not exclude from its coverage persons whose services are remunerated wholly by commission or percentage reward, or wholly at piece rates, being persons who are currently excluded from the definition of an employee under s 3 of the *Minimum Conditions of Employment Act 1993* (WA) (MCE Act) and regulation 3 of the *Minimum Conditions of Employment Regulations 1993* (the MCE Regulations).

39. The 2018 IR Act not exclude from its coverage persons:

(a) Who receive a disability support pension under the *Social Security Act 1991* (Cth); and

(b) Whose employment is supported by "supported employment services" within the meaning of the *Disability Services Act 1986* (Cth), being persons currently excluded from the definition of an employee under s 3 of the MCE Act and regulation 3 of the MCE Regulations.

40. A taskforce be assembled and chaired by a representative of the Department of Mines, Industry Regulation and Safety (DMIRS), with representatives from the Chamber of Commerce and Industry WA (CCI), UnionsWA and the WAIRC, to assist employers and employees in the change to the regulation of employment in Western Australia contained in proposed recommendations in [37], [38] and [39] above, and any proposed recommendations that might arise after the receipt by the Review of submissions in response to the requests in [42] – [45] below.

41. Given:

(a) The operators of digital platforms in the gig economy are mostly if not entirely constitutional corporations; and

197 Interim Report, [879]-[915].
198 Interim Report, [916]-[922].
199 Interim Report, [922]-[928].
200 Interim Report, [929]-[970].

(b) If these constitutional corporations employ people they will be national employers under the FW Act, whose industrial relations and employees' conditions of employment are governed by the FW Act; and

(c) If these constitutional corporations engage someone as an independent contractor under a "services contract", as defined in s 5 of the *Independent Contractors Act 2006* (Cth) (IC Act), so that s 7 of the IC Act applies to exclude State laws from operating in the circumstances there set out, in relation to any workplace relations matter, as defined in s 8 of the IC Act; so that

(d) The State Parliament may have very limited, if any, legal authority to effectively legislate about the engagement, working conditions and termination of engagement of people working in the gig economy; and

(e) The gig economy is a new and fast developing industry in Western Australia; but

(f) As the State Government has a legitimate interest in the engagement, working conditions and termination of engagement of people working in the gig economy in Western Australia; therefore

(g) A taskforce be assembled and chaired by a representative of DMIRS and include a member from the CCI, UnionsWA, the WAIRC, the State Solicitor's Office and a nominee of the President of the Law Society of Western Australia, to monitor the engagement, working conditions and termination of engagement of people in the gig economy and to consider and report to and make recommendations to the Minister as to whether and to what extent the regulation of the industry can or ought to be pursued by the State Government, by way of representations to the Commonwealth Government, separate legislative action or otherwise.

The Review seeks additional submissions on these issues arising from Term of Reference 4.

42. Whether, and if so what, limitations or safeguards ought to be imposed upon industrial inspectors or people holding right of entry permits with respect to the carrying out of their duties, rights and privileges at places of work that are also private residences.

43. Whether the MCE Act or, if included in the 2018 IR Act, the State Employment Standards, should contain the following exclusion, either at all or in some amended form:

Volunteers etc.

Persons who are not entitled to be paid for work done by them but who receive some benefit or entitlement in relation to the work.

being persons who are currently excluded from the definition of an employee under s 3 of the MCE Act and regulation 3 of the MCE Regulations.

44. Whether the MCE Act or, if included in the 2018 IR Act, the State Employment Standards, should exclude from its coverage persons appointed under s 22(1) of the *National Trust of Australia Act 1964* (WA) to carry out the duties of wardens, being persons who are currently excluded from the definition of an employee under s 3 of the MCE Act and regulation 3 of the MCE Regulations.

45. Whether:

(a) The 2018 IR Act could contain a legally operative provision, broadly similar to s 192 of the *Workers' Compensation and Injury Management Act 1981* (WA), that would have the effect of allowing the 2018 IR Act to cover people who are, under the *Migration Act 1958* (Cth) either unlawful non-citizens in Australia who have engaged in work for an employer, or who are lawful non-citizens in Australia who have engaged in work for an employer that is contrary to the conditions of their visa, having regard to s 109 of the Commonwealth Constitution, the contents of s 235 of the *Migration Act* and the *Migration Act* as a whole.

(b) If the answer to (a) is yes, whether, as a matter of policy, the 2018 IR Act ought to contain such a provision.

46. Whether the IR Act, MCE Act or, if included in the 2018 IR Act, the State Employment Standards, ought to apply to:

(a) People who are employed in Western Australia by a foreign state or consulate.

(b) People who are employed as sex workers.

5.3 Submissions upon the Interim Report

507. Public submissions on the Interim Report and about this Term of Reference were received from AMMA, CCIWA, DWER, Master Builders, AMWU, the HSUWA, UnionsWA, United Voice, the WASU, the WAPOU, My Place Foundation (My Place), WACOSS, WA Individualised Services (WAiS), the ELC, the ECCWA, the HIA, vegetablesWA, the TWU, Mr Peter Katsambanis MLA (in his private capacity), Scarlet Alliance, and the National Trust Western Australia. Confidential submissions were received by an employee association, an employer association and a private individual. These submissions have been considered by the Review and will be referred to where relevant, although the authors will not be identified.

508. It is appropriate to consider and analyse each of the sets of submissions about the particular proposed recommendation or request for additional submissions contained in the Interim Report.

5.3.1 Proposed Recommendation 37

The 2018 IR Act not exclude from its coverage any employee whose place of work is the private home of another person, presently referred to as "any person engaged in domestic service in a private home" in s 7(1) of the IR Act.

509. There were different views expressed in the submissions received about this proposed recommendation. Those that opposed the proposed recommendation were CCIWA, Master Builders, My Place, WAiS and a submission from a private individual. Those who supported the proposed recommendation were UnionsWA, the AMWU, the HSUWA, the WASU, the WAPOU, United Voice, WACOSS, the ELC, the ECCWA and DWER. AMMA submitted consideration should be given to removing the exclusion of persons employed in domestic service but did not elaborate. The Review also notes that the removal of the domestic service workers exclusion was supported by submissions from the Salvation Army and the Shop, Distributive and Allied Employees' Association of Western Australia (SDA), prior to the publication of the Interim Report.[201] Additionally, the Small Business Development Corporation (SBDC) in its December 2017 submission was generally supportive of an intent to cover domestic service workers within the definition of "employee" but said the challenge would be to "capture the non-monetary remuneration that is often provided for these workers such as accommodation and food and utilities".[202]

510. It is appropriate to summarise the submissions opposing the proposed recommendation, followed by those who support it. The Review will then analyse the submissions and issues and provide its recommendation on the issue.

5.3.2 Submissions Opposed to Proposed Recommendation 37

511. CCIWA expressed its opposition to proposed recommendation 37 as follows:

> CCIWA would oppose the removal of the current exclusion under section 7(1) of the IR Act for "*any person engaged in domestic service in a private home*".
>
> CCIWA believes that adequate protections are provided within the definition of employee at paragraph (e) and (f) of section 7(1) to capture those persons who are engaged in domestic services in a boarding or lodging environment and for those persons providing domestic services to an employer who is engaged to provide the services to an owner or occupier of a private home.
>
> The removal of the exclusion as proposed, it is submitted, would in the first instance create a simply untenable and unworkable proposition.
>
> The proposition suggests that a home owner who engages (in the broadest sense of the word engage) a friend to undertake general domestic services once a week would

201 Interim Report, [816]-[817].
202 Interim Report, [819].

become an employer and would be required to provide a suite of relevant insurance coverage, pay employer superannuation contributions, deduct and pay taxation contributions, and the like. In addition, the home owner would be obliged to provide all minimum terms and conditions by virtue of that friend being deemed an employee.

…

For a large number of individuals performing minor home domestic services it is a critical source of additional income.

Any change that creates a home owner as an employer would simply end domestic services. There would be significant impacts on individuals.

CCIWA would submit that people providing domestic services are doing so in a freely entered into arrangement, often between friends, neighbours and acquaintances and cannot be considered employees with the IR Act. Fundamentally, people do this voluntarily and mutually agree the price. This is not labour that is forced or captive domestic service in any way; there is no compulsion or threat / duress to individuals who perform the work.

Individuals may also elect to engage in the provision of domestic services through a registered domestic agency that provides status and coverage as an employee.

Thus, CCIWA recommends that the State does not seek to include domestic workers as employees, as the consequence of making all households employers, by default, would create unacceptable, impractical and additional regulations that are unnecessary and intrusive into the private home. The extension of workplace regulations to home owners would raise fundamental concerns.

A household cannot sensibly be seen as an employer.

CCIWA recommends that there should be no change to the definition of "employee" in the IR Act and the MCE Act. The 2018 IR Act should continue to exclude individuals providing domestic services as currently provided by section 7(1) of the IR Act.

Doubtless the broader WA community would find this recommendation and its implications unpalatable.

512. Master Builders made the following submission opposing the proposed recommendation:

Whilst not an issue Master Builders would ordinarily involve itself in, Master Builders considers the public interest warrants a response to at least raise debate similar to the role of amicus curiae on the basis of making the Reviewer aware of countervailing issues. Should this recommendation be taken up by the Western Australian Government it will need to be mindful of how domestic help and domestic carers employed directly by a home owner result in them attracting responsibility of an employer paying wages, keeping time and wages records, paying superannuation in the event more than $450 per month is paid to the employee, workers' compensation insurance obligations and State Employment Standards as a minimum. This comes about given the recommendation to include the State Employment Standards (SES) within the 2018 IR Act.

Master Builders asserts a domestic home owner who directly employs a home cleaner and/or home carer would likely be unaware of what these obligations would mean to them as an employer. That is why Master Builders says any move down this path

> would require the Western Australian Government to, at the very least, embark on a public education campaign to appraise the public of what these changes mean to them given the consequences of failing to meet their obligations. Not to do so in Master Builders estimation would be irresponsible, especially given the impact of the recommendations set out in paragraph 50 of the Interim Report.

513. Master Builders noted that proposed recommendation 50 of the Interim Report "proposes breaches of the SES be treated as a civil penalty. It follows a home owner who would be captured by the SES as an employer who may be in breach of the SES, in one way or another, would potentially face pecuniary penalties, compensation or associated orders. That is, this is an outcome which must be made known to the public."

514. Master Builders also expressed concerns about proposed recommendation 66 in the Interim Report "which proposes a jail sentence of up to 12 months for breaches of the Act under s 84A(5) of the current IR Act". That is dealt with in Chapter 8 of the Final Report. The Review notes however that proposed recommendation 66 will not, in the terms specified in the Interim Report, be included in the recommendations made in the Final Report.

515. Master Builders also contended:

> The 2018 IR Act should expressly set out domestic employers captured by the Act be subject to the SES only, not any New Award.
>
> An education programme be conducted by the WA Government for home owners faced with these new obligations as employers, similar say, to the slow down to 40kmh for road assistance workers.
>
> A reasonable transition period be adopted to allow home owners as employers to make the necessary arrangements to meet these new obligations.
>
> …
>
> Master Builders also submits home owners who directly employ home help/carers would also be subject to the unfair dismissal provisions. Whilst not an issue directly dealt with in the Interim Report Master Builders says logically there ought be similar provisions as the federal provisions covering the small business dismissal code and restraints on unfair dismissal applications based on 12 months employment applying in the FW Act.

516. The confidential submission from the private individual was opposed to the removal of the exclusion for domestic service workers because of concerns for the possible impact that might have on managing people who were engaged to "… look after someone with a full disability and residing at home with

grandparents who has full time carers to look after him 7 days a week". The submission was:

> If I am interpreting it correctly I feel that this will have major affect on the shared-management service that will impact the services in a negative way. Therefore I believe that the domestic service in a private home should remain exclusive [sic] and not be removed as for the above reason.

517. The same person, in a subsequent communication to the Review said:

> Caring for a loved one with major disabilities and knowing that life will be short for them is hard enough to bare; and now the possibility of adding extra stress that might or might not change to the service we currently have in place via co-management will not only be detrimental to his health but also to others around him.

518. It is appropriate to comment on this submission at this point. The submission expresses feelings the Review can empathise with. What the submission does not relate, however (and this is not meant as a criticism) is what the fears set out are based upon in a more specific way. That is, what is it about including domestic service workers in the IR Act and the MCE Act (or WAES) that will or might change things, so that the present arrangements for the grandchild cannot continue?

519. The submission highlights the need for information about any proposed changes and new responsibilities employers in their own homes might have to be provided to people who for good reason feel vulnerable about the changes.

520. My Place[203] submitted the domestic service exclusion should remain. The assertions made by My Place included:

> The removal of the private & domestic exclusion under the IR Act (WA) to deem all arrangements as that of employer-employee not only poses a number of detrimental ramifications but is based on assumptions about those arrangements that are both misleadingly broad and unrepresentative.
>
> A "One Size Fits All" approach to the definition of employment which the proposed changes promulgate obscures the reality of the highly segregated nature of service arrangements that now exist in the contemporary labour market. It is our view that any attempt to corral all such arrangements under a single definition of "employee", in particular, by removing the private and domestic exclusion from the current Act is regressive.
>
> Currently, hundreds of examples exist of families and people with disabilities in WA directly engaging domestic workers in order to provide support within the family home

[203] The public submission from My Place, that is on the website of DMIRS, sets out some information about the organisation.

> and, by natural extension, the community. At the heart of these arrangements are the principles of trust and mutual benefit, conditions that would be largely absent in the 'gig' economy that is being targeted for increased industrial regulation. Such beneficial arrangements under the private & domestic exclusion could not exist without the arrangement providing benefits for *both* parties, not just the one.
>
> The benefits accrued by domestic workers are not always necessarily monetary in nature. For example, under live-in arrangements the domestic worker also receives benefits such as accommodation, food and utilities, that are not only of value to the domestic worker, but perhaps also of necessity in carrying out of the work. Such non-monetary benefits are simply not captured in the regulatory framework of the current industrial system, but they are under a private & domestic arrangement and should be recognised and protected for the benefit they provide.
>
> It is our view that the broad assumption used to promote the proposed changes i.e. that all arrangements outside the "protection" of industrial relations legislation must be, by definition, exploitative is misleading as it neither recognises nor represents the typical household arrangements that currently operate in WA under the private & domestic exclusion and have done so for over 30 years.

521. The submission outlines a number of examples, in shaded boxes and by giving people's names and circumstances that suggest, in an emotive way, the domestic service exclusion should remain. Regrettably, these emotive examples were unaccompanied by facts on why permitting domestic service workers to be covered by the minima of industrial relations laws of the State would lead to a cessation of self-care. Nor was there any analysis of how self-care survives in every other Australian State, where the NES, and possibly awards, cover the employment.

522. My Place also said it was concerned that, should the domestic workers exclusion be removed:

> … there would an increased administrative burden on the homeowner to deal with a range of additional compliance matters not currently required. This includes minimum wage requirements, leave entitlements, reasonable hours of work, public holidays and record-keeping requirements including the holding of records for a minimum of seven years as well as the arrangements being subject to Unfair Dismissal provisions.
>
> With many of these arrangements being struck, maybe for just a few hours of support of [sic] week, by people unfamiliar within the sophisticated employment practices required, the consequences of the proposed changes are disproportionate to the nature of the private & domestic setting. The result is a real and unfair disadvantage placed on the homeowner. To suggest the establishment of a Helpline for householders to assist them with their responsibilities (Ref 5.5(d) 822) as proposed in the Review document skirts the issue and devalues the complexity of skills and training that a householder would need to maintain their currency of knowledge and satisfy their on-going responsibilities under law.

523. My Place argued: "To suggest, as it has been, that work offered and delivered under a private & domestic agreement is unregulated is erroneous". My Place provided a copy of a sample document entitled "Contract for Private and Domestic Support". This, with respect, is an errant proposition. The fact that an organisation like My Place can produce a sample contract does not make the employment of domestic service workers industrially "regulated".

524. My Place also made submissions about the issue of industrial inspectors and unions being able to enter into domestic homes if the domestic service workers exclusion was removed. That issue is addressed in Chapter 8 of the Final Report.

525. The submission from WAiS[204] said it and its members support people and their families "to be good and fair employers, by providing information and support about what their legal considerations are when they are hiring their own workers."

526. WAiS stated its position as follows:

> In the context of people with disability and their families privately employing their own support workers, WAiS fundamentally believes that:
>
> i. People with disability and their families also need optimum flexibility to offer their support workers mutually beneficial conditions of employment when their workers are supporting them in and around their private homes; and
>
> ii. Support workers are entitled to have fair and reasonable wages and employment conditions.[205]
>
> The impact of the removal of the exclusion will be significant:
>
> 1. Not only will it increase the compliance burden on private families and households (as has been raised in prior submissions);
>
> 2. It will also –
>
> a. Reduce the ability to be flexible and offer mutually beneficial conditions of employment; and
>
> b. Potentially prohibit a large number, if not all, of highly individualised living arrangements that enable people with disability to live good lives in as natural a home environment as possible (for example, in their own private homes as compared to residential group homes).
>
> WAiS and WAiS members have found that use of the exclusion has afforded flexibility to people, with workers provided with fair and reasonable conditions of employment.

[204] The public submission from WAiS, that is on the website of DMIRS, sets out some information about the organisation.

[205] The lettering and numbering of the submission have been altered to fit the format of the Final Report.

> WAiS refutes that many of the workers in the arrangements are subject to exploitation as was raised as a concern in the Interim Report. The flexibility has, however, allowed for an approach akin to the "Better Off Overall Test" (BOOT) used for the creation [of] Enterprise Bargaining Agreements whereby people and workers are able to negotiate conditions of employment that are workable for both parties, particularly within an environment where the relationship is an interaction between formal and informal supports in a home environment and based on flexibility for both parties.

527. "Individualised Living Arrangements" are discussed and it is noted that:

> Private and domestic arrangements have enabled highly individualised arrangements in WA to succeed and be high in numbers for more than 15 years.

528. The WAiS submission provided examples of individualised domestic arrangements and submits the Review ought "to consider the implications of the removal of the exclusion to the definition of employee".

529. It then submitted that if the Review determines that the removal of the exclusion "must proceed", it:

> ...urges the Review to then consider exceptions for people who are privately employing workers in a domestic arrangement as to how the legislated minimum conditions of employment would apply. These exceptions could include:
>
> - Private households employing workers to support a person in their home not be subject to unfair dismissal laws;
> - Private households employing workers to support a person in their home not be subject to redundancy obligations;
> - Private households employing workers to support a person in their home not be subject to long service leave obligations;
> - Private households employing workers to support a person in their home not have to apply minimum conditions of employment restrictively, but afforded application of the minimum conditions of employment using a legal mechanism akin to the "Better Off Overall Test."

530. The WAiS submission tried to counter the suggestion that the ILO Forced Labour Protocol might affect the current exclusion. It said it understood the "Protocol does not require a prohibition of employment arrangements that are entered into voluntarily by both parties and in which workers work without threat of force/penalty."

531. WAiS did note, however, that the Review contained a proposed recommendation in the Interim Report that the Government put in place a program providing information and assistance to households who would become employers. It

supported this recommendation and requested WAiS be consulted in the development of such a program. No other party making submissions suggested such a role for WAiS.

532. Referring to Term of Reference 6 which relates to State awards, WAiS stated that: "Private and domestic households do not currently fall under the coverage of any award. WAiS strong position is that for people with disability and families and any other private households who are privately employing workers in domestic arrangements, these arrangements continue to be award free." This issue is considered in Chapter 7 about Term of Reference 6.

533. In conclusion, WAiS stated:

> The removal of the exception across the board, would mean a significant impact to people being supported, and particularly people who are significantly vulnerable, or with complex support needs. The options available for people in this situation will be reduced, and the 'live-in' support arrangements less likely to be as highly individually designed, flexible and embedded in the things we all value - a home, belonging, love, community, mutual respect and contribution. In fact, many may have [to] move from an individualised, independent living arrangement to living in group, congregate arrangements. Furthermore, it would also disregard the many people, and community members, who offer and provide individualised support to people, who currently have very flexible, mutually beneficial employment arrangements directly with people, particularly in 'live-in' support arrangements.

5.3.3 Submissions in Support of Proposed Recommendation 37

534. The submission on the Interim Report from UnionsWA contained a summary which noted the preliminary opinion of the Review that exclusions of employees from coverage under the IR and MCE Acts should be removed. UnionsWA said it supported this proposition.

535. Later in its submission, UnionsWA said it supported "legislative changes to ensure that households are considered as workplaces where workers need to directly enter people's home."

536. UnionsWA expressly supported proposed recommendation 37 as follows:

> UnionsWA supports our affiliate United Voice in pointing out that this exclusion it is out of step with the rest of Australia and presents a barrier to ratification the ILO's Domestic Workers Convention (No. 189) and Recommendation (No. 201) on forced labour. Given the heightened potential for exploitation of these workers, who are

> often low paid, work in isolation and have little bargaining power, it is remarkable that WA has retained this exclusion for so long.

537. The AMWU supported and adopted the submissions made by UnionsWA and United Voice on proposed recommendation 37. The HSUWA and WASU also supported the UnionsWA submission.

538. WAPOU supported the expansion of the definition of "employee" to ensure all workers in WA, not currently covered by State or Federal jurisdictions, are properly captured by the Amended IR Act. To this end, it said it fully supported the submissions made by UnionsWA.

539. As stated by UnionsWA, United Voice supported proposed recommendation 37. United Voice asserted: "no stakeholder has been able to provide reasoned grounds for maintaining the current exclusion." United Voice submitted that opposition to the removal of the domestic worker exclusion relied on "antiquated notions that this would result in increased regulatory burden to households".

540. United Voice also said:

> Any attempt to use this outdated argument as a means to justify denying basic rights to a cohort of workers is offensive, misguided and should be strongly rejected by the Review. The CCI are seeking to rely on a position from the 1950's that has no place in today's society…
>
> As previously highlighted the domestic worker exclusion in Western Australia is unique to the rest of the country. In other Australian jurisdictions, workers in private residences receive protection under the FW Act as employees (i.e. nannies and au pairs) or as independent contractors. As other jurisdictions have clearly managed to cope with the legal implications of this, there is no reason why Western Australia would find this so burdensome as to justify the retention of the exclusion in the IR Act.

541. As mentioned WACOSS also supported the proposed expanded coverage of the IR Act to include employees whose place of work is the private home of another person. It submitted the current exclusion of these and the other categories of employees excluded by the IR Act and MCE Act "is not desirable and leaves them at significant risk of experiencing negative and unsafe working conditions".

542. The ELC said in its submission, that as noted in its December submission[206] it could not see any justification for continuing to exclude domestic workers from the definition of an "employee" in the IR Act and the MCE Act.

543. The ECCWA said in its submission:

> As the peak umbrella body in WA that represents the interests of culturally and linguistically diverse communities ECCWA strongly supports the recommendations of the Review report. This is particularly so because people of CaLD[207] backgrounds are disproportionally represented in vulnerable sections of the workforce i.e. casual workers, gig economy "workers", those working in private homes i.e. people employed by those "self-managing" under the NDIS and Aged care programs etc. A further reason for its support of the recommendations is because its constituency includes those who are not proficient in English and or have difficulties in understanding and navigating the industrial relations system.

544. As mentioned previously the Salvation Army made a submission in support of the removal of the exclusion prior to the Interim Report.[208] The submission was that a new definition of employee should adopt the definitions of "domestic worker" and "domestic work" in the ILO *Domestic Workers Convention* (No. 189). The Salvation Army further submitted that Western Australia should establish an award or amend an existing award to ensure coverage for private domestic workers. The Salvation Army also submitted the definition of employee in the IR Act should stipulate that all employees are covered by minimum conditions of employment regardless of immigration status and wherever some form of an employment relationship could be verified. It was argued that was particularly important for domestic workers, many of whom are "lured, forced or coerced into working in breach of or without a valid work visa and without a formal contract".[209]

5.3.4 Analysis of Submissions on Proposed Recommendation 37

545. It is relevant to restate the relevant background to the Review being asked to consider this issue as set out in the Interim Report. The Minister has noted that the exclusions under the IR Act and MCE Act mean that Western Australia does

206 Interim Report, [815].
207 Culturally and Linguistically Diverse.
208 Interim Report [816].
209 Interim Report, [816].

not comply with the ILO Protocol which requires that relevant labour laws apply to all workers and all sectors of the economy. Additionally, the PSD of DMIRS has identified the exclusion of domestic service workers under the IR Act and MCE Act as obstacles to Western Australia's compliance with the ILO Protocol.

546. The Interim Report also set out the legislative history of the exclusion of domestic service workers. It is fair to say that the comments made in the parliamentary debates are reflective of a bygone age, which did not countenance the change to the types employment that would occur within the home, or the rapid expansion of in-home workers occurring within this generation.[210] Aged care and disability services work are particularly relevant examples. As also set out the Interim Report and represented in the table reproduced earlier, domestic service workers are not excluded from the definition of an employee under the WCIM Act and the LSL Act, and some of the terms and conditions of employment provided in the FW Act, apply to domestic service workers in Western Australia. For domestic service workers in the rest of Australia, the FW Act and the minimum conditions of employment contained in the National Employment Standard apply. In the rest of Australia, a person directly employed by a person with a disability to perform caring work in that person's home is covered by the national *Social, Community, Home Care and Disability Services Industry Award 2010.*[211]

547. It is also to be noted that if the exclusion is removed, it will only affect those in a relationship of employer and employee. A one-off contractor arrangement or a friend going to another person's house, as in effect a "volunteer" to "lend a hand" on an occasional basis are not going to be captured by any removal of the exclusion.

---

210 This is not to ignore the harsh employment and minimalist industrial acceptance of domestic service workers in Australia and in Western Australia in particular, as noted in, summary of 'Theorising the 'gig' economy in home-based service work, Dr Frances Flanagan and Ms Miriam Thompson, United Voice, paper delivered at the Association of Industrial Relations Academics in Australia and New Zealand Conference, 7 February 2018, University of Adelaide, in particular pages 1, 2, 5, 6, 8, 9, 10, 11.

211 Fair Work Ombudsman, Award coverage for attendant carers employed in private homes www.fairwork.gov.au/library/k600582_award-coverage-for-attendant-carers-employed-in-private-homes

548. The My Place submission is in the opinion of the Review and with respect, somewhat disappointing. The Review engaged in a stakeholder meeting with My Place and WAiS and endeavoured to explain the effect of the removal of the exclusion, with respect to the IR Act and the employment conditions contained in the MCE Act or the SES. The Review in effect invited those attending to make submissions upon whether there ought to be any particular modifications from the application of the IR Act or the SES to employers whose employees worked in their residence. The My Place submission does not attempt to grapple with these issues. Instead, and with respect, it contains rather broad examples of people who may be affected by proposed changes, but unsupported by particular information as to what it is about the change that would have a negative impact. This is especially so given that the employment relationship is, as mentioned, in all of the other States subject to the NES.

549. There are other difficulties that the Review has with the submissions made by My Place and the other submissions opposing the proposed recommendation. These submissions support the retention of an industrial relations system containing two different categories of employees in Western Australia; one that has minimum conditions of employment and entitlements under the IR Act and a second that does not. In the opinion of the Review, that is patently unfair. In the opinion of the Review it is inapposite to describe the removal of this unfairness as "regressive", as submitted by My Place.

550. On a separate concern expressed by those opposed to the proposed recommendation, the fact that the benefits accrued by domestic workers are not necessarily monetary in nature does not mean that they cannot be covered by an award or minimum condition of employment. The drafting and implementation of the Federal *Social, Community, Home Care and Disability Services Industry Award 2010* has had to manage these issues.

551. The assertion by My Place that the Interim Report contains the broad assumption that all arrangements outside the protection of industrial relations legislation must be by definition exploitative is, with respect, inaccurate. The concern of the

Review is the absence of minimum employment conditions and industrial entitlements. Without them there is the risk of employees being "exploited". It is that which is decisive. The fact that some, even most present employers do not exploit their employees is no reason not to provide this category of employees with basic protections under the State's industrial relations laws.

552. The CCIWA submission that any change that creates a homeowner as an employer would simply end domestic services does not appear to be supported by any evidence. The Review does not accept the submission of CCIWA and My Place that making employers whose place of employment is their household accountable, by being subject to the IR Act and the minimum conditions of employment creates an unacceptable burden upon those employers. This is particularly so when they are already subject to the WCIM Act and the LSL Act, as well as some employment obligations under the FW Act. The submission that the broader WA community would find the recommendation and its implications unpalatable is unsupported by any evidence other than of an anecdotal nature. It is undermined by the proposed recommendation being supported by the union movement, WACOSS, the ECCWA, the ELC and the Salvation Army. All of these bodies represent part of what might be called the "broader community".

553. The Review notes the submission by Master Builders that a public education campaign ought to be engaged in. Some comments about that have been made above with respect to the submission made by the private individual. As there stated the Review agrees with the suggestion that information, education and support for employers to enable them to understand and comply with the laws should be provided.

554. The points made above also counter the submissions made by WAiS, who did following the stakeholder meeting, try and assist the Review by including in its submission areas of the law that it said should not apply if the domestic service exclusion is removed. As to these points, the Review states:

(a) Unfair dismissal laws are beyond the scope of the Terms of Reference of the Review. However, the particular facts and circumstances of an employment relationship will be taken into account by the WAIRC in assessing any unfair dismissal claim.

(b) There is no reason why redundancy provisions should not apply to a person working in the home. It should be noted that the TCR provisions currently exclude employers with less than 15 employees from having to make severance payments. A person employing one, or several, people to work for them in their home would therefore not generally have to make severance payments, even if the TCR provisions are applied to them.

(c) LSL provisions already apply to people employed in the home, as noted above and in the Interim Report.

(d) The Review does not accept that something akin to the better off overall test ought to apply to the minimum conditions of employment insofar as they apply to domestic service workers.

555. The Review accepts the submissions made on this issue by UnionsWA, United Voice, the ELC and the ECCWA. The Review also makes these points as referred to in the Interim Report:

(a) As already stated if householders employ domestic service workers in their home in any other Australian State they are covered by the Federal industrial relations system, including the NES obligations under the FW Act.

(b) There are no exclusions of domestic service workers in either the OSH Act, LSL Act or the WCIM Act.

(c) If the exclusion is removed, both the IR Act and the MCE Act (or WAES) would still only apply to an employment relationship and not a one off contractor.

(d) The Commonwealth has requested that Western Australia identify possible barriers to ratification of the ILO Protocol of 2014 to the *Forced Labour Convention, 1930* and the State Government has identified that domestic service workers' exclusion is one such barrier.

(e) The number of people who will be engaged in family homes in aged care or disability services work is rapidly increasing. It is unfair for such a large class of employees not to be entitled to basic entitlements in Western Australia.

(f) Domestic service workers in Western Australia are already covered by some provisions of the FW Act.

(g) In particular, domestic service workers are covered by the notice of termination provisions in Part 2-2 subdivision A of Division 11 of the FW Act which are extended to employees in the State industrial relations system and other non-national system employees by Part 6-3 Division 3 of the FW Act.

(h) Additionally, the unpaid parental leave provisions in the FW Act are extended to employees in the State industrial relations system and other non-national employees by Part 6-3, Division 2 of the FW Act.

556. There are, as the Review noted in the Interim Report, particular issues that arise with respect to rights of entry into residences that are also places of employment, and they are addressed later in this chapter under the request for additional submissions called "Additional Submissions 42".

557. The Review will make a recommendation in terms of the proposed recommendation 37.

5.3.5 Proposed Recommendation 38

The 2018 IR Act not exclude from its coverage persons whose services are remunerated wholly by commission or percentage reward, or wholly at piece rates, being persons who are currently excluded from the definition of an employee under s 3 of the *Minimum Conditions of Employment Act 1993* (WA) (MCE Act) and regulation 3 of the *Minimum Conditions of Employment Regulations 1993* (the MCE Regulations).

558. AMMA did not support the proposed recommendation but did not explain why.

559. CCIWA submitted it did not oppose proposed recommendation 38 but said, "wider industry consultation would be required where commission-only or piece-rates are an essential component of operating business models."

560. CCIWA submitted employees in the real estate industry are sometimes engaged on a commission-only basis and that in the national IR system, the *Real Estate Industry Award 2010* provides for commission-only employment under certain conditions. It further noted there is currently no award under the State industrial relations system that covers the real estate industry and suggested that:

> Should the definition of employee be amended in accordance with recommendation 38 so as to no longer exclude persons who are remunerated by commission-only or percentage reward or wholly at piece rates as currently provided under the MCE Act and the MRC [sic] Regulations, to result in coverage by the 2018 IR Act, then current practices would need to be accommodated.

561. The submission also stated that: "In December 2005, the *Workplace Relations Amendment (Work Choices) Bill 2005* amending the *Workplace Relations Act 1996* came into operation in March 2006. This change brought the vast majority of real estate employers into the coverage of the national jurisdiction for the first time. The amendment required a minimum wage to be paid to all employees as at that time there was no award covering the real estate industry and no provision for commission-only employment. This caused significant difficulties within the real estate industry and, following an application to the then Australian Fair Pay Commission, commission-only employment was revalidated and reinstated."

562. CCIWA suggested that the list of "New Awards" referred to in proposed recommendation 55 of the Interim Report "be expanded to include a Real Estate Industry Award that would contain provisions, similar to those expressed by clause 16 of the Real Estate Industry Award 2010, to allow for the engagement of commission-only employees. Such terms as those contained in clause 16 would provide adequate protections for employees as well as reducing the impact on operating businesses." That issue is referred to in Chapter 7 of the Final Report.

563. Unions and other entities who supported proposed recommendation 37, also supported proposed recommendation 38.[212]

564. The Review notes the points made by CCIWA. They are about how these employees should be accommodated into the State industrial relations system. CCIWA does not suggest they support the continued exclusion of these employees from minimum conditions of employment. The Review will make a final recommendation to the Minister in terms of the proposed recommendation.

5.3.6 Proposed Recommendation 39

The 2018 IR Act not exclude from its coverage persons:

(a) Who receive a disability support pension under the *Social Security Act 1991* (Cth); and

(b) Whose employment is supported by "supported employment services" within the meaning of the *Disability Services Act 1986* (Cth), being persons currently excluded from the definition of an employee under s 3 of the MCE Act and regulation 3 of the MCE Regulations.

565. AMMA submitted the definition of "employee" should not be expanded beyond its current scope, save consideration being given to removing the exclusion of persons employed in domestic service. It did not provide any elaboration on this submission.

566. CCIWA submitted that in principle it supported the inclusion of people with disabilities who are engaged in employment being included in the definition of "an employee" where they are so engaged. It did say, however, that payment of wages, was "a complex matter where the rate of wage is proportional to, and therefore determined by, the assessed skill, capacity and capability of the individual." CCIWA said:

> It is imperative to ensure that people with disabilities are not excluded from employment opportunities because of any rigidity or lack of pragmatism within the workplace relations system because of any change.
>
> Therefore, the supported wage framework is essential to achieve the outcomes desired. There are significant considerations to be addressed, for example, the approved assessment methodology, the assessment instruments to be utilised, accreditation of assessors, the application of the Commonwealth system to support

[212] United Voice did not address proposed recommendation 38 in its submission on the Interim Report.

> those who cannot work at full award wages because of a disability, and the relationship with the criteria and requirements of the disability support pension …
>
> This would essentially include interactions with the social security system and wage supplements provided together with other forms of support.
>
> It is also important to examine the interrelationships with other State employment legislation.

567. CCIWA noted:

> While this recommendation deals with the definitional question, there are however a significant range of complex issues that arise from any outcome in this area.

568. With respect, the Review agrees with that submission, but that does not mean the employers and employees should be excluded from the minimum conditions of employment.

569. Unions and others who supported recommendation 37 also supported this proposed recommendation.[213]

570. A recommendation will be made in accordance with the proposed recommendation.

5.3.7 Proposed Recommendation 40

A taskforce be assembled and chaired by a representative of the Department of Mines, Industry Regulation and Safety (DMIRS), with representatives from the Chamber of Commerce and Industry WA (CCI), UnionsWA and the WAIRC, to assist employers and employees in the change to the regulation of employment in Western Australia contained in proposed recommendations in [37], [38] and [39] above, and any proposed recommendations that might arise after the receipt by the Review of submissions in response to the requests in [42] – [45] below.

571. CCIWA said it would welcome participation in the proposed taskforce.

572. UnionsWA accepted the proposal for a taskforce, but did not support the suggested membership. It submitted "… representatives of DMIRS should not be on such a taskforce as they can be consulted by the taskforce if needed. This Taskforce, along with others proposed in this Review, should only include the WAIRC, and parties under section 50 of the current IR Act". These are relevantly, the Minister, UnionsWA, CCIWA and AMMA.

---

[213] United Voice did not address proposed recommendation 39 in their submission on the Interim Report.

573. United Voice agreed with the UnionsWA submission.

574. The ECCWA and the ELC both supported the proposed recommendation.

575. As earlier mentioned, WAiS requested that it be included in the taskforce being assembled to oversee the assistance provided to employers and employees, but no other party making submissions endorsed this.

576. On the issue of taskforces, the WAIRC has raised with the Review whether it is appropriate for it to be a member of a taskforce as opposed to being available to confer with a taskforce if the taskforce thought it appropriate to do so. The Review understands this stance and accepts it. The Review also notes the comments by UnionsWA. It seems to the Review to be important to have a representative of the regulator on the taskforce; and therefore DMIRS is an appropriate body to be so represented. The Minister should also have the opportunity to participate in or be represented on the taskforce in his own right and may of course do so if he wishes. The recommendation of the Review on this topic will reflect these points.

5.3.8 Proposed Recommendation 41

Given:

(a) The operators of digital platforms in the gig economy are mostly if not entirely constitutional corporations; and

(b) If these constitutional corporations employ people they will be national employers under the FW Act, whose industrial relations and employees' conditions of employment are governed by the FW Act; and

(c) If these constitutional corporations engage someone as an independent contractor under a "services contract", as defined in s 5 of the *Independent Contractors Act 2006* (Cth) (IC Act), so that s 7 of the IC Act applies to exclude State laws from operating in the circumstances there set out, in relation to any workplace relations matter, as defined in s 8 of the IC Act; so that

(d) The State Parliament may have very limited, if any, legal authority to effectively legislate about the engagement, working conditions and termination of engagement of people working in the gig economy; and

(e) The gig economy is a new and fast developing industry in Western Australia; but

(f) As the State Government has a legitimate interest in the engagement, working conditions and termination of engagement of people working in the gig economy in Western Australia; therefore

(g) A taskforce be assembled and chaired by a representative of DMIRS and include a member from the CCI, UnionsWA, the WAIRC, the State Solicitor's Office and a nominee of the President of the Law Society of Western Australia, to monitor the engagement, working conditions and termination of engagement of people in the gig economy and to consider and report to and make recommendations to the Minister as to whether and to what extent the regulation of the industry can or ought to be pursued by the State Government, by way of representations to the Commonwealth Government, separate legislative action or otherwise.

577. In *The Sunday Times* newspaper on 12 May 2018 there was an article headed *The gig (economy) is up - Government to scrutinise Uber and co over workplace protection, wages*. The article reported the Minister had said that "players" in the so-called gig economy were "guilty of driving wages down and reducing benefits for workers and predicted Government regulation was inevitable". The article reported that the State Government is considering whether the sector needs to be brought under the State's industrial relations system. The article quoted the Minister as saying the gig economy "gave greater flexibility and the chance to earn valuable extra dollars to some people, but the downside was others were forced to work for poor wages or with no workplace protection, and were effectively being exploited". The article referred to the Interim Report of the Review and its questioning of whether the gig economy was a deregulated underbelly of the labour market with no minimum standards of employment conditions applying. The article also quoted ACTU Secretary Ms Sally McManus saying gig workers should get the same minimum conditions as employees, including access to unfair dismissal remedies and collective bargaining. The article also referred to United Voice saying there should be an overhaul of Western Australia's industrial laws because "people doing work using digital platforms deserve the same protections and rights as other workers". The article also referred to WACOSS saying that there should be minimum employment standards for gig economy workers.

578. The following is a summary and analysis of the submissions made about the Interim Report and proposed recommendation on this issue.

579. CCIWA acknowledged the views of the Review in proposed recommendation 41. It said it would welcome participation in the proposed taskforce.

580. CCIWA also made a number of general observations about the gig economy.

581. The HIA submitted the emergence of the digital or "gig" economy is currently under consideration in a number of forums and is slowly becoming a part of public discourse.

582. The HIA submitted: "It would therefore not only be premature for WA to respond but also unnecessary for a taskforce to be formed to further consider and monitor the 'gig economy' given that the state government '*may have very limited, if any legal authority*' in relation to the sector."

583. The vegetablesWA submission said, the "gig economy is defined as working on a task-by-task basis for different employers concurrently. It is generally short-term, flexible and a growing feature of millennial workers. It is to be hoped that there will not be yet another category of employee to consider. While it's recognised that those operating in the "gig" economy see themselves as something different, the reality is they can be contracted for work in any number of existing ways currently available to them. If they are required short term and do their work on an hourly basis, they can be defined as casual employees. If they are employed for a defined period time or for a defined task, either in a workplace or from home, they are fixed term contract workers. If they work based on unit output they are likely to be pieceworkers (though generally these workers can be defined and covered by relevant Awards). In all situations they are covered by the MCE, if not an Award."

584. The vegetablesWA submission also contended:

> The ATO provides a clear definition of what distinguishes an employee from an independent contractor, and there are penalties for sham contracting. Information and training for those managing their own businesses – eg currently offered through ATO and Chambers of Commerce, would be preferable to creating another employee category, and/or seeking to include them in a system in which they do not wish to be included.

585. The AMWU said the Interim Report "unfortunately does not extend itself in considering how the gig economy can be regulated and gig economy workers protected" and it encourages the Review to "look at creative ways of addressing the gig economy". The AMWU also stated "It is unfortunately outside the time

constraints of this submission to fully explore the facets of the gig economy and the complex position it occupies in Australian industrial relations law. … Despite the difficulty of the question of how the gig economy should be tackled, it is absolutely imperative that Government addresses it." The AMWU noted and commended the substantial work conducted by the Australia Institute's Centre for Future Work on the gig economy and the inequality suffered by those who engage in it. The AMWU submitted it should be an "anathema to any Australian government that it is possible for companies to engage workers in such a way that they do not receive the entitlements and protections that other workers do." That may be so, but the quandary expressed in the Interim Report was how the State Government could effectively legislate, given Commonwealth legislation and consequent constitutional constraints on doing so.

586. The AMWU said the Interim Review had "identified" a number of different "strategies". These were said to have included:

(a) The development of legislation similar to the *Construction Contracts Act 2004* (WA) and the OD Act to extend employment protections to independent contractors in the gig economy.

(b) The creation of a new category between employee and independent contractor, such as "dependent contractor".

(c) Extending statutory entitlements to independent contractors by way of "deeming" provisions.

587. However, none of these so-called strategies were, as expressed in the Interim Report, likely to overcome the constitutional issues also referred to.

588. The AMWU also noted the different outcomes between the case of *Aslam v Uber BV*[214] in the United Kingdom and the Australian case of *Kaseris v Rasier Pacific V.O.F*[215] and referred to the fundamental difference between the United Kingdom and Australian law, as regards the United Kingdom definition of "worker". The

[214] [2017] IRLR 4 (ET).
[215] [2017] FWC 6610.

AMWU submitted the "UK experience provides an example for us to consider in terms of creating new definitions and categories of employee."

589. The AMWU said it agreed with the Interim Report's suggestions to explore ways of extending statutory entitlements. It referred also to the current reviews of workers' compensation legislation and occupational health and safety legislation in Western Australia. The AMWU submitted these reviews "present opportunities to extend protections that employees currently have to workers in the gig economy in a way that avoids a potential constitutional challenge." That is, with respect, not entirely correct. Workers' compensation and occupational safety and health, are subjects the FW Act expressly permits the States to make laws about. They are not subjects that are affected by the *Independent Contractors Act 2006* (Cth). It is this combination of legislative coverage, in conjunction with s 109 of the *Constitution* that creates the legislative problem for the State.

590. The UnionsWA submission said:

> UnionsWA and our affiliates insist that people doing work using digital platforms deserve the same protections and rights as other workers. Automation and digital technology offer huge potential to make work and society better.
>
> If left unregulated, the gig economy will continue to undermine the protections and safeguards that are at the heart of the Australian industrial relations system. Flexibility shouldn't mean forcing people to try and make ends meet with temporary or non-standard employment where workers have little social or economic security. There is no reason why technological change should invariably make jobs less secure. Technology and the gig economy can be readily integrated into social and legal structures that give primacy to job quality and security, provided these are matters that are collectively prioritised by those making decisions.

591. United Voice expressed disappointment that the Interim Report did not make any definitive recommendations concerning the gig economy in WA. The submission stated that:

> This is a missed opportunity to meaningfully contribute ideas for a more productive, inclusive, equal and fairer industrial relations system that tackles future workforce challenges. This is a failure to look to our future needs in regulating a new workforce in a new economy and a failure to provide ideas for strengthening the regulatory infrastructure and ensure a proper safety net for these coming changes. The Federal Government has made it clear that they are not interested in this cohort of workers. The Labor State Government should be leading the way on these issues and we would expect to see more comprehensive recommendations regarding the gig economy in the final report.

> …
>
> There is no reason why technological change should invariably make jobs less secure. Technology and the gig economy can be readily integrated into social and legal structures that give primacy to job quality and security, provided these matters are collectively prioritised by those making decisions.

592. Unfortunately, United Voice did not provide any suggestions as to how these things might be done, nor grapple with the constitutional impediments to so doing, as set out in the Interim Report and above. This is not necessarily a criticism but an observation.

593. As to the suggested taskforce, UnionsWA supported the creation of the proposed taskforce, but "strongly" believed the "taskforce should only include the WAIRC, and the parties under section 50 of the Industrial Relations Act (IR Act) 1979. Lawyers and representatives of the Department of Mines, Industry Regulation and Safety (DMIRS) should not be involved." UnionsWA as later requested by the Review, made submissions specifically about its opposition to a Law Society nominee being on the taskforce. It said legal advice could always be sought and it was unnecessary to include a member of the Law Society on the taskforce. The Review notes this opposition but considers there may be benefit in having an independent legal member on the taskforce, to provide advice directly.

594. United Voice also did not agree with the composition of the proposed taskforce regarding the gig economy, stating that this taskforce should be limited to the parties included in s 50 of the IR Act. "There is no clear reason provided as to why the Department of Mines, Industry Regulation and Safety, the State Solicitors Office, or a nominee of the President of the Law Society have been included. Further, the taskforce should be provided with a clear term of reference including timelines to ensure it can contribute constructively." Issues of membership of the taskforce have been addressed above.

595. The WASU and the WAPOU adopted the UnionsWA submission.

596. The ELC supported proposed recommendation 41. It submitted: "As discussed in ELC's December Submission, in our view, consideration needs to be given to what protections should be afforded to workers in the gig economy, particularly since

they are typically engaged in low-paid work. We therefore support there being a taskforce to examine these issues. However, it is important to ensure that the establishment of such a taskforce does not result in any protections for workers in the gig economy being delayed, given how rapidly the economy has changed in recent years and the fact that the number of gig economy workers is ever-increasing."

597. This is recognised, but the problem is understanding precisely what the issues are and how, within the present constitutional and legal arrangements, Western Australia might do anything about them.

598. ECCWA said the gig economy is a new and fast developing industry in Western Australia; and as the State Government has a legitimate interest in the engagement, working conditions and termination of engagement of people working in the gig economy in Western Australia; agrees that a taskforce be assembled as proposed.

599. Mr Peter Katsambanis MLA, in his personal capacity, submitted:

> In relation to point 41 of the Issues Report, two points clearly outline the context of the gig economy, both within our industrial relations system and across our economy more generally:
>
> *(a) The operators of digital platforms in the gig economy are mostly if not entirely constitutional corporations.*
>
> *…*
>
> *(d) The State Parliament may have very limited, if any, legal authority to effectively legislate about the engagement, working conditions and termination of engagement or people working in the gig economy.*
>
> It would be far more efficient for our economy that if any additional regulations are considered necessary in this area, they should be introduced at a Commonwealth level. This would avoid creating Constitutional issues and would recognise the trans-border nature of the gig economy and of participants in this sector.

600. The Review agrees with Mr Katsambanis that the issue should be addressed by the Commonwealth. The difficulty at present is that the Commonwealth has not done so.

601. My Place submitted "strengthening legislation to control the currently unregulated 'gig' economy is a welcome move as it is in this area where the majority of what

could be termed exploitative hiring practices occur. However, such a blanket approach fails to recognise that there are legitimate enterprises that fall outside the scope of industrial relations but do, nevertheless, operate for mutual benefit of both parties." With respect, that is a fairly banal submission, largely made in support of the My Place submission that the exclusion from coverage of the IR Act for domestic service workers ought to remain. That contention has been earlier dealt with.

602. WACOSS submitted that whilst it recognised the difficulties of legislating on this issue at a State-level, as outlined in the Interim Report, it would support the establishment of an arrangement within DMIRS to monitor the situation of the possible regulation of the participants in the gig economy and the working conditions of workers within the gig economy, as proposed by the Review. WACOSS submitted: "Should this monitoring arrangement discover negative conditions being experienced by gig economy workers, we trust that DMIRS and the State Government will take the necessary actions to address them and ensure they do not reoccur." The Review thinks this is a helpful submission and will form part of the recommendation to be made.

603. As set out in the Interim Report, the position of people engaged in the gig economy is a matter of concern to the Review. However, the legal and constitutional impediments to Western Australia legislating about gig economy workers seem presently insurmountable. No submission to the Review pointed to anything that could be devised to counteract the position that:

(a) Any employees of constitutional corporations will be governed by the provisions of the FW Act.

(b) State laws about the employment conditions of employees of constitutional corporations would be inoperative due to the FW Act "covering the field".

(c) If the relationship between a corporate gig economy operator and the worker is one of independent contract then the Commonwealth has also covered the field by the IC Act, and any WA legislation will be inoperative.

(d) Placing a label on gig economy employees like "dependant worker" will not escape the legal problem. Nomenclature will not override the true legal nature of the relationship; and if the type of relationship is one that falls within the field covered by the Commonwealth in the FW Act, and the IC Act, then any legislation about the subject by Western Australia will be inoperative due to s 109 of the *Constitution*. The Native Title Act case of the High Court is an example of an attempt by the Western Australian Parliament to legislate on a subject that was covered by Commonwealth legislation and therefore of no effect.[216]

604. In these circumstances it is probably beyond the legislative authority for Western Australia to pass laws on the gig economy without Commonwealth cooperation. As with the OD Act, the Commonwealth could legislate to exclude from the operation of the IC Act, laws about the gig economy in WA. The State Government could engage with the Commonwealth about that. There is no guarantee however that the engagement would be productive.

605. The Review is of the opinion that at present it is likely the issue can be taken no further by the State Government, legislatively, and that the best that can be done is to form the type of monitoring taskforce referred to in the Interim Report and the WACOSS submission.

606. In the opinion of the Review it is unacceptable if people are engaged by others within the gig economy and not remunerated in accordance with the minimum conditions of employment that exist either Federally or within the State of Western Australia. That is, under the present legislative arrangements, however, a matter that needs to be taken up by the Commonwealth.

216 [1995] HCA 47; (1995) 183 CLR 373.

5.3.9 Additional Submissions 42

Whether, and if so what, limitations or safeguards ought to be imposed upon industrial inspectors or people holding right of entry permits with respect to the carrying out of their duties, rights and privileges at places of work that are also private residences.

607. AMMA submits that as a matter of principle, industrial inspectors should be required to obtain additional authority (such as a Warrant from a Magistrate or an Industrial Registrar) before entering any private residence that is also a workplace. AMMA said:

> Persons holding Right of Entry permits should not be able to enter premises or part of a premises mainly used for residential purposes. AMMA notes that under the Fair Work Act, Section 493 Right of Entry is not permitted in relation to any part of a premises that is used mainly for residential purposes.

608. CCIWA expressed concerns about entry to private homes by industrial inspectors and permit holders as follows:

> CCIWA's submission with respect to recommendation 42 is definitive. It simply cannot be contemplated that private residences can be entered as proposed. The notion that industrial inspectors or those persons holding a right of entry permit (i.e. union officials) can, with or without notice, enter a private residence would be unacceptable to the WA community. Such an unequivocal right to enter a private residence without consent is not even available to members of the WA Police Force. Division 2 of Part 3-4 of the FW Act specifically prevents a permit holder from entering any part of the premises that "is mainly used for residential purposes" (section 493). Entering a private home should not be contemplated. Consider the ability for the individual entering a private residence to proceed to a child's bedroom (even more concerning if children are present in the home), view personal possessions, 'inspect' the home and assess activities within the residence. Further consider what if there is loss or damage that occurs during the entry? Who would be responsible for loss or damage and the impacts on the householder's insurance? Additionally, recommendation 65 would that mean that entry suggested can occur at any time not just while work is being carried out. CCIWA would submit that the public concern on this would be significant.

609. In the section of the CCIWA submission in response to the Interim Report which addresses Term of Reference 7 of the Review, CCIWA further states regarding recommendation 65:

> As expressed, this extension to the powers of industrial inspectors is too broad and in particular, with respect to the implications of recommendation 42 for private residences and the application to the proposed definition provided at paragraph (i) of recommendation 63.
>
> CCIWA would not support any change to the current provisions of section 98 of the IR Act. The limits of the powers of an industrial inspector must remain limited to an 'industrial location'.

> Any proposed variation to the current provisions must specifically provide for the exclusion on the exercise of powers 'at any location, premises or part of premises that are used mainly for residential purposes'.
>
> CCIWA would submit that to provide such a proposed open-ended ability to exercise of powers to any location 'where work is or was being performed' is too broad in scope.

610. With regard to access to residential premises, HIA noted that currently, the IR Act allowed industrial inspectors unfettered access to premises whereby work in relation to the Act is performed, including private residences. The submission stated that:

> HIA is of the view that s98 of the IR Act, which deals with industrial inspectors obtaining access to residential premises, be amended to replicate s708 of the FW Act and include the following safeguards:
>
> (a) that an inspector must not access part of a residential premises unless there is work in which the 2018 IR Act applies being performed on that part premises; and
>
> (b) as a precondition to access, an inspector must always, not just on request as per s99B of the IR Act, provide their identity card in order for access to be permissible.
>
> HIA is otherwise of the view that provisions in relation to authorised representatives accessing residential premises should remain unchanged.

611. The Master Builders' submission expressed concerns about proposed recommendation 68(b) which would allow unions to take photographs and make recordings by electronic means, and stated:

> A further consideration is union officials exercising right of entry and entering a private home to investigate alleged non-compliance with the SES and/or some safety issue. There are no limitations on what a union official can do if taking photos/vision in the home. Master Builders contends this issue further reinforces its submissions on the need to only allow investigations which are directly related to the suspected breach. In addition, the need for a strong disincentive against any abuse of this privilege via similar provisions as s148 of the WHS Act are needed.

612. The Master Builders' submission also argued that those who hold right of entry permits should be required to be employees of the State union on whose behalf they are exercising right of entry:

> … permit holders will have a right of entry to private homes as the recommendations set out. It is a reasonable position to put that where a union seeks to exercise a right of entry to investigate some alleged breach of the SES or alleged safety breach under the WA safety laws that the person exercising that right of entry is a union employee. This is a crucial issue based around the privacy of the home owner and a stranger having access to a private residence. As the Reviewer is aware, right of entry is a legal privilege which overrides trespass laws and in the industrial relations context, a principle well known and accepted subject to the necessary checks and balances under

the industrial rations [sic] laws, and safety laws. Master Builders says expanding union right of entry to private homes casts an entirely differing light on the issue which cannot be ignored.

613. Master Builders submitted:

- right of entry permits must be issued to employees of unions similar to the FW Act;
- right of entry to private homes be restricted to appointed Inspectors under the State IR Act 2018 and WA safety laws;
- union officials exercising right of entry under the 2018 IR Act only be authorised to request documents directly related to the alleged breach(s);
- right of entry in connection to safety investigations by union officials be dealt with only under the proposed 2019 Work Health and Safety laws which includes their being able to take photos on site and that similar penalty provisions apply as s 148 of the WHS Act.

253. A confidential submission from an employer association said it:

> Supports that limitations or safeguards be imposed upon industrial inspectors or people holding right of entry permits with respect to the carrying out of their duties, rights and privileges at places of work that are also private residences. Term of Reference 7 (item 65) also deals with industrial inspectors entering private residences for the purposes of exercising their powers and the [Association] expresses concern that such provision will infringe on a person's right to privacy in their own home. In relation to item 64 which deals with no restriction on the powers of industrial inspectors to enter a premises where work is or was being performed or where the inspector reasonably believes there are relevant documentation or records, the [Association] expresses concern that this will allow industrial inspectors to enter the residential premises of small businesses (many of whom operate their accounts from home) and will infringe on the occupant's right to privacy in their own home.

614. The vegetablesWA submission was: "In a situation in which a private residence is also a place of employment for employees, inspection rights should be limited to the actual place where the business is conducted. There should be no automatic right to inspect other parts of the structure identified as private residences."

615. UnionsWA submitted:

> Workers providing services in a private residence environment could be faced with:
>
> - working in isolation without assistance for team handling;
> - the home not designed for health or personal care (e.g. low bed heights);
> - working in restricted work spaces such as small bathrooms;
> - the home being laid out to suit the client's preferences;
> - a change in the client's physical and mental condition between visits;

- workers from other agencies also providing assistance for the client.

According to Victorian occupational health and safety (OHS) laws, a workplace is defined as a place where employees work. In the case of employees working in private homes, while the worker is undertaking work, that home is a workplace. As part of the assessment for clients and carers, home care service providers should assess all homes, any work activity to be undertaken in the home, and OHS risks to workers. These risks should be addressed in order to support both the client and worker. Accordingly, industrial inspectors and right of entry permit holders should have their full rights regarding workplaces extended to places of work that are also private residences.

616. The UnionsWA submission was supported by the WASU, AMWU, HSUWA and the WAPOU.

617. United Voice submitted:

> Some stakeholders have also sought to rely on union and industrial inspector access to domestic homes as a means to justify the removal of the domestic worker exclusion. We strongly reject this argument.
>
> Unions have an institutional compliance function in the industrial relations system. Any restriction on right of entry for compliance purposes erodes their capacity to carry out that function. A significant amount of interaction in the workplace between employers and trade union employee representatives occurs by mutual agreement and without incident or disruption. Where entry and representation arrangements can be agreed by the industrial parties the law should facilitate and not impede those arrangements.
>
> Domestic service workers who undertake work in private residences often do so in isolation in high risk environments. As a result, it is even more important to be able to enter a workplace, specifically where there are concerns for health and safety.
>
> As was considered in the Interim Report, the concerns of right of entry can be managed in Western Australia as they are managed in the rest of the country. In the absence of any clear evidence that this poses a problem in other states, this objection is baseless and must not be used as an excuse to deny workers access to basic rights and entitlements under state industrial laws.

618. The ECCWA submitted that industrial inspectors or people holding right of entry permits with respect to the carrying out of their duties, rights and privileges at places of work that are also private residences should have reasonable access to them.

619. My Place was opposed to industrial inspectors and union representatives being able to access private homes. It asserted as follows:

> The current private & domestic arrangement is the ideal fit where the family home is also the workplace. An area of significant concern with the proposed changes is that it proposes the very real possibility that the sanctity of the private home will be laid bare

to intrusive or 'fishing expedition' visits by trade union representatives or workplace inspectors on the premise of investigating potential breaches of industrial law.

It is stated in the Ministerial Review paper that "*Concerns about trade unions and inspectors entering into domestic homes can be managed. The issue is managed in the Federal jurisdiction and hence all other States of Australia"* (Ref 5.5(d) 821(g)).

It is concerning that, the current WA Industrial Relations Act contains no provision at all preventing an inspector from entering premises, or a part thereof, that are used for residential purposes (IR Act s 98(1). The sweeping industrial powers thus afforded trade union representatives and workplace inspectors of right of entry into a private home in WA are highly problematic.

It is not enough for the Ministerial Review to assert that this is managed 'elsewhere' and leave the issue unaddressed. Moreover, how this is managed 'elsewhere' is not explicitly explained in the interim review.

On an independent investigation into the operation of rights of entry in the equivalent Federal jurisdiction of the Fair Work Act (2009), it was found that the Fair Work Act *expressly prohibits* a permit holder to enter any part of a premise that is used mainly for residential purposes (section 493). Moreover, this prohibition applies equally to both where the permit holder intends to investigate a suspected contravention of the Act but also to where the principal intention is to hold discussions with employees.

Further, sections 486 and 503 makes it an offence for that permit holder to remain on the premises, or exercise any other right, pursuant to investigating suspected contraventions or to hold discussions if he or she contravenes Subdivision A (of which section 493 is included) in exercising that right.

Far from enabling the right of entry into private homes, the Federal jurisdiction (and by referral to all States other than WA), in fact, prohibits that right of entry into private residences under industrial relations law.

A copy of the advice received from the Fair Work Commission on this matter has been appended. (**ADDENDUM A**)

So, if WA seeks to be in line with Federal jurisdiction and the rest of Australia in its management of right of entry into private homes, it should, in fact, be prohibiting and removing that right from workplace inspectors and trade union representatives.

620. Addendum A was what appeared to be a copy of an email from a person at the Registered Organisations Section of the FWC, which contained advice about entry upon domestic premises by permit holders under the FW Act.

621. WAiS also expressed concerns about industrial inspectors accessing private homes as follows:

WAiS is very concerned about the possibility of industrial inspectors entering peoples' private residences and strongly submits that very strong, firm and clear restrictions are put in place against this.

For potential breaches of the Industrial Relations Act or Minimum Conditions of Employment Act, WAiS does not see any legitimate grounds for investigations by an

industrial inspector or union official to take place on-site in a person's private home. Such potential breaches could be adequately investigated offsite.

If on rare occasion, an on-site investigation is found warranted, WAiS urges strong regulatory safeguards be put in place to protect the privacy, comfort and security of private householders.

We note that, under section 49K IR Act, an authorised representative presently does not have authority to enter any part of the premises of an employer that is principally used for habitation by the employer and his or her household. WAiS submits that this should remain.

622. The Review does not accept the criticism made by My Place that it was insufficient for the Review to assert the issue was managed elsewhere and then "leave the issue unaddressed". The Interim Report was in the nature of an issues report and called for additional submissions on this very topic. Further, the Interim Report specifically referred to how the issue was managed under the FW Act at [811]-[812]. The Interim Report referred to sections 708, 483A and 484 of the FW Act. With respect to permit holders, reference was made to s 493 of the FW Act providing for a permit holder not to enter any part of the premises that is mainly used for residential purposes.

623. The Review is of the opinion that the concerns of both the unions, and the employer and other groups, who oppose rights of entry to residential homes, can be accommodated. The Review is of the opinion that the right of entry regime ought to allow a right of entry holder to enter into a residence that is a workplace if 72 hours' notice is provided in writing and there is consent provided by the homeowner/employer to the entry to the home. If there is an absence of consent then the regime can permit an application to be made to the WAIRC to determine whether and in what circumstances the right of entry can take place. In a situation where there may be some urgency about the matter due to occupational health and safety issues, the right of entry holder should be able to make an urgent application to the WAIRC for an order permitting them to enter into the workplace/residence. The WAIRC is likely to be quite respectful of privacy concerns consequent upon the exercise of rights of entry to residences and would need, the Review anticipates, cogent evidence before it would make any such order. The WAIRC would also be able to use its general powers of conciliation to try and resolve the industrial matter.

624. A recommendation to this effect will be made.

625. For industrial inspectors, it is noted that a residential premise can be an "industrial location" within the meaning of s 98(3)(a) of the IR Act. However, given the recommended removal of the domestic service exclusion in the definition of an employee, the Review accepts there should be some constraints on the ability of an industrial inspector to enter a private residence that is also a place of employment. The Review is of the opinion that it is appropriate for 24 hours' notice to be provided to the homeowner. There may be situations, however, in which it would be appropriate for an industrial inspector to have immediate access to a residential premise which is an industrial location. An example, is where a premise is being used to carry on a business, trade or occupation and an industrial inspector has serious concerns about the conditions of employment there taking place. Another example is that it may be appropriate for there to be immediate access if there are reasonable grounds to suspect that evidence may be removed or destroyed. The Review will therefore recommend that the Amended IR Act contain a requirement that an industrial inspector is to give the owner or occupier of any such residential premises 24 hours' notice if they intend to enter the premises subject to:

(a) There being no requirement to give 24 hours' notice if the owner or occupier of the residential premises is carrying on a business, trade or occupation at the premises; or

(b) An industrial inspector being able to apply to the WAIRC for an order permitting the inspector to enter the premises without providing the 24 hours' notice if the WAIRC is satisfied that to give the notice would defeat the purpose for which the power is intended to be exercised.[217]

[217] This recommendation includes wording in the same terms as s 49I(7) of the IR Act.

5.3.10 Additional Submissions 43

Whether the MCE Act or, if included in the 2018 IR Act, the State Employment Standards, should contain the following exclusion, either at all or in some amended form:

Volunteers etc.
Persons who are not entitled to be paid for work done by them but who receive some benefit or entitlement in relation to the work.

being persons who are currently excluded from the definition of an employee under s 3 of the MCE Act and regulation 3 of the MCE Regulations.

626. CCIWA made a number of observations about the important role of volunteers in the community. The submission stated:

> For the benefits gained by the community from volunteering, any proposed disruption would affect the community as a whole. The consequences of the removal of the exclusion for volunteers such that the proposed IR Act 2018 would apply to the organisations relying on the selfless work of volunteers is untenable. Volunteers willingly donate of their time for the service of their local community. They are not and cannot be considered employees in any reasonable context …
>
> Volunteers should remain excluded from the definition of employee under the 2018 IR Act.

627. The submission from vegetablesWA said:

> Volunteering Australia define volunteering as "time willingly given for the common good and without financial gain". WAIRC should give consideration to including some form of definition (for the purposes of the Act). There is potential for having any definition subjected to constant challenge to accommodate different interpretations, so protection should be provided under the normal mechanisms for employees who believe they have a dispute about the nature or conduct of their employment status.

628. UnionsWA said the request for additional submissions, was "not supported at this stage". UnionsWA commented: "More work needs to be done before UnionsWA can respond to this interim recommendation. E.g. the meaning of 'paid' needs to be considered in light of honorarium and expenses payments. More work is also needed on whether these changes would leave volunteers vulnerable on health and safety grounds." The Review understands the submission, even though there was no "interim recommendation", but a request for submissions.

629. The AMWU, HSUWA, WASU and WAPOU endorsed the UnionsWA position.

630. The ECCWA argued that a volunteers' exclusion should continue to apply to the MCE Act or to the Amended IR Act. The position was not however elaborated upon.

631. WACOSS said it supported the continued exclusion of volunteers from the definition of an employee. WACOSS argued volunteers are under no obligation to attend workplaces, perform work, and there is no expectation to be paid for their work. The nature of being a volunteer is that they give their "time willingly". As they are not receiving remuneration it is crucial that volunteers are not coerced into performing duties beyond what is time-willingly given, nor should they be exploited or be used to replace paid employees. WACOSS states that while it does not believe including volunteers under the definition of employee is the means by which to do so, there is a need for additional mechanisms to protect volunteers that should be addressed. On the advice of Volunteering WA, WACOSS recommends the inclusion of wording in the definition of volunteering in the proposed 2018 IR Act similar to: "Volunteering is time willingly given for the common good and without financial gain".

632. In the opinion of the Review the exclusion ought to remain. Volunteers are, by their nature, not employees and do not need to be subject to the industrial relations system. This would not, of course, apply to an employee who was just called a volunteer. A "sham" volunteer arrangement would not fall within the exclusion in the Amended IR Act.

5.3.11 Additional Submissions 44

Whether the MCE Act or, if included in the 2018 IR Act, the State Employment Standards, should exclude from its coverage persons appointed under s 22(1) of the *National Trust of Australia Act 1964* (WA) to carry out the duties of wardens, being persons who are currently excluded from the definition of an employee under s 3 of the MCE Act and regulation 3 of the MCE Regulations.

633. The National Trust of Western Australia (National Trust) provided a submission in answer to this request. The submission provided information on National Trust volunteer wardens, and said: "It should also be emphasised that the roles and

functions of volunteers and volunteer wardens are distinctly different to those of National Trust employees."

634. The submission stated that:

> … where financially possible, payment may be provided to volunteer wardens to assist with administrative and out-of-pocket expenses. The provision of accommodation in some instances is to ensure a presence at these remote or regional places and provides additional security as well as public access. Volunteer and volunteer wardens have no formal operational obligations. Their role is to facilitate public access during opening hours and assist in keeping the places presentable to the public. Volunteers and volunteer wardens are not responsible for conducting operational maintenance and conservation works.

635. The National Trust submission referred to the exclusion of National Trust wardens from the definition of employee in the MCE Act and stated:

> Properly understood, this is not a process of exempting these persons from the operation of the law. These provisions simply clarify that the Act does not apply to the persons described. As discussed above, there are good reasons why the law should not be changed. National Trust volunteers and volunteer wardens are in truth appointed, not as employees under S 22 (1) (a) of the *National Trust of Australia (WA) 1964 Act,* but under S 22 (1) (b) of that Act, as "agents" of the National Trust when performing their duties as volunteers or volunteer wardens.
>
> The National Trust notes the observations of the Review at paragraph 876 that it believes the exemption only applies to "employees" appointed by the National Trust under section 22(1) of the *National Trust of Australia (WA) Act.*
>
> It is the National Trust's submission that it does not appoint wardens as "employees" under section 22(l)(a). Rather, in practice in relation to volunteer wardens, they are either volunteers in the traditional sense and/or they are being engaged as "agents" under section 22(l)(b) of the *National Trust of Australia (WA) Act* when performing their role of volunteer warden.
>
> To avoid any uncertainty with respect to the status of wardens the National Trust submits that an exclusion should be maintained as these persons are not accurately considered to be employees. In light of the observation of the Review as to the use of the words "appointed under section 22(1)", perhaps the ongoing exclusion could be clarified to refer to volunteers performing the role of volunteer wardens and/or to refer to persons engaged under subsection 22(l)(b) instead.

636. UnionsWA did not specifically address the "National Trust" exclusion other than to say it "generally supports the expansion of the definition of employee to cover those who perform work duties". That submission was supported by the WASU, WAPOU, AMWU and the HSUWA.

637. CCIWA made no submission on the issue.

638. The exclusion applies to people "appointed under s 22(1) of the *National Trust of Australia (WA) Act 1964* to carry out the duties of wardens in relation to property" managed by the National Trust. In turn, s 22(1)(a) of the *National Trust of Australia (WA) Act 1964* provides the Trust may "appoint such employees as may be necessary for the efficient carrying out of the functions of the trust under this Act".

639. Thus, it is clear that the exemption applies to employees and not volunteers. A volunteer would not need a specific or separate exclusion as they would be covered by the volunteers' exclusion referred to earlier.

640. The Review has received information from the Secretariat that there is no exclusion for employees of the National Trust in any other State of Australia.

641. The Review has read the National Trust submission but does not accept there is a need for a class of employees, engaged by the National Trust, who should be removed from the protections of the minimum conditions of employment in Western Australia.

642. Accordingly, the Review will recommend that this exclusion be removed.

643. If the people referred to in the submission from the National Trust are in fact and law volunteers and not employees, then the removal of the exclusion will have no impact upon its operations.

5.3.12 Additional Submissions 45

Whether:

(a) The 2018 IR Act could contain a legally operative provision, broadly similar to s 192 of the *Workers' Compensation and Injury Management Act 1981* (WA), that would have the effect of allowing the 2018 IR Act to cover people who are, under the *Migration Act 1958* (Cth) either unlawful non-citizens in Australia who have engaged in work for an employer, or who are lawful non-citizens in Australia who have engaged in work for an employer that is contrary to the conditions of their visa, having regard to s 109 of the *Commonwealth Constitution*, the contents of s 235 of the *Migration Act* and the *Migration Act* as a whole.

(b) If the answer to (a) is yes, whether, as a matter of policy, the 2018 IR Act ought to contain such a provision.

644. AMMA said that it did not endorse any expansion of the jurisdiction of the WAIRC to employment relationships that are regulated by other legislation. It also submitted the IR Act should not in any manner regulate employment relationships that are unlawful under other laws such as the Migration Act.

645. CCIWA's views on the issue were expressed as follows:

> CCIWA does not support the proposed change outlined in recommendation 45 that illegal contracts of employment may be treated as valid for the purposes of the IR Act. Individuals working without a visa or contrary to their visa terms should not be deemed 'employees' for the purposes of the IR Act.
>
> The starting position is that working without a visa, or contrary to a visa, would breach the *Migration Act 1958 (Cth)* (Migration Act) and any such contract of employment could be rendered unenforceable.
>
> It is CCIWA's view that recommendation 45, which would provide such workers access to the WAIRC (and potentially the Court of Appeal) for the purposes of seeking a remedy, would undermine the legislative scheme provided for in the Migration Act, and may be considered unconstitutional.
>
> In any event, even if the Migration Act has not covered the field rendering the proposal unconstitutional, recommendation 45 should not be introduced on public policy grounds. For example, the WAIRC cannot be seen to come to the assistance of a party acting illegally. The introduction of the proposed provisions would place the WAIRC at risk of being perceived by the community as furthering an illegal purpose.
>
> As a general statement of principle, it is well-established that a contract "*whose making or performance is illegal will not be enforced*". Potential claims by individuals working without a visa, or contrary to a visa's conditions, would be so closely linked with the illegal performance of the work as provided for by the Migration Act, that the WAIRC cannot appear to condone or aid in such conduct by granting a remedy."[218]
>
> In some circumstances, a worker may work contrary to the terms of their visa in respect to some *portion* of the employment, such as working beyond their visa's expiry. CCIWA submits that these types of cases could be decided on a case by case basis by applying the doctrine of illegality, without the need for any amendment to the IR Act.
>
> For example, the validity of the employment contract will likely depend on the nature of the breach taking into account the particular circumstances, such as whether the illegal work can be separated from the legal work, whether the employment contract was tainted with illegality in toto, and / or whether the worker actively participated in the illegality or had knowledge of it.
>
> CCIWA does recognise the complex policy questions arising in circumstances where a vulnerable unlawful non-citizen has been exploited by their employer, who is then unable to bring a claim on the basis of the employment contract being rendered unenforceable due to statutory illegality.

[218] The submission had, as a footnote - See *Miller v Miller* (2011) 242 CLR 446 [27] citing *Holman v Johnson* (1775) 1 Cowp 341 at 343.

> However, CCIWA doubts whether the proposed amendment to the IR Act is the correct mechanism by which to address this complex legal and policy question. Indeed, the Migration Act, the criminal law and/or potentially the common law courts may be better equipped to deal with questions associated with such illegality.

646. A confidential submission from an employee association did not support coverage under the 2018 IR Act for unlawful non-citizens in Australia.

647. The UnionsWA submission said:

> Workers on visas, and people working without a visa, are more vulnerable to workplace exploitation than their local counterparts. They also face higher barriers to accessing remedies. The power asymmetry that exists in any employer/employee relationship is exacerbated in the case of temporary migrant workers, because their right to remain in the country is contingent on them not being found to be in breach of the work conditions on their visa. Any legal irregularity in the employee/employer relationship, whether the fault of the employee or not, can trigger a chain of events that leads to a grievous result for the worker (detention and deportation) that is disproportionate to any negative outcome potentially faced by the employer and is insensitive to the power dynamics.
>
> The systemic vulnerabilities that arise from our linked immigration and industrial relations regime are compounded by the range of other impediments commonly faced by temporary migrants in accessing justice, including: language and cultural barriers; economic vulnerability; geographical isolation; young age; lack of access to unions and/or legal services; lack of decent work opportunities; and the threat of more egregious levels of abuse in their home country.
>
> There should be a fundamental principle and expectation that exploitation should not result in deportation. People working without a visa or contrary to the terms of their visa have a right to seek justice without fear of deportation. That workers from overseas are granted the right to remain in the community until civil and/or criminal claims are resolved is especially important when indicators of modern slavery are found.

648. The AMWU, HSUWA, WAPOU and WASU supported the submission of UnionsWA.

649. United Voice also answered proposition 45 by saying there should be increased protections for people working without a visa, or contrary to the terms of their visa, to the extent that this would enable enforcement proceedings against employers in contravention of the IR Act, the MCE Act or the LSL Act. United Voice said:

> While we do not seek to comment on the constitutional aspect, we support this recommendation on the grounds that it is good policy. … This will increase protections for workers from exploitation and make it harder for employers to avoid their legal responsibilities.

> It is widely recognised that workers on visas, and people working without a visa, are more vulnerable to workplace exploitation than their local counterparts. They also face higher barriers to accessing remedies.
>
> …
>
> There should be a fundamental principle and expectation that exploitation should not result in deportation. People working without a visa or contrary to the terms of their visa have a right to seek justice without fear of deportation. That workers from overseas are granted the right to remain in the community until civil and/or criminal claims are resolved is especially important when indicators of modern slavery are found. Applying a protective rather than a punitive approach to regulating migrant labour is simply good policy and we urge the Review to include this recommendation in its final report.

650. The ELC submitted:

> In ELC's view, the 2018 IR Act should, as a matter of policy, contain a provision equivalent to s 192 of the Workers' Compensation and Injury Management Act 1981 (WA).
>
> ELC strongly supports any measures that enhance legal protections for migrant workers. In ELC's experience, migrant workers are particularly vulnerable to exploitation, face significant barriers to enforcing their rights (due to the fact that their employment is tied to their visa status, their lack of familiarity with English, their lack of familiarity with the Australian legal system and so forth), and in practice, do not receive the same conditions and entitlements as Australian workers, as outlined in evidence ELC gave at a recent Senate inquiry.
>
> It may be the case that the WAIRC and the IMC would treat migrant workers without a valid visa or working in breach of their visas in the same way as any other WA workers, regardless of whether there is an express provision in the IR Act allowing them to do so. However, given the legal uncertainty about whether it is possible to enforce a migrant worker's contract where the migrant worker is working in breach of the Migration Act, as outlined in the Interim Report, it seems preferable to remove this uncertainty by expressly providing for this in the IR Act. (footnotes omitted)

651. The ECCWA supported the proposition contained in question (a) in the request for additional submissions, but did not elaborate on this position.

652. As set out in the Interim Report, the present issue is a difficult one. It may well be that, constitutionally, the Western Australian Government could not enact a law that could operate to provide minimum conditions of employment to a person engaged to perform work who does not have a visa or where working is contrary to the terms of the visa. This would be because of the contents of s 235 of the Migration Act and s 109 of the Constitution. Cases referred to in the Interim Report such as *Smallwood v Ergo Asia Pty Ltd*[219] and *Australia Meat Holdings Pty*

[219] [2014] FWC 964.

Ltd v Kazi[220] suggest that purported contracts of employment in these situations will not give rise to an employee obtaining any rights as an employee; such as to claim statutory entitlements or compensation.

653. It is also problematic whether a "solution" such as that contained in s 192 of the WCIM Act could lawfully operate in the present situation.

654. Despite the understandable concerns expressed in submissions like from those of CCIWA, the Review finds it problematic if employers who may engage employees for under award rates or beneath the minimum statutory conditions are not able to be penalised for this. That is to some extent a separate issue to whether the "employee" is able to obtain the entitlements an employee would have been able to if they had been in the same circumstances but without the visa problem.

655. It is a legal area that it would be preferable if the Commonwealth would act upon; however, the Commonwealth has failed to do so to date. It is noted however, that the Fair Work Ombudsman continues to seek redress in these cases. That is of some significance to the Review, as it supports the notion that Western Australia should try and address the issue if able to.

656. Overall the Review inclines to the view that the State should endeavour to legislate to accommodate enforcement proceedings taking place in these circumstances, via a section of the IR Act similar to the WCIM Act provision cited. It may be such a provision is not constitutional, but it does not appear to the Review to be so sufficiently clear that the State ought not to seek to legislate in this way. Further constitutional advice can be sought by the Minister subsequent to the publication of the Final Report, if the Minister wishes to engage in this option.

5.3.13 Additional Submissions 46

Whether the IR Act, MCE Act or, if included in the 2018 IR Act, the State Employment Standards, ought to apply to:

(a) People who are employed in Western Australia by a foreign state or consulate.

[220] [2004] 2 Qd R 458.

(b) People who are employed as sex workers.

657. This request for additional submissions addressed two separate topics, and the submissions are best considered separately.

5.3.14 Additional Submissions 46(a)

658. There were not many submissions on this question. CCIWA provided no submissions on either limb of question 46.

659. There was support for the proposition contained in the question in some submissions however. The ELC submitted for example that it was "sensible to ensure that employees of foreign states and consulates are not excluded from the coverage of the IR Act or the MCE Act conditions of employment."

660. Coverage for these employees by the Western Australian government is consistent with the position in the Federal sphere, where the employers and employees are covered by the FW Act. A recent example of this is *Republic of Italy (Minister of Foreign Affairs and International Cooperation – Adelaide Consulate) v Benvenuto*[221]. The Full Federal Court found the Republic of Italy was an employer covered by the FW Act in its employment of employees in South Australia. This was because South Australia is a "referring State" under the FW Act. As a result by virtue of s 47(1)(a) of the FW Act, the Republic of Italy was bound by a Federal award.

661. The consequence of the reasoning of the Full Court is that the FW Act would not apply to similar employment in Western Australia, as Western Australia is not a "referring state" under the FW Act. However, the issue can be addressed by legislation in Western Australia to ensure that the definition of "employee" in the Amended IR Act covers this type of employment. The Review recommends this occur.

[221] [2018] FCAFC 64.

662. The Review has corresponded with the Department of Foreign Affairs and Trade who has confirmed that it cannot foresee any adverse foreign affairs consequences if such a decision was made by the Western Australian Government.

5.3.15 Additional Submissions 46(b)

663. This question raised, at least indirectly, the historically vexed question in Western Australia, of the illegality of working as an employee sex worker; and whether such employees should be able to have coverage by the IR Act and the minimum conditions of employment in Western Australia, bearing in mind the employment relationship would only be within the operative purview of the Western Australian Parliament if the employer was not a constitutional corporation.

664. In relation to the question asked, the Commissioner of Police did not comment on proposition 46(b), despite the Review expressly checking whether he wished to do so.

665. United Voice supported the inclusion of sex workers in the WA industrial relations system. United Voice argued as follows:

> Clear coverage by industrial relations legislation may enable sex workers in Western Australia to access minimum employment conditions. Sex workers experience unique workplace health and safety demands and issues. Formalised application of industrial relations legislation will in part recognise these needs and experiences. However, it is important to note that decriminalisation, as present in New South Wales, is the legal model preferred by Scarlet Alliance and has proven to have better health and safety outcomes for sex workers.
>
> Any legislative change to the legal or industrial relations position of sex work should foreground the experiences and concerns of sex workers. United Voice therefore encourages the Review to seek further consultation with Magenta and Scarlet Alliance as representative organisations for sex workers in Western Australia.

666. This submission was supported by UnionsWA, the HSUWA, the WASU, the AMWU and WAPOU.

667. The ELC submitted:

> …there is a need to provide employment protections for sex workers particularly because of the prevalence of modern slavery in the sex work industry. The ILO estimated in 2017 that out of 24.9 million people in forced labour worldwide, 4.8 million (19% total) were victims of forced sexual exploitation. Given the uncertainty about determining the legal status of a sex worker, as discussed in the Interim Report,

> in our view it is preferable for sex workers to be expressly included in the definition of an employee under the IR Act, the MCE Act or the State Employment Standards (as the case may be).

668. WACOSS also supported the IR Act, MCE Act or, if included in the 2018 IR Act, the SES, applying to people who are employed as sex workers. It was submitted this was "an important and crucial step in better protecting the rights of sex workers as workers, and particularly ensuring protections are in place regarding their health, safety and well-being."

669. WACOSS said:

> We are concerned that the continued criminalisation of sex-work related activities, which has been noted by researchers to cause a reluctance in sex workers to go to the police as victims of crime for instance, may result in a similar reluctance or impediment for sex workers who would otherwise access the industrial relations system. We recognise, however, that the case for the decriminalising sex work falls outside the scope of this review.

670. The Review also received a submission from Scarlet Alliance, which is the Australian Sex Workers' Association. The submission said the aim of Scarlet Alliance is to achieve equality, social, legal, political, cultural and economic justice for past and present workers in the sex industry. The submission said Scarlet Alliance is the national peak body, with a membership of individual sex workers and sex worker networks and organisations from around Australia.

671. The submission referred to the decision cited in the Interim Report of *Phillipa v Carmel*.[222] Scarlet Alliance said the decision highlighted that the illegality of (some sections) of the sex industry did not necessarily prevent a sex worker from accessing industrial rights in a particular case.

672. The Scarlet Alliance submission referred to anecdotal evidence provided by community based sex worker organisations in Western Australia which highlighted that sex workers have complained that sex industry businesses:

(a) Have withheld "wages".

(b) Have no process to deal with workplace bullying and harassment.

[222] *Phillipa v Carmel* [1996] IRCA 451.

(c) Can cut "rates of pay" or change employment conditions without negotiation or notice.

(d) Are not held accountable if workplace issues occur such as not managing problematic clients.

673. Scarlet Alliance also said "sex workers have complained that it is not uncommon that sex industry businesses prioritise revenue over sex workers' workplace health and safety".

674. The thrust of the submission from Scarlet Alliance was that there should be decriminalisation of sex workers within Western Australia. Decriminalisation is supported by the Curtin University Western Australian Law and Sex Workers Health (LASH) Study.[223] The LASH study set out the sections of the *Criminal Code* (WA) and *Prostitution Act 2000* (WA), in Western Australia that criminalise brothel keeping, living on the earnings of prostitution, inducing and procuring offences, advertising offences, offences concerning acts of prostitution in specified circumstances and child prostitution offences; as well as the police powers of enforcement. After considering in particular, issues of health and safety, the study concluded:

> Our study demonstrated a number of ways that the criminalisation of sex work in Western Australia has a negative impact on the health, safety and well-being of sex workers. This includes criminalisation being used as an excuse for abuse by clients of sex workers; a reluctance of sex workers to go to the Police as victims of crime; the hidden nature of sex work in the context of private houses and massage parlours impeding access to services and health promotion; and the physical risk of street-based sex work. Decriminalisation also allows a highly visible focus on workplace health and safety in brothels and massage parlours. It is also an important step towards reducing stigma and discrimination experienced by sex workers. There is good evidence that decriminalising sex work does not result in an increase in the number of clients accessing sex work (Rissel et al., 2017), and the normalisation of this work is important in improving the health and well-being of sex workers.

675. Relevant to the overall consideration of the issue are developments in South Australia to decriminalise sex work.

---

223 Selvey, L., Hallett, J., Lobo, R., McCausland, K., Bates, J., & Donovan, B. (2017). *Western Australian Law and sex Worker Health (LASH) Study. A summary report to the Western Australian Department of Health.* Perth: School of Public Health, Curtin University, August 2017.

676. There was an announcement on 31 May 2018 that the South Australian Attorney General, Hon. Vickie Chapman MLA, would sponsor the Statutes Amendment (Decriminalisation of Sex Work) Bill 2018 that had been introduced into the Upper House by Hon. Tammy Franks MLC, in May 2018. The Bill was in the same form as a 2015 Bill, which passed the Legislative Council, but lapsed in the House of Assembly when Parliament was prorogued in 2017 for the general election.

677. On 22 May 2018, Ms Franks said in the Legislative Council:

> There are approximately 2,000 sex workers currently operating in our state, many of whom work privately and are not employed by what is known as a brothel. This bill is based on the New Zealand model of decriminalisation of sex work and it seeks to achieve the following: safeguard the human rights of sex workers, protect sex workers from exploitation, promote the welfare and occupational safety and health of sex workers and create an environment conducive to public health….
>
> The new legislation, if passed by this parliament, will bar minors from conducting sex work and prohibit the provision of services to children.
>
> It will also address occupational health and safety concerns of sex workers. Due to criminalisation, sex work is unregulated and without industrial or workplace health and safety protections. Criminalisation has created an environment of stigma, discrimination and systematic exclusion that prevents sex workers from accessing health and support services and increases the risk of violence and abuse. It has also silenced sex workers from reporting to the police sexual abuse, harassment or damage to property caused by their clients…
>
> However, the stigma that is created by our current laws allows abuses for which we should not be standing. This bill, which previously went through a select committee, embodies a principle of 'nothing about us without us'. In the spirit of this I also welcome the supporters of this bill and those affected by the current laws who are not only with us today in the gallery but also those who have long advocated for this reform, such as Ari Reid and others who have had a voice in this space that certainly those of us who wish to listen have heard loud and clear.
>
> Sex work is their occupation. This occupation has long existed and it will exist into the future. The antiquated laws surrounding the sex work industry in this state need an overhaul and sex workers themselves deserve and need the same rights and protections as any other worker. As it stands, this industry is often cloaked in criminality. This puts workers, who are in the majority female but by no means all female or female identifying, at risk every single day. Not only is their safety at risk but if they change their career later on their opportunities for different work or volunteering may be limited due to not only stigma but, of course, enforced discrimination, and if they accrue convictions they will follow them for the rest of their days…
>
> Whether you believe that sexual favours in exchange for money should or should not be a crime, it should not overshadow the fact that this is a human rights issue. The leading body on human rights, Amnesty International, has recommended decriminalisation as the model that will support those human rights…

> The industry itself has been active in discussions and instrumental in shaping this bill which safeguards the rights of their workers. Most importantly, it is a bill that has involved and respected the input of those very workers that it concerns. A consideration of current laws may lead to some confusion, while the specific practice of sex work is not of itself actually illegal in South Australia. Exactly what is illegal and what is not is a little puzzling which is why, again, we have the need for such reform.[224]

678. As represented in the LASH Study, many of these observations would be relevant to Western Australia. It is of course beyond the Terms of Reference of the Review to simply recommend the decriminalisation of sex work. Under the present Term of Reference, the Review is to make recommendations with respect to the definition of employee in the IR Act and the MCE Act with the objective of ensuring comprehensive coverage for all employees. These Acts may well not presently apply to sex workers, in whole or part, due to the illegality of at least some of the work involved.

679. As *Phillipa v Carmel* illustrates however the legal and factual issues and decisions are not always straightforward. There, the issue of illegality did not prevent an employee obtaining industrial relations law rights because of what was then called the "containment policy". Whilst as set out in the Interim Report, the containment policy officially no longer applies, it seems that a variant of it may do so.[225]

680. As a matter of policy, the State Government could take the view that a person employed in sex industry work should be entitled to rely upon the entitlements under the Amended IR Act, although it would be perhaps strange for the same State to both make some types of sex work illegal and then recognise employee entitlements for those so engaged.

681. The Review supports the principle that the Amended IR Act should cover all employees. The Review is concerned that the sex workers represent a class of employees in Western Australia who may have no industrial relations or employment law rights. The Review thinks the issue is deserving of further

---

224 Parliamentary Debates, South Australia, Legislative Council 9 May 2018, (Second Reading speech of Statutes Amendment (Decriminalisation of Sex Work) Bill 2018.

225 Donovan, et al (2010) *The Sex Industry in Western Australia: a Report to the Western Australian Government*. Sydney: National Centre in HIV Epidemiology and Clinical Research, University of New South Wales, p 26.

consideration and will recommend further consideration of the issue by the Minister.

5.4 Recommendations

682. With respect to Term of Reference 4 the Review makes the following recommendations and observations:

42. The Amended IR Act is not to exclude from its coverage, any employee whose place of work is the private home of another person, presently referred to as "any person engaged in domestic service in a private home" in s 7(1) of the IR Act.

43. The Amended IR Act is not to exclude from its coverage persons who are currently excluded from the definition of an employee under s 3 of the *Minimum Conditions of Employment Act 1993* (WA) (MCE Act) and regulation 3 of the *Minimum Conditions of Employment Regulations 1993* (MCE Regulations), as persons remunerated wholly by commission or percentage reward, or wholly at piece rates.

44. The Amended IR Act is not to exclude from its coverage persons:

    (a) Who receive a disability support pension under the *Social Security Act 1991* (Cth); and

    (b) Whose employment is supported by "supported employment services" within the meaning of the *Disability Services Act 1986* (Cth), being persons currently excluded from the definition of an employee under s 3 of the MCE Act and regulation 3 of the MCE Regulations.

45. The Amended IR Act is not to exclude from its coverage persons appointed under s 22(1) of the *National Trust of Australia (WA) Act 1964* to carry out the duties of wardens, being persons who are currently excluded from the definition of an employee under s 3 of the MCE Act and regulation 3 of the MCE Regulations.

46. The Amended IR Act is to provide that an employee does not include a volunteer, including persons who are not entitled to be paid for work done by them but who receive some benefit or entitlement in relation to the work.

47. The Amended IR Act include provisions relating to the exercise of the powers of people holding right of entry authorities, with respect to the carrying out of their duties, rights and privileges in places of work that are also private residences, so that:

    (a) Except in a case of urgent occupational safety and health, the right of entry holder must provide 72 hours' written notice to the employer and householder of the intended right of entry.

    (b) The right of entry is only to proceed, subject to (c) and (d), if the employer and householder consents to the entry.

    (c) If the employer or householder does not consent to the entry the right of entry holder may make an application to the WAIRC for an order permitting entry into the residence for such purposes and on such terms and conditions as the WAIRC shall think fit.

    (d) In a case of urgent occupational safety and health, the right of entry holder may apply to the WAIRC for an order entitling them to exercise right of entry powers under the Amended IR Act at the residence, which may be ordered by the WAIRC for such purposes and on such terms and conditions as the WAIRC shall think fit.

48. Given that a residential premise where work is being performed by an employee for an employer is an "industrial location" within the meaning of s 98(3)(a) of the IR Act, the Amended IR Act is to contain a requirement that an industrial inspector is to give the owner or occupier of any such residential premises 24 hours' notice if they intend to enter the premises subject to:

(a) There being no requirement to give 24 hours' notice if the owner or occupier of the residential premises is carrying on a business, trade or occupation at the premises; or

(b) An industrial inspector being able to apply to the WAIRC for an order permitting the inspector to enter the premises without providing the 24 hours' notice if the WAIRC is satisfied that to give the notice would defeat the purpose for which the power is intended to be exercised.[226]

49. The Amended IR Act contain a provision, broadly similar to s 192 of the *Workers' Compensation and Injury Management Act 1981* (WA), to the effect of allowing enforcement proceedings under the Amended IR Act to be taken by or on behalf of people who are, under the *Migration Act 1958* (Cth) either unlawful non-citizens in Australia who have engaged in work for an employer, or who are lawful non-citizens in Australia who have engaged in work for an employer that is contrary to the conditions of their visa.

50. The definition of an employee under the Amended IR Act include a person whose employment is in Western Australia and who is employed by a foreign state or foreign consulate.

51. A taskforce be assembled and chaired by a representative of the Department of Mines, Industry Regulation and Safety (DMIRS), with representatives from the Chamber of Commerce and Industry WA (CCIWA), and UnionsWA for the purpose of recommending to the Minister any actions that should be taken to assist employers and employees with the change to the regulation of employment in Western Australia contained in recommendations [42]-[50].

[226] This recommendation includes wording in the same terms as s 49I(7) of the IR Act.

52. Given:

(a) The operators of digital platforms in the gig economy are mostly if not entirely constitutional corporations; and

(b) If these constitutional corporations employ people they will be national system employers under the FW Act, whose industrial relations and employees' conditions of employment are governed by the FW Act; and

(c) If these constitutional corporations do not employ people but instead engage someone as an independent contractor under a "services contract", as defined in s 5 of the *Independent Contractors Act 2006* (Cth) (IC Act), so that s 7 of the IC Act applies to exclude State laws from operating in the circumstances there set out, in relation to any workplace relations matter, as defined in s 8 of the IC Act; so that

(d) The State Parliament may have very limited, if any, legal authority to effectively legislate about the engagement, working conditions and termination of engagement of people working in the gig economy; and

(e) The gig economy is a new and fast developing industry in Western Australia; but

(f) As the State Government has a legitimate interest in the engagement, working conditions and termination of engagement of people working in the gig economy in Western Australia; therefore

(g) A taskforce be assembled and chaired by a representative of DMIRS and include a member from CCIWA, UnionsWA, the State Solicitor's Office and a nominee of the President of the Law Society of Western Australia, to monitor the engagement, working conditions and termination of engagement of people in the gig economy and

to consider and report to and make recommendations to the Minister as to whether and to what extent the regulation of the industry can or ought to be pursued by the State Government, by legislation, by way of representations to the Commonwealth Government or otherwise.

53. The Minister consider whether the Amended IR Act should include provisions so that it applies to adult people who are employed as sex workers.

Chapter 6 Minimum Conditions of Employment

6.1 The Term of Reference

683. The fifth Term of Reference reads as follows:

> The Ministerial Review of the State Industrial Relations system is to consider and make recommendations with respect to the following matters…
>
> 5. Review the minimum conditions of employment in the *Minimum Conditions of Employment Act 1993*, the *Long Service Leave Act 1958* and the *Termination, Change and Redundancy General Order* of the Western Australian Industrial Relations Commission to consider whether:
>
> (a) the minimum conditions should be updated; and
>
> (b) whether there should be a process for statutory minimum conditions to be periodically updated by the Western Australian Industrial Relations Commission without the need for legislative change.

684. As set out in the Interim Report at [973], under this Term of Reference the Review is directed to firstly, review what the minimum conditions of employment are in the two specified pieces of legislation and in the *Termination, Change and Redundancy General Order* (the TCR General Order). The Review is then required to consider whether the minimum conditions should be updated. Additionally, the Review is to consider whether there ought to be a process for statutory minimum conditions to be periodically updated by the WAIRC, without the need for legislative change.

6.2 The Interim Report

685. The Interim Report contained an analysis of the MCE Act, the LSL Act and the TCR General Order. It is unnecessary to repeat that analysis in the Final Report. The Interim Report also made reference to the power of the WAIRC to issue General Orders under s 50 of the IR Act.

686. The Review also set out the minimum conditions of employment under the FW Act. From 1 January 2010 the FW Act introduced statutory minimum employment conditions that are collectively termed the National Employment Standards (NES). In addition, the FW Act contains some minimum conditions that are not part of the NES.

687. As set out in section 6.8 of the Interim Report, some of the FW Act provisions providing for conditions of employment apply to employees under the State system.

688. The Interim Report then contained a summary of those provisions. They are about notice of termination,[227] unlawful termination,[228] notification and consultation requirements relating to certain terminations of employment,[229] and parental leave.[230]

689. As also set out in the Interim Report, s 747 of the FW Act provides that State laws that give a parental leave entitlement to a non-national system employee[231] that is more beneficial can continue to apply. As mentioned in the Interim Report at [1035] there are more beneficial parental leave provisions in the MCE Act in s 38(4) and s 38(5).

690. The Interim Report also referred to the interaction between the FW Act and the State laws about long service leave. As set out at [1042] and [1043] of the Interim Report, the effect of s 26, s 27(1)(c) and s 27(2)(g) of the FW Act is that the laws of a State with respect to long service leave continue to apply to a national system employee, except in relation to an employee who is entitled to long service leave under Division 9 of Part 2-2 of the FW Act. Additionally, under s 113 of the FW Act a national system employee is entitled to any long service leave entitlements that are contained in a Federal pre-modern award that would have covered the employer and their employees before 1 January 2010.[232] The Interim Report also compared the MCE Act conditions and those under the FW Act in attachment 6C. This is attached to this Final Report for ease of reference, as **Attachment 6A**.

691. The Interim Report then considered the issue of family and domestic violence leave (FDV leave) by reference to the FW Act, the entitlements of the public sector

227 FW Act s 759.
228 FW Act s 771.
229 FW Act Part 6-4 Division 3.
230 FW Act s 744.
231 Defined in the FW Act s 12 to mean an employee who is not a national system employee (which is also defined in the FW Act).
232 The FWC has prepared an indicative list of Federal instruments which contain long service leave provisions at https://www.fwc.gov.au/awards-and-agreements/awards/award-modernisation/termination-instruments.

of Western Australia, the four yearly reviews of modern awards in the Federal sphere and in developments in other States and Territories. As set out later, there have been developments since the publication of the Interim Report about paid FDV leave.

692. The Interim Report then contained an analysis of submissions both general and specific regarding minimum conditions of employment and the process for periodically updating minimum conditions of employment.

693. The Review then set out its preliminary opinions about the issues arising from the Term of Reference and set out the following proposed recommendations for submission and discussion purposes as well as the following specific requests for additional submissions.

> 47. The 2018 IR Act include a Part that provides for minimum conditions of employment for employees covered by the State system to be called the State Employment Standards (SES).
>
> 48. The SES include:
>
> (a) The minimum wage (including for employees who have a disability that has been assessed to affect their productive capacity to perform their particular job).
>
> (b) Subject to (d), the National Employment Standards (NES), as contained in the FW Act, other than the long service leave NES.
>
> (c) Conditions comparable to those contained in Part 3-6, Division 3 (Employer obligations in relation to employee records and pay slips) and Part 2-9, Division 2 (Payment of wages and deductions) of the FW Act.
>
> (d) Any minimum condition of employment, as contained in the MCE Act, if the condition is, on the issue to which it relates, more beneficial to an employee or in addition to any NES condition of employment.
>
> (e) The conditions set out in the *Termination, Change and Redundancy General Order* of the WAIRC (TCR General Order) in lieu of Part 5 of the MCE Act, but incorporating the provisions contained in the FW Act that are more beneficial to employees than the TCR General Order.
>
> (f) Subject to [49] below, provision for long service leave.
>
> (g) Provision for Family Domestic Violence (FDV) leave as a minimum condition of employment, in accordance with recommendations to be made after receiving additional submissions as requested in [54] below.
>
> 49. The SES condition with respect to long service leave include the following:
>
> (a) Express provision for casual employees to be entitled to receive long service leave and guidance on how to calculate their continuous employment.

(b) Express provision for seasonal workers to be entitled to receive long service leave and guidance on how to calculate their continuous employment.

(c) A provision that no long service leave may be "cashed out" until it is an entitlement that has accrued or crystallised as a legal entitlement.

(d) Provision for all forms of paid leave to count towards an employee's continuous employment.

(e) Provision for continuous employment to apply in circumstances equivalent to when there has been a transfer of business under Part 2-8 of the FW Act.

(f) A provision that an employer be obliged to provide a copy of an employee's employment records, relevant to an assessment of if, and when, they will be entitled to long service leave, to any subsequent employer to whom the first employer's business has been transferred, at the time of or within one month of the transfer of the business.

(g) Provision for the taking of long service leave in alternative ways.

(h) Express provision that service as an apprentice counts towards an employee's continuous employment.

(i) Expressing that the term "one and the same employer" in s 8(1) of the *Long Service Leave Act 1958* (LSL Act) includes related bodies corporate within the meaning of s 50 of the *Corporations Act 2001* (Cth).

50. The law in Western Australia be amended so that, under the 2018 IR Act, a failure to comply with the long service leave SES will, like the other SES, be able to be enforced by the imposition of a pecuniary penalty, compensation and/or associated orders made by the IMC, on application by an industrial inspector, the person who was the subject of the alleged failure to comply or an industrial organisation of which the person is a member.

51. (a) Subject to (b), within 12 months of the passing of the 2018 IR Act, the WAIRC, sitting as the Arbitral Bench, is to review the SES in the 2018 IR Act and decide whether any of the SES ought to be enhanced or clarified by a General Order, including by reference to the comparable conditions that then apply under the FW Act.

(b) The SES review referred to in (a) is to be on notice to stakeholders and other members of the public who are to have the opportunity to make submissions on the issues to the WAIRC.

52. In addition to the initial review of the SES referred to in [51]:

(a) The WAIRC will be required to review the SES every two years (after the initial review) and decide by a General Order whether, and to what extent, the SES ought to be added to and/or enhanced.

(b) The SES review referred to in (a) is to be on notice to stakeholders and other members of the public who are to have the opportunity to make submissions on the issues to the WAIRC.

(c) The WAIRC may, in exceptional circumstances, of its own motion or on application, review any or all of the SES at any time and decide by a General Order whether, and to what extent, the SES ought to be added to and/or enhanced.

(d) The SES review referred to in (c) is to be on notice to stakeholders and other members of the public who are to have the opportunity to make submissions on the issues to the WAIRC.

The Review seeks additional submissions on these issues arising from Term of Reference 5.

53. Should the "casual loading" currently set at 20 per cent under the MCE Act be increased or should the issue be deferred to consideration by the WAIRC, either on an award by award basis, or as a possible updated or enhanced SES, to be determined by the Arbitral Bench.

54. The nature and extent of the FDV leave to be included in the SES, including the length of the leave and the extent to which the leave should be paid or unpaid.

6.3 Submissions on the Interim Report

694. Submissions on the Interim Report about this Term of Reference were received from CCIWA, DWER, vegetablesWA, the AMWU, the CPSU/CSA, the HSUWA, UnionsWA, United Voice, the WASU, the WAPOU, the ECCWA, the ELC, AMMA, the HIA, Master Builders, the SBDC, the Western Australian Local Government Association (WALGA), the City of Canning, Mr Peter Katsambanis MLA (in his private capacity) and Slater & Gordon. Additionally, the Review received confidential submissions from two employer associations, one employee association and a State Government department. These confidential submissions have been taken into account and will be referred to although the providers of the submissions are not identified.

695. It is easiest to set out and assess these submissions under the heading of each of the proposed recommendations referred to in the Interim Report.

6.4 The Proposed Recommendations and Requests for Submissions - Submissions Provided Upon the Interim Report and Analysis and Conclusions of the Review

6.4.1 Proposed Recommendation 47

The 2018 IR Act include a Part that provides for minimum conditions of employment for employees covered by the State system to be called the State Employment Standards (SES).

696. WALGA, AMMA, the ECCWA, CCIWA and DWER all supported the recommendation. So too did a confidential employer association submission.

697. The HIA supported the recommendation with these qualifications:

(a) It was concerned that the proposed approach would see the retention of any existing superior State based conditions of employment.

(b) It suggested a cautious approach should be taken when assessing which employment conditions are more 'beneficial' under the State system versus those under the FW Act.

(c) It submitted the current provisions have real and perceived benefits for both employers and employees and any adopted changes should consider the balance of fairness from both the employer and employee perspective.

698. Master Builders implicitly supported the recommendation but said the SES must be easily understood and user friendly for small employers and written in "plain English" for ease of interpretation.

699. The SBDC supported standardising minimum employment requirements via the creation of the SES.

700. vegetablesWA said it "has no specific objection to the establishment and consolidation of various provisions under one heading of State Employment Standards. … The need to change to one should not lead to the review of all. The process of review should not be seen or used as a mechanism for enhancing provisions."

701. The unions who made submissions on the proposed recommendation all supported it, as did an employee association in a confidential submission.

702. The CPSU/CSA agreed with the proposal but suggested they be called State Minimum Conditions (SMC) as SES means "Senior Executive Service" in the public sector. UnionsWA also supported the recommendation but noted the point made by the CPSU/CSA.

703. The ELC:

(a) Supported the recommendation.

(b) Did not have a view on what the minimum conditions should be called but noted "two minor matters", being:

(i) SES is an acronym already widely known in different contexts so there is potential for confusion.

(ii) The reference to 'State', which is not a word specific to WA, may have the potential for confusion as to the scope or application of these minimums.

(c) Said another option may be to call them the Western Australian Employment Standards (WAES).

704. The Review is of the opinion that a recommendation should be made that there be included in the Amended IR Act a Part that contains a set of statutory minimum conditions of employment. The Review notes the concerns about confusion if the statutory minimum conditions were to be called the SES. Accordingly the Review accepts the submission of the ELC that it would be better to call the statutory minimum conditions the Western Australian Employment Standards, or WAES. The Review will call these statutory minimum standards the WAES in the balance of this chapter, except where the context makes it appropriate to continue to refer to the SES.

705. The Review considers that the WAES ought to be included in the Amended IR Act so that the employment standards are located in the same piece of legislation as the industrial relations laws that generally apply to State system employers and employees. Hopefully that will assist in the understanding of the terms and conditions that govern the employment relationship of State system employees and the way in which the State industrial relations system works. It will also give some prominence to the WAES, which befits their status.

6.4.2 Proposed Recommendation 48

The SES include:

(a) The minimum wage (including for employees who have a disability that has been assessed to affect their productive capacity to perform their particular job).

(b) Subject to (d), the National Employment Standards (NES), as contained in the FW Act, other than the long service leave NES.

(c) Conditions comparable to those contained in Part 3-6, Division 3 (Employer obligations in relation to employee records and pay slips) and Part 2-9, Division 2 (Payment of wages and deductions) of the FW Act.

(d) Any minimum condition of employment, as contained in the MCE Act, if the condition is, on the issue to which it relates, more beneficial to an employee or in addition to any NES condition of employment.

(e) The conditions set out in the *Termination, Change and Redundancy General Order* of the WAIRC (TCR General Order) in lieu of Part 5 of the MCE Act, but incorporating the provisions contained in the FW Act that are more beneficial to employees than the TCR General Order.

(f) Subject to [49] below, provision for long service leave.

(g) Provision for Family Domestic Violence (FDV) leave as a minimum condition of employment, in accordance with recommendations to be made after receiving additional submissions as requested in [54] below.

706. The reasons for the suggested inclusion of these minimum conditions are explained in the Interim Report.

707. AMMA agreed with a broad alignment with the NES and submitted there is no logical reason why minimum conditions should vary between State and Federal employers. It also submitted that updated State awards could regulate additional entitlements for a distinct occupational or geographic group of employees.

708. CCIWA submitted the minimum wage should not be included in the SES (as is the case with the NES). It also argued the enactment of the SES should not result in any "scaling up" or "duplication" of entitlements with respect to proposed recommendation 48(d). Whilst the submission did not explain what CCIWA meant by no duplication of entitlements, the Review infers that CCIWA is opposed to an employer having to incur the greater of the two costs if both the NES and the MCE Act currently apply to a condition of employment.

709. CCIWA also supported the incorporation of the TCR General Order and alignment/consistency with the FW Act.

710. The City of Canning raised the issue of local government employees and their long service conditions being underpinned by the *Local Government (Long Service Leave) Regulations* (the Local Government LSL Regulations). It submitted any long

service leave SES would need to contemplate the interaction it would have with these regulations if local government moves to the State system.

711. Section 4(3) of the LSL Act provides, that a person is not an "employee" for the purposes of the LSL Act if they are entitled to long service leave "at least equivalent to" the entitlement under the LSL Act, by virtue, inter alia, of an enactment of the State, such as the Local Government LSL Regulations.

712. The Local Government LSL Regulations are "at least equivalent to" the entitlement to long service leave for employees covered by the LSL Act – in fact, they are significantly more beneficial. For example, local government employees are entitled to 13 weeks' leave after 10 years' service, compared with 8 2/3 weeks' leave after 10 years' service under the LSL Act. Therefore, local government employees are not "employees" for the purposes of the LSL Act.

713. In the opinion of the Review, the WAES condition for long service leave should have a provision that has the effect that more beneficial long service leave entitlements will apply (such as those provided by the Local Government LSL Regulations). That is, the WAES condition is a minimum entitlement – it is not meant to foreclose more generous conditions being provided.

714. Additionally, as for the other minimum conditions of employment, the WAES should be expressed as minimum conditions of employment, which would not prevent more favourable conditions from applying to employees.

715. A confidential submission from a Government department urged caution with the adoption within the SES of an equivalent to s 62 of the FW Act (that provides for a maximum of 38 ordinary hours per week) suggesting it should not override the terms of some current State awards, which provide for more than 38 ordinary hours per week. It cited the example of some employees within its department who can work up to 42 ordinary hours per week in accordance with a State award. The Review notes that s 62(1) of the FW Act refers to the prospect of the working of more than 38 hours per week if it is "reasonable". Section 62(3) sets out criteria for determining this. The Review thinks the same regime should apply to the

WAES. That way, if, in the employment of the employees mentioned it is "reasonable" for them to be working for 42 hours, according to the statutory criteria, then there will be no difficulty for the Department. The Review appreciates this is different to the provisions of s 9A of the MCE Act. The difference being that the MCE Act provides an employee is not to be required or requested by an employer to work more than either their ordinary hours as specified in an industrial instrument or, if there is no industrial instrument that specifies ordinary hours of work, 38 hours per week. Section 9A of the MCE Act also permits the working of reasonable additional hours. The FW Act in contrast provides that an employer must not request or require an employee to work more than 38 hours per week (for a full time employee) unless the additional hours are reasonable.

716. In the opinion of the Review, it is preferable that where there is a difference, the FW Act provisions should be incorporated into the WAES, in lieu of s 9A of the MCE Act. That, it seems to the Review is the better recognition of the entitlement to a 38 ordinary hours working week and it is the standard bearer for the private sector in the remainder of Australia.

717. The Department also contended there should be a comprehensive review/comparison of the NES against the MCE Act as a separate process. By contrast, DWER supported the proposed recommendation. The Review is concerned that such a process would slow down the implementation of the WAES and is not necessary prior to the enactment of the WAES.

718. The HIA supported the development of a single set of State employment standards. It was concerned however, with the proposal to retain existing superior State conditions of employment. The HIA submitted a cautious approach should be taken when assessing which conditions are more beneficial and for whom. It suggested the criteria for determining the minimum wage should consider productivity, industry specific circumstances and how particular industries may be affected. The HIA also argued that the maximum weekly ordinary hours under the WAES should include provisions for the averaging of

work hours. The HIA also appeared concerned with the overly prescriptive nature of the annual leave NES where cashing out for award covered employees is limited to where an award provides for it; employers not being able to incorporate annual leave payments into an employee's wages; and suggested there are issues with "re-crediting" annual leave where an employee was ill or caring for someone during their annual leave.

719. The HIA also submitted the FW Act requirement to provide notice of termination in writing is unnecessary red tape with a "disproportionate penalty for contraventions". A similar submission was made about the requirement for an employer to provide a "Fair Work Information Statement". As well, the HIA contended there should not be a carve out in the SES allowing for industry specific redundancy schemes. As to the notice of termination in writing requirement, the Review notes this is provided for in the FW Act to all employees, and not just those in the Federal system and so it is not something that the State could change in the Amended IR Act. The Review also notes that industry specific redundancy schemes are already provided for in some State (as well as Federal) awards. If what is presently the TCR General Order was included as a statutory minimum condition of employment, it would not change the prospect that a particular award could provide for something more beneficial than this minimum condition.

720. Master Builders did not support the inclusion of wages for employees who have a disability within the minima. It argued that as disabilities can vary considerably, this should be a discretionary issue between the parties. The Review does not accept the thrust of this argument. The Review is of the opinion that an employee's disability is no reason for their wages not to be governed by the statutory minimum wage process that is envisaged for employees with a disability.

721. The Review also notes that wage assessment tools such as the Supported Wage System (SWS) by their nature recognise that disabilities vary, as does the effect of a disability on a person's productive capacity. The SWS provides for an independent assessment of the effect of a person's disability on their productive

capacity, which then determines the proportion of the relevant wage that is to be paid to the employee.

722. A confidential employer association submission said there needs to be a general overhaul of the minimum conditions and the establishment of State minimum standards in a similar vein to the NES. It argued the standards should include overtime rates, casual rates, standard loadings and allowances, and annualised salary arrangements.

723. A different employer association also made a confidential submission which did not support any changes to the TCR General Order without further consultation with industry. vegetablesWA also submitted the current TCR provisions are in "dire need of updating – they are outdated and largely irrelevant to the current environment". Elaborating, it argued the present process is onerous and unduly complicated and the severance pay system is "skewed". vegetablesWA provided an example of an employer having to pay a 25 year old with three years' service seven weeks' redundancy pay, whilst a 60 year old with 20 years' service is only entitled to 10 weeks' severance pay.

724. WALGA generally supported the proposed recommendation. It also said that, as local government long service leave is regulated by the Local Government LSL Regulations, it did not make any submission on the SES insofar as it may provide for long service leave. This issue has been dealt with above.

725. The AMWU, the CPSU/CSA, United Voice, the WAPOU, UnionsWA and a confidential submission from an employee association supported the proposed recommendation. The confidential submission also contended the WAES should ensure that all annual leave and personal leave be accrued in hours (in contrast to the NES).

726. That submission also argued that the provision of FDV leave should be the responsibility of Government, to provide access to financial assistance. Alternatively, it argued that employees affected by FDV could have access to paid personal leave. It also argued for a requirement that payments of wages,

allowances, loadings and penalties are made within one month of the performance of the work.

727. The CPSU/CSA agreed with the proposal and argued that FDV leave should be included as a minimum condition in accordance with the terms of the current entitlements in CSA industrial agreements with the State. That issue is referred to below in the context of the requested submissions on that particular topic.

728. UnionsWA supported the recommendation provided that existing MCE Act minimums are retained or improved as a result of the process. It made the clear submission that there should be no reduction in conditions. The HSUWA, the WASU and the WAPOU supported the UnionsWA submission.

729. United Voice reiterated this, arguing that the minimum conditions should reflect the MCE Act where they exceeded the NES; but where the MCE Act "falls short of the NES, the NES should prevail". United Voice repeated a submission made in its December 2017 written submission, that minimum standards relating to the right of access to flexible working arrangements, union delegate rights and penalty rates should be included in the SES.

730. The ELC:

(a) Agreed the minimum conditions and protections should be expanded to include at least any of the national system conditions and protections where they are new or more beneficial to employees.

(b) Supported an amendment to the provisions in clause 4.10 of the TCR General Order (exemption from redundancy pay with respect to employers of less than 15 employees) that reduces the number of employees to whom the exclusion applies or reverses the onus such that it permits an employer to seek an order varying the entitlement to redundancy pay if it is a small business employer.

(c) Submitted the right to request flexible working arrangements or an extension to unpaid parental leave should be strengthened in the State

legislation by introducing sanctions where the employer refuses the request, other than on reasonable business grounds (in contrast to the NES).

731. The ECCWA supported the proposal.

732. The Interim Report set out the preliminary opinion of the Review about how the SES ought to be compiled, from the interaction of the NES, the MCE Act conditions, and LSL Act, as follows:

> 1093 One of the issues in considering whether there ought to be modelling on, or alignment with, the NES is the situation where an existing State system minimum condition is superior (that is, more beneficial to an employee) to the NES. It was submitted that, where a State minimum condition involved a superior standard, it ought to be maintained. That submission is understandable from the perspective of the standards being developed having regard to Western Australian circumstances and providing conditions that employers and employees have become accustomed to.
>
> 1094 The same question may be asked then as to whether superior national system standards ought to be imposed upon State system employers. To some extent, whether that seems a good idea depends upon the paradigm through which the question is looked at. An employer group may regard it as an impost on business; a union is likely to regard it as an enhancement of working conditions. It needs to be remembered, in the opinion of the Review, however, that the NES were an attempt to construct minimum conditions of employment that achieved a balance between the interests of employers and employees. This occurred against the backdrop of an intent to cover as many private sector employers and employees as could be covered under the national system. That, as detailed in chapter 1, has been enhanced by a referral to the Commonwealth of legislative powers with respect to industrial relations for private sector employment in all States, except Western Australia. That being the case, it is hard to justify there being an exception for small businesses in Western Australia not being covered by standards equivalent to the NES when the small businesses in each other State of Australia are. On this basis, at present, the Review is of the opinion that standards equivalent to the NES ought to apply to State system employers and employees, unless the State system already offers a superior condition. In that instance, it would not be appropriate for employees to effectively lose that entitlement under a new set of standards.

733. The Review has taken into account the submissions of employers and employer associations that are contrary to this preliminary opinion. However, the Review remains of the opinion that employees ought not to suffer any reduction in their terms and conditions of employment if the WAES are legislated for. Therefore, the standards of employment conditions equivalent to the NES ought to apply to

State system employers and employees when the WAES are enacted, unless under the present State system the employee already has a better minimum condition of employment. In that instance, the superior State condition ought to apply. The reasons for this opinion are those set out in the above paragraphs of the Interim Report.

734. The Review will make a recommendation in terms of the proposed recommendation.

6.4.3 Proposed Recommendation 49

The SES condition with respect to long service leave include the following:

(a) Express provision for casual employees to be entitled to receive long service leave and guidance on how to calculate their continuous employment.

(b) Express provision for seasonal workers to be entitled to receive long service leave and guidance on how to calculate their continuous employment.

(c) A provision that no long service leave may be "cashed out" until it is an entitlement that has accrued or crystallised as a legal entitlement.

(d) Provision for all forms of paid leave to count towards an employee's continuous employment.

(e) Provision for continuous employment to apply in circumstances equivalent to when there has been a transfer of business under Part 2-8 of the FW Act.

(f) A provision that an employer be obliged to provide a copy of an employee's employment records, relevant to an assessment of if, and when, they will be entitled to long service leave, to any subsequent employer to whom the first employer's business has been transferred, at the time of or within one month of the transfer of the business.

(g) Provision for the taking of long service leave in alternative ways.

(h) Express provision that service as an apprentice counts towards an employee's continuous employment.

(i) Expressing that the term "one and the same employer" in s 8(1) of the *Long Service Leave Act 1958* (LSL Act) includes related bodies corporate within the meaning of s 50 of the *Corporations Act 2001* (Cth).

735. AMMA agreed that it is sensible to provide legislative guidance on long service leave entitlements for casual employees and seasonal workers. However, it disagreed with proposed recommendation 49(c) on the basis that many employers provide long service leave benefits in excess of or in advance of the State standard. For example, employers may provide an entitlement for long service leave after five years' continuous service. Other examples were also provided.

AMMA submitted a legislative prohibition on employers paying long service leave prior to the benefit crystallising would create "employee relations issues and may act to reduce entitlements for some employees". As to this, the Review reiterates that the LSL provisions included in the WAES will be minimum conditions of employment. If the employees that AMMA is concerned about are entitled to superior terms of long service leave to the WAES condition, then the WAES condition should not (as earlier set out) prevent that. Accordingly, as part of any such agreement, there could be terms allowing for the cashing out of leave before the entitlement crystallises. It will be a question of law and fact however, in each instance, as to whether the long service leave provided to the employee is or is not more beneficial than that provided by the WAES.

736. AMMA agreed with recommendation 49(d), but disagreed with recommendation 49(e). AMMA submitted the current WA transmission of business provisions are quite clear cut in their application. By contrast it said the FW Act transfer of business provisions are "poorly drafted and difficult to interpret and apply in some cases, particularly where a new employer has no direct business relationship with the old employer".[233] On this issue, the Review takes note of information provided by the PSD, that for regulatory purposes the FW Act provisions on the transfer of businesses are clearer and would provide better guidance for enforcement. The Review notes that the meaning of transfer of business in s 311(1)(d) of the FW Act provides that one of the requirements that must be satisfied is that there is a "connection" between the old and new employer. There is a connection if the new employer has the beneficial use of some or all assets of the old employer and they are used in connection with the transferring work. Consequently, if these requirements are not met, there is not a transfer of business. In these circumstances the concern of AMMA dissipates as a transfer would not apply "where a new employer has no direct business relationship with the old employer".[234] For these reasons, the Review will make a recommendation in the terms of the proposed recommendation.

---

233 The LSL Act does not necessarily require there to be a "direct business relationship" between the new and old employer – see the broad definition of 'transmission' in s 6(5).

234 See, for example, *Health Services Union* [2018] FWC 2527.

737. AMMA also disagreed with proposed recommendation 49(f). It said there was no demonstrated need for this provision and it created an administrative burden on employers where there may be no direct business relationship with, or knowledge of, the new employer. The Review understands the point. The Review accepts it in part; that is if the employer has no relationship or knowledge of the new employer it would not be fair to impose a burden to, in effect search for and find them. However, there is a problem with the submission. As referred to above, if the transfer of business provisions are adopted it should not be an administrative burden for the old employer to provide the new employer with a copy of the employment records of any transferring employees as there must be a connection between the two employers in the first place.

738. The Review considers that the proposed recommendation should be amended to only apply as part of the WAES when a request is made to the old employer by or on behalf of their former employee. In these circumstances, the Review does not think the burden would outweigh the benefit. The employer will have to have maintained the records to satisfy their obligations as an employer and it will not be difficult to transfer copies of the records to another employer. A safeguard can apply, so that the only records that need to be transferred are those that relate to employee entitlements. More personal records, such as relating to medical or disciplinary issues need not be transferred.

739. AMMA supported recommendation 49(g) provided that the alternatives are agreed in writing between the employer and employee. AMMA did not support proposed recommendation 49(h). It argued this might reduce the employment of young people due to increasing the cost of taking on an apprentice. There was no information provided to support what might be claimed as a speculative or perhaps at best an intuitive submission.

740. AMMA endorsed proposed recommendation 49(i).

741. CCIWA submitted that the modernisation and inclusion of long service leave in the SES is appropriate. Specifically, however, CCIWA said the granting of long service

leave, in principle, was the granting of leave after a long period of working for the same employer. Thus the inclusion of casual employees and seasonal workers was purposeless, as these employees would not reach the qualifying period by the nature of their work. Mr Katsambanis also submitted that making an express provision for casual employees and seasonal workers will make it harder and more expensive for employers to engage flexible labour and would reduce employment opportunities. This point is addressed below.

742. CCIWA submitted the inclusion of casual and seasonal workers should not be used as a mechanism for the pursuit of "portability" of long service leave entitlements. CCIWA said, additionally, that the inclusion of these employees would be a significant administrative impost on employers. With respect to the taking of long service leave in different ways, CCIWA said there should be a minimum leave period of one week.

743. DWER supported the proposed recommendation.

744. The HIA opposed the proposed recommendation, saying that changes to long service leave should be done by amending the LSL Act and not via the SES. It said, "there does not appear to be a demonstrated case as to why the LSL Act alone cannot be reviewed and amended if necessary."

745. A confidential employer association submission also said it did not support any changes to the LSL Act without further consultation with industry. Specifically, it argued that proposed recommendation 49(h) should be dealt with by the relevant award (following consultation with industry groups), not via legislative change. A confidential submission by a different employer association also opposed any changes, submitting the current long service leave system is adequately served by the LSL Act.

746. The SBDC said it did not support recommendation 49(b), arguing that extending long service leave to seasonal employees will add an unfair administrative and financial burden on small business. It said it could not support proposed recommendation 49(b) until the Government undertakes "targeted consultation

with employers of seasonal workers and develops a model aimed at minimising the impacts for employers, the calculation the leave would be based on." However, it also said it understood that casual employees are presently entitled to long service leave if they met the continuous employment requirements and said an express provision regarding this "may make it clearer for employers".

747. The AMWU agreed with the proposed recommendation, but did raise the introduction of a portable long service leave scheme. It submitted that it was unclear how a proposed recommendation like 49(b) could effectively confer a benefit onto workers without a portable scheme in existence. It also submitted a portable long service leave scheme that covers "gig economy" workers would be a "step in addressing the inequality of entitlements that gig economy workers suffer".

748. A confidential employee association submission questioned proposed recommendation 49(e). It was described as a significant change, which would not be supported by some of its members. The submission however expressly endorsed proposed recommendation 49(h).

749. The CPSU/CSA supported the proposal. It submitted the proposed recommendation appropriately remedies the barriers to long service leave arising out of increased casualisation of work. It also contended it was appropriate from a "gender equity perspective" due to the over-representation of women in casual work.

750. UnionsWA said the proposed recommendation is supported provided that the conditions contained in the LSL Act are not undermined or replaced for any worker. It also joined with United Voice in calling for recommendations in support of portable long service leave for cleaning, security and community-based workers in the Final Report. United Voice submitted the Review should consider its initial submission in support of portable long service leave for cleaning, security and community based workers, especially given the portable long service leave developments in these industries in Victoria.

751. The HSUWA, the WASU and the WAPOU supported the UnionsWA submission.

752. The ECCWA supported the proposed recommendation.

753. The ELC also supported the recommendation, saying there should be greater clarity around continuity of service and the other matters set out in the Interim Report.

754. On this point the PSD has informed the Review that it is of the opinion that the provisions of the LSL Act already apply to casual and seasonal workers, depending upon the facts and circumstances of the individual case. The touchstone is the statutory criteria of whether they have the requisite continuous employment. The PSD submitted to the Review that the proposed recommendation would merely clarify that the LSL Act applies, and provide guidance on how to calculate continuous employment for these employees, which can be challenging for both employers and employees. The PSD argued a seasonal employee could be continuously employed, notwithstanding that they may not work for certain periods of the year. Whether or not a seasonal employee has continuous employment can only be assessed on a case-by-case basis. The PSD submitted the LSL Act does not exclude casual or seasonal employees from its application.[235] Additionally, the question will always be whether a particular employee has the requisite "continuous employment" to qualify for long service leave. The Review accepts these arguments and remains of the view that it is preferable to include the provision in the WAES to provide for greater certainty in entitlement and the application of the entitlement. That is not, in the opinion of the Review the same issue as whether there should be an entitlement to portable long service leave in industries outside the construction industry, that already has portable long service leave. As set out in the Interim Report the Review regards that issue as outside of the Terms of Reference for the Review.

755. As to how long service leave ought to be able to be taken the Review takes note of the submission made by CCIWA but does not think it is appropriate to restrict the

[235] Indeed, s 4(2)(c) of the LSL Act sets out how to calculate a casual employee's normal weekly hours of work where their normal weekly number of hours have varied during their period of employment.

taking of long service leave to at least a period of one week. The Review does not think that individual employers and employees should be restricted in the manner suggested.

756. With respect to proposed recommendation 49(h), the preponderance of submissions to the Review were in favour of, or did not oppose this proposed recommendation. Given that long service leave is, in its origin, intended to reward a long period of employment with the same employer, the Review does not see why that should not apply to a period covered by service as an apprentice. The purpose of the amendment is to clarify that long service leave applies to service as an apprentice rather than introducing a new entitlement.

757. With the modification referred to with respect to proposed recommendation 49(f), the Review intends to make a recommendation in terms of the proposed recommendation.

6.4.4 Proposed Recommendation 50

The law in Western Australia be amended so that, under the 2018 IR Act, a failure to comply with the long service leave SES will, like the other SES, be able to be enforced by the imposition of a pecuniary penalty, compensation and/or associated orders made by the IMC, on application by an industrial inspector, the person who was the subject of the alleged failure to comply or an industrial organisation of which the person is a member.

758. This proposed recommendation was expressly endorsed by all who made submissions about it. They were DWER, the AMWU, the CPSU/CSA, UnionsWA, the HSUWA, the WASU, the WAPOU, the ECCWA and the ELC. Perhaps also tellingly, no employer association opposed it. The CPSU/CSA made the point that there is currently no avenue for employees or a union to enforce long service leave entitlements and no consequences for non-compliance. It argued there was a clear legislative gap that needed to be filled, particularly in the context of "the pervasiveness of wage theft". UnionsWA reiterated the latter point. The Review will include a recommendation in the terms of the proposed recommendation.

6.4.5 Proposed Recommendation 51

(a) Subject to (b), within 12 months of the passing of the 2018 IR Act, the WAIRC, sitting as the Arbitral Bench, is to review the SES in the 2018 IR Act and decide whether any of the SES ought to be enhanced or clarified by a General Order, including by reference to the comparable conditions that then apply under the FW Act.

(b) The SES review referred to in (a) is to be on notice to stakeholders and other members of the public who are to have the opportunity to make submissions on the issues to the WAIRC.

759. CCIWA did not support proposed recommendation 51(a).

760. A confidential submission from a Government department supported the proposal but recommended it occur after 24 months rather than 12 months.

761. DWER also supported the recommendation.

762. The vegetablesWA submission drew attention to the resources required to engage in the suggested review in conjunction with that put forward with respect to State awards. It said it put a significant burden on all parties. It argued that without the evidence of the clear necessity for a review "it would be a waste of time and resources on all sides". It also argued that:

> While monitoring and review of implementation and effectiveness is important, substantive reviews should occur when there is demonstrable evidence it is needed to address an inconsistency, ambiguity or gap, or the provision is clearly not operating in the way it was intended.

763. UnionsWA supported the proposed recommendation. This submission was endorsed by the AMWU, the HSUWA, the WASU, and the WAPOU. The CPSU/CSA also agreed with the proposal, saying it would "remove the process from politics". It warned however that there must be a provision that the minima cannot be reduced. It was argued, "this will ensure state minimum conditions will not fall below the federal provisions and reflects current community expectations".

764. United Voice did not support the proposed recommendation. It argued the proposed recommendation does not provide adequate safeguards to ensure that entitlements cannot be reduced as an unintended consequence of the process.

765. United Voice also argued "any automatic process for updating conditions will be costly for the government and resource intensive for union stakeholders". United Voice also contended the Interim Report did not satisfactorily address concerns raised in United Voice's initial submission about the appropriateness of unelected WAIRC Commissioners, who are not accountable to the public, amending statutory minimum conditions.

766. The ECCWA supported the proposal.

767. The ELC said it was generally supportive of periodic updating of the minima subject to:

(a) No employees being worse off under any changes; and

(b) The updates not occurring too frequently so as to be overly onerous for the parties involved in the review process.

768. The ELC also supported recommendation 51(b) subject to a point raised in the Interim Report that legislation could enshrine that the WAIRC cannot reduce the minimum standards.

769. The Review accepts the point made by United Voice that there is an anterior question to the one implicit within the proposed recommendation. That is whether it is appropriate for the WAIRC to be amending statutory minimum conditions. That is an issue that applies separately to whether a Review ought to take place within 12 months of the passing of any Amended IR Act.

770. The interim position of the Review was that it might be appropriate to have a review of the statutory minimum conditions within 12 months in case there was something that had been overlooked by the Review and in the enactment of the State minimum conditions of employment.

771. However, the Review also takes notice of the point made by vegetablesWA, and others, about the resource intense process that a review of the minimum conditions could be for stakeholders and the WAIRC. The Review also notes the

concern of the unions about ensuring that minimum conditions of employment are not reduced by way of a process of review.

772. Given these issues the Review considers that it is not appropriate to recommend a 12 month review of the WAES. The issue of the minimum rate of pay for casual employees is dealt with separately below.

6.4.6 Proposed Recommendation 52

In addition to the initial review of the SES referred to in [51]:

(a) The WAIRC will be required to review the SES every two years (after the initial review) and decide by a General Order whether, and to what extent, the SES ought to be added to and/or enhanced.

(b) The SES review referred to in (a) is to be on notice to stakeholders and other members of the public who are to have the opportunity to make submissions on the issues to the WAIRC.

(c) The WAIRC may, in exceptional circumstances, of its own motion or on application, review any or all of the SES at any time and decide by a General Order whether, and to what extent, the SES ought to be added to and/or enhanced.

(d) The SES review referred to in (c) is to be on notice to stakeholders and other members of the public who are to have the opportunity to make submissions on the issues to the WAIRC.

773. CCIWA did not support proposed recommendations 52(a) or 52(c). It submitted the WAES should only be varied by legislative amendment, as occurs with the NES.

774. DWER supported the proposed recommendation.

775. The HIA also opposed proposed recommendations 52(a) and 52(c). It also submitted Parliament should be responsible for the review of statutory minima, as occurs Federally. The HIA also argued that two years is a very short time period to carry out a review and that employers need certainty in the IR framework. It also argued: "There is little justification in the Interim Report for providing the WAIRC with a broad, unfettered discretion to review the SES".

776. Master Builders strongly opposed proposed recommendation 52(a). It also argued it is the role of Parliament to amend the SES on advice, not the WAIRC, especially as the SES is proposed to be a subset of the Amended IR Act. Master Builders

submitted the Parliament could provide authority to the WAIRC to review the SES on some regular basis or as required but the WAIRC could only be able to make recommendations to the responsible Minister who could then seek "Parliament's approval to do so". It also submitted two years was too short a time frame to conduct such reviews.

777. A confidential employer association submission also said that any change to the SES after implementation should be made via legislation and not updated periodically by the WAIRC.

778. The point made by vegetablesWA, above, about the resources required to participate in, and the necessity for reviews is also relevant in considering this proposed recommendation.

779. A confidential employee association submission agreed with the notion of a regular review of the minima but questioned how it would be conducted or change achieved by a General Order, given legislative change would require Parliamentary approval. By way of response to that point, the Review notes it could be accommodated by the terms of the legislation.

780. UnionsWA did not support the recommendation. It favoured a more limited review process, to only consider increases/improvements to the minimum conditions and only every four to five years, albeit it submitted the State minimum wage case should continue to occur each year. The AMWU, the HSUWA, the WASU and the WAPOU all endorsed the UnionsWA submission on this point.

781. United Voice also did not support the proposed recommendation based on the submissions set out under proposed recommendation 52.

782. The ECCWA supported the proposed recommendation.

783. The ELC was generally supportive of the periodic updating of the minima subject to the points made under proposed recommendation 52 above. The ELC also said the WAIRC needed to be adequately funded and resourced to conduct any review in a meaningful way. The ELC also noted the combined effect of proposed

recommendations 51 and 52 is that the WAIRC will be reviewing the SES twice in three years. The ELC was concerned that the critical nature and large extent of the review could be overly onerous on the WAIRC and other stakeholders, particularly given the effect of any updating of State awards.

784. The Review notes that this proposed recommendation has limited support. In particular, it is opposed by both UnionsWA and CCIWA who are "section 50 parties" under the IR Act and hold important positions as stakeholders in the State IR system. The Review also pays close regard to the submissions on the topic from Master Builders, the HIA and United Voice.

785. The thinking behind the proposed recommendation was that a regular WAIRC review of the SES may benefit employees under the State system. This was if there is not a regular review legislated for, minimum conditions of employment can become forgotten or overly politicised issues. There is a danger that they could stagnate and not be improved upon, despite there being a compelling case that they should be, because of an absence of political will. The Review suspects that recent experiences with the FWC, and in particular the decision to cut some penalty rates, may be of particular current concern to the unions; and the Review can understand that. The Review also notes the cogency of the argument that the NES can only be varied by the Commonwealth Parliament and so the same ought to apply in the State. For these reasons, the Review will not make a recommendation in the form of this proposed recommendation. The Review also notes however, that s 50 of the IR Act allows the WAIRC to make a General Order relating to industrial matters and that s 51B of the IR Act allows for the WAIRC to make a General Order setting a minimum condition that is more favourable to employees than a condition in the MCE Act. This means that currently a s 50 party could make application for either a completely new minimum or to improve on an existing MCE Act minimum. The WAIRC is also empowered to do this of its own motion. The Amended IR Act should retain these provisions, in the opinion of the Review.

786. The minimum wage should continue to be reviewed annually by the WAIRC, as it has been for many years.

6.4.7 Additional Submission 53

Should the "casual loading" currently set at 20 per cent under the MCE Act be increased or should the issue be deferred to consideration by the WAIRC, either on an award by award basis, or as a possible updated or enhanced SES, to be determined by the Arbitral Bench.

787. CCIWA submitted casual loading is best dealt with on an award by award basis, via award "modernisation". CCIWA submitted that an increase in the casual loading should not take place as part of the enactment of the SES.

788. A confidential Government department submission opposed an increase in casual loading as it would erode "parity" between permanent/fixed term contract positions and casual employment and would increase the department's costs. The Department of Health also submitted that any increase in the casual loading would have a significant financial impact on the WA health system.

789. The HIA said it is appropriate that the minimum entitlement is 20 per cent with scope for awards to provide a higher loading. There was no need to alter the statutory minimum.

790. Master Builders also said the WAIRC should review casual loading as part of award updating; submitting "adopting a simplistic, one size fits all approach and applying that across all awards is not supported", and a case by case approach was more prudent.

791. A confidential employer association submitted that the rate should remain at 20 per cent for small businesses. It argued if it is increased, it should be implemented via a transitional phasing period to allow time for small businesses to adjust.

792. The vegetablesWA submission strongly opposed an increase in casual loading being included in "considerations around the SES or MCE". It added, if the issue must be considered, it should be with the full benefit of industry evidence to

support its position. vegetablesWA referred to the need for industry specific considerations saying it "will not do to have mining or hospitality or health determine what is practical and possible in horticulture".

793. WALGA acknowledged that casual employees are paid a 25 per cent loading in the Federal system and there may need to be a review of the current rate in the State system. However, it submitted it would be appropriate to do so in the context of a wider review of entitlements and conditions. WALGA did not support an arbitrary increase to casual loading and inclusion in the MCE Act in the absence of any review or analysis that supports the change. It suggested any review of the proposed casual rate be subject to further submissions from interested parties to fully explore potential need and effects of an increase.

794. The CPSU/CSA argued the proposal was not contentious and there was no need to engage the WAIRC resources to consider appropriateness of raising the loading – that casual loading at an increased rate should be incorporated into the SES.

795. UnionsWA submitted the loading should be increased to 25 per cent and this should be legislated for. The UnionsWA submission was supported by the AMWU, the HSUWA, the WASU and the WAPOU.

796. United Voice also strongly supported increasing the casual loading to 25 per cent to align with the Federal system. It argued, this "should be done automatically".

797. The ECCWA submitted there is a case for increasing casual loading by either method suggested in the question posed.

798. The ELC submitted there should be an increase of the loading to 25 per cent, consistent with the national system. It also argued the WAIRC should have the ability under its own motion to review and set a higher percentage.

799. Mr Katsambanis MLA submitted that if casual employees are provided with long service leave, their hourly rate should be reduced to avoid "double compensation". To the extent that the submission refers to the position of casual employees and long service leave, the issue has been dealt with above.

800. The SBDC did not support an increase due to additional costs being imposed on employers.

801. It argued it is more appropriate for the WAIRC to consider rates of pay more generally through award modernisation or minimum wage reviews. The SBDC said that introducing increased casual loading, in addition to extending the reach of long service leave and introducing FDV leave, would not represent a balanced approach to IR reform.

802. At present the minimum loading for casual employees is set under s 11 of the MCE Act. Section 11(1) of the MCE Act provides that the amount to be paid to casual employees under the MCE Act is the amount to be paid to a non-casual employee plus "the prescribed percentage of that amount". Section 11(2)provides that the prescribed percentage means (a) 20% or (b) if a percentage higher than 20% is set by an order under s 51I of the IR Act for the purposes of the section, that percentage.

803. In turn, s 51I of the IR Act provides as follows:

> **Casual employees' loading, setting for MCE Act s. 11**
>
> (1) Subject to subsection (2), the Commission may, by way of order, set a percentage that is higher than 20% to be the prescribed percentage for the purposes of section 11 of the MCE Act.
>
> (2) An order under subsection (1) can only be made on an application made —
>
> (a) by UnionsWA, the Chamber, the Mines and Metals Association or the Minister; and
>
> (b) at least 12 months after the determination of the most recent application for an order under subsection (1).

804. It is relevant that none of the parties who may make an application to increase the loading for casual employees has made such an application to the WAIRC.

805. The Review notes that the rate of casual loading under the Federal system is 25 per cent. This is higher than the State loading by 5 percentage points. That is a reasonable amount both for an employee and an employer. The Review also notes that in the FWC decision on the Annual Wage Review 2017-18, the FWC decided, with the concurrence of submissions from the ACTU, the Australian

Industry Group, Australian Business Industrial and the NSW Business Chamber that the casual loading in modern awards and for award/agreement free employees should be maintained at 25 per cent.[236]

806. The Review also takes note of the submissions made by, for example, the Department of Health, and vegetablesWA and other employer groups. Following on from the submission by the Department of Health, if there is to be an increase of 5 percentage points in the loading for casual employees and there is a significant number of casual employees within the State Government or a large department of the State Government then there are financial and budgetary issues wrapped up within this issue that the Review is in no position to assess.

807. Accordingly, whilst the Review considers there is a case to support an increase in the casual minimum loading it is a matter that needs to be considered taking these things into account. These are matters that could be determined by the WAIRC in an application under s 51I of the IR Act. Accordingly, the Review considers it appropriate to go no further than to recommend that the Minister give consideration to applying for an order under s 51I of the IR Act to increase the minimum casual loading to 25 per cent; and that the Amended IR Act retain s 51I of the IR Act. In the interim, of course it would be open to any other party mentioned in s 51I of the IR Act to make an application to the WAIRC for an increase in the casual loading. In hearing any such application, the WAIRC would have the resources and skills, as assisted by the parties, to come to a conclusion on whether there should be an increase in the loading.

6.4.8 Additional Submissions 54

The nature and extent of the FDV leave to be included in the SES, including the length of the leave and the extent to which the leave should be paid or unpaid.

808. CCIWA submitted that if FDV leave is adopted, it should be in the same terms as the recent FWC Full Bench decision entitled, *4 yearly review of modern awards – Family and Domestic Violence Leave*.[237] The order arising from the decision

[236] [2018] FWCFB 3500, [465]-[467]; delivered 1 June 2018.
[237] [2018] FWCFB 1691, 26 March 2018.

provided for 5 days' unpaid leave to employees experiencing FDV. CCIWA submitted an entitlement to FDV leave should be available:

(a) For attendance with police, at Court, with a lawyer, and with Government support services; and

(b) To locate refuge, shelter or temporary accommodation.

809. CCIWA submitted FDV leave should only be provided where it is impracticable to attend to these matters outside work time.

810. The HIA recommended a cautious approach, with detailed and extensive consideration. It suggested awaiting the FWC review of its proposed model FDV leave award term in 2021 before making any legislative change.

811. A confidential employer association submission said FDV leave should be taken from an employee's personal leave (if applicable), with unpaid leave taken after personal leave has been exhausted.

812. WALGA recommended the inclusion of a minimum unpaid FDV leave entitlement in the SES. It also said each employer should be able to determine the quantum of the leave and the flexibility arrangements they choose to offer on a case by case basis.

813. The CPSU/CSA said that the Government has agreed to FDV leave in CPSU/CSA agreements and it would help enshrine the entitlement if FDV leave was included in the SES. It also argued that extending the entitlement to all State system employees would lead to valuable social change, which would have a positive effect on retention rates, occupational safety and health and the productivity of employees who are FDV victims.

814. UnionsWA argued FDV leave should be at least 10 days' paid leave. This was endorsed by the AMWU, the HSUWA, the WASU and the WAPOU. United Voice submitted the State IR system should lead by example when it comes to FDV leave

and a minimum condition of employment should be enacted and modelled on the ACTU's FDV leave model clause. That is referred to below.

815. The ECCWA said FDV leave should be included in the SES and should include both paid and unpaid leave. It did not have a firm view on the length but submitted 14 days' leave was a minimum.

816. The ELC said FDV leave should be included in the SES with the following terms:

(a) At least 10 days' paid leave.

(b) An ability to take additional unpaid leave.

(c) Provisions regarding confidentiality.

(d) The right to flexible working arrangements and transfer to a safe job.

(e) Protections from discriminatory treatment.

817. In response to any arguments that FDV leave will be a "slippery slope" to other forms of leave, the ELC argued that FDV leave is an entitlement which needs to be examined on its own merits and not in comparison to other forms of hypothetical leave. Also, in response to any argument that FDV leave will detrimentally impact on women's employment prospects, the ELC argued that protections already exist to prevent women from being discriminated against on grounds of gender. It contended that other "employment protections" relating to pregnancy and family responsibility do not act as a disincentive to hiring women.

818. In response to the argument that FDV leave will be costly for employers, the ELC noted recent research[238] which found that:

(a) Only 1.5 per cent of women and 0.3 per cent of men are likely to use paid FDV leave per annum.

[238] Jim Stanford, Centre for Future Work at the Australia Institute, *Economic Aspects of Paid Domestic Violence Leave Provisions*, December 2016, 3.

(b) Incremental "wage payouts" would be in the order of $80-$120M per year for the whole economy. The Review was informed this was equivalent to less than 1/50th of 1 per cent of existing payrolls or 0.02 per cent. The ELC submitted this was a "modest" amount.

(c) Costs associated with these payments are likely to be largely or completely offset by benefits to employers associated with the provision of paid FDV leave including reduced turnover and improved productivity.

819. Slater & Gordon submitted the effects of FDV is a workplace issue and therefore requires a workplace solution. It said an employer's FDV leave policy can be changed or revoked at any time, so it was important for FDV leave to be legislated for and included in the SES.

820. Slater & Gordon made no submission on the length of the leave other than it should be paid leave so as to not further unnecessarily burden the person experiencing FDV. It was also contended that if the aggressor controls the "financials" of the victim, it is very unlikely the victim will take unpaid leave. It also submitted it was inevitable that FDV leave will become nationally regulated and so the 2018 IR Act should include FDV leave as a SES before State system employees become disadvantaged compared with national system employees.

821. The United Voice submission upon the Interim Report referred back to its original submission to the Review provided in December 2017. This contained the following paragraphs about FDV leave:

> **Family Domestic Violence (DFV) Leave**
>
> There is no standardised requirement for employees covered by the state system to access DFV leave. Over the year from 2014-15 to 2015-16 the number of incidents of DFV reported to WA Police has increase by 17.5%. In 2016-17 there were over 50,000 DFV incidents reported in Western Australia and over 4,500 calls to helplines. DVF is distinctly gendered with women accounting for almost two thirds of all family and domestic violence-related homicides.[239]
>
> Workplaces are both affected by and have a role in supporting and ensuring the safety of working people. Two thirds of women who have reported DFV are in paid employment.[240] DFV has major impacts on the lives of those it affects, including making

239 Australian Bureau of Statistics, 'Victims of Family and Domestic Violence', 13 July 2016, www.abs.gov.au

240 Australian Council of Trade Unions, 'Domestic Violence', 13 July 2016 https://www.actu.org.au/our-

> it difficult to maintain standard work hours and retain paid employment. Research indicates the variety of ways DVF can negatively impact on employment including decreased performance and productivity, increased absenteeism, job loss and disrupted work history.[241] One in five survivors of DVF report violence continuing while at work, most commonly through harassing or abusive emails or phone calls.
>
> Employment and financial stability are critical to escaping a violent and abusive relationship. Stable, secure employment is a cost effective preventative measure which sends a message of cultural intolerance towards violence against women.
>
> As incidences and awareness of DFV have grown, unions have led the case for the introduction of additional leave entitlements…
>
> United Voice proposes that a DFV clause be included in the IR Act as a specific minimum condition of employment. The clause should be modelled upon the Australian Council of Trade Unions family and domestic violence 'model clause'.[242]
>
> > *"The minimum Domestic Violence Leave provision proposed by the ACTU aims to make it easier for survivors of domestic violence to remain in paid employment and manage stressful and time consuming tasks like finding a new home and attending court. It does this by providing access to ten days paid leave and an additional two days unpaid leave per year."*[243]

822. The Review regards this as an impressive submission, although the counter to it is that the FWC considered the issue of paid leave for FDV in March 2018 and rejected it, as referred to above. This is, not surprisingly but importantly relied upon by CCIWA in their submission. On that basis there is a cogent argument for the same standard to apply to Western Australian private sector employers and employees. It is noted however, that within State Government agreements there is an entitlement to 10 non-cumulative days of paid FDV leave per annum and on the exhaustion of this leave entitlement up to 2 days' unpaid FDV leave on each occasion. This is set out in a model clause published in a Premier's Circular and is to be incorporated into public sector industrial agreements as they are replaced.[244]

---

work/policy-issues/domestic-violence.

241 Industrial Relations Legislative Reform Reference Group, *A Review of the Industrial Relations Framework in Queensland*, December 2015, 75.

242 Australian Council of Trade Unions, 'ACTU Model Clause', https://www.actu.org.au/media/886613/actu-model-family-and-domestic-violence-leave-clause-revised-18-march-2.pdf.

243 Australian Council of Trade Unions, Domestic Violence', 13 July 2016, https://www.actu.org.au/our-work/policy-issues/domestic-violence.

244 See Premier's Circular 2017/07 https://www.dpc.wa.gov.au/GuidelinesAndPolicies/PremiersCirculars/Pages/2017-07-Family-and-Domestic-Violence-Paid-Leave-and-Workplace-Support.aspx- which provides all public sector employees with 10 non-cumulative days of paid FDV per annum and, on exhaustion of this leave entitlement, up to 2 days' unpaid FDV leave on each occasion as per a model clause set out in the circular. This model clause is to be incorporated into public sector industrial instruments as they are replaced. See, for example, clause 23 of the 2017 Public Service and Government Officers General Agreement http://forms.wairc.wa.gov.au/Agreements/Agrmnt2017/PUB038.pdf.

823. The Review also notes that in 2016 the Queensland State Government decided to include within its *Industrial Relations Act 2016* an entitlement to paid domestic and family violence leave in the same way for public sector employees and the local government employees covered by the Queensland State system.

824. An issue of concern for the Review is the possible cost for small employers within the State system. However, the Review has some encouragement that the cost may not be as great as sometimes might be feared, based on the research referred to by the ELC.

825. The Review also thinks there is some substance to the submission made by UnionsWA, that Western Australia could set the example in this field. It is, as the submission from United Voice sets out, an issue that is far more relevant to female employees than male employees. The provision of paid FDV leave is, according to the union movement, an important step forward in attempts to decrease gender based workplace disadvantages. It is an issue that, in the opinion of the Review, ought to be a societal concern generally.

826. Accordingly, the Review will recommend to the Minister that one of the WAES be the provision of paid and unpaid FDV leave for all employees in terms consistent with the Premier's Circular. That is, there be a WAES providing for:

(a) Ten non-cumulative days of paid FDV leave per annum; and

(b) If these days of leave are completely taken in any year, up to two days' unpaid FDV leave that may be taken if required on each occasion when FDV has occurred.

827. If there is a WAES in those terms and it causes particular hardship for a small employer who is required to pay for the FDV leave of an employee, the Government could give consideration to providing for a system for governmental relief.

6.5 Flexible Work Arrangements

828. In the original submission of United Voice, reiterated in their submission on the Interim Report, there was a submission that flexible working arrangements ought to be included as part of the minimum employment standards of the State. It was submitted "women disproportionately take on domestic and child caring duties, and are far more likely than men to be primary care providers. Women are thus most impacted by a lack of flexible working arrangements … Enshrining flexible working arrangements in the IR Act would go to ensuring women and carers are able to stay in the workforce. This would also have some positive flow on effects for closing the gender pay gap. Flexible working arrangements can also go to assisting employees navigate demanding or challenging times outside of their work life, such as DFV."

829. United Voice submitted that the IR Act should be amended to include flexible working arrangements mirroring s 65 of the FW Act. The right to request flexible working arrangements is part of the NES, and therefore would become part of the WAES, under the legislative process earlier described.

830. The FW Act provides as follows:

> **65 Requests for flexible working arrangements**
>
> *Employee may request change in working arrangements*
>
> 65(1) If:
>
> (a) any of the circumstances referred to in subsection (1A) apply to an employee; and
>
> (b) the employee would like to change his or her working arrangements because of those circumstances;
>
> then the employee may request the employer for a change in working arrangements relating to those circumstances.
>
> Note: Examples of changes in working arrangements include changes in hours of work, changes in patterns of work and changes in location of work.
>
> 65(1A) The following are the circumstances:
>
> (a) the employee is the parent, or has responsibility for the care, of a child who is of school age or younger;
>
> (b) the employee is a carer (within the meaning of the *Carer Recognition Act 2010*);
>
> (c) the employee has a disability;

(d) the employee is 55 or older;

(e) the employee is experiencing violence from a member of the employee's family;

(f) the employee provides care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing violence from the member's family.

65(1B) To avoid doubt, and without limiting subsection (1), an employee who:

(a) is a parent, or has responsibility for the care, of a child; and

(b) is returning to work after taking leave in relation to the birth or adoption of the child;

may request to work part-time to assist the employee to care for the child.

65(2) The employee is not entitled to make the request unless:

(a) for an employee other than a casual employee—the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or

(b) for a casual employee—the employee:

(i) is a long term casual employee of the employer immediately before making the request; and

(ii) has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

Formal requirements

65(3) The request must:

(a) be in writing; and

(b) set out details of the change sought and of the reasons for the change.

Agreeing to the request

65(4) The employer must give the employee a written response to the request within 21 days, stating whether the employer grants or refuses the request.

65(5) The employer may refuse the request only on reasonable business grounds.

65(5A) Without limiting what are reasonable business grounds for the purposes of subsection (5), reasonable business grounds include the following:

(a) that the new working arrangements requested by the employee would be too costly for the employer;

(b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;

(c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;

(d) that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;

(e) that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

65(6) If the employer refuses the request, the written response under subsection (4) must include details of the reasons for the refusal.

831. United Voice also submitted that the IR Act should provide that the people covered by s 65(1A)(a) of the FW Act be extended to include all dependents rather than limiting it to just school age children.

832. The Review accepts that the thrust of the submission made by United Voice. The Review therefore considers that it would be appropriate to include possible coverage of dependents as opposed to just school age children, as submitted. This narrow provision does seem to be an anomaly. The Review notes the "safeguard" for employers is that they can refuse the request on reasonable business grounds. That will take into account the nature of the business, the number of employees and the cost, as set out in s 65(5A) of the FW Act. Accordingly, the Review will make a recommendation to this effect to the Minister. Whilst this is in one sense an unenforceable right, a dispute about it could be an industrial matter an organisation could refer to the WAIRC via s 44 of the IR Act.

833. The Review also notes that the current parental leave provisions in the MCE Act contain rights in relation to returning to work on a modified basis after parental leave which will continue to apply in accordance with recommendation 55(d).[245]

6.6 Union Delegate Rights

834. United Voice also made a submission relating to a gap in the IR Act's freedom of association provisions and the recognition of the rights of union delegates.

835. Whilst the Review notes the submission, it considers that the freedom of association provisions under the IR Act are a separate topic for consideration; and one that was not included in the Terms of Reference. Accordingly, the Review does not propose to consider making a recommendation as submitted by United Voice.

[245] MCE Act s 38.

6.7 Penalty Rates

836. United Voice also made a submission that the IR Act should be amended to include penalty rates as a statutory minimum condition of employment.

837. The Review notes the content of the United Voice submission on penalty rates and the importance of penalty rates to the take home pay of working people in Western Australia. The Review is also aware of the recent decisions from the FWC that have stripped back an entitlement to penalty rates in some industries, for some occupations. The issue of penalty rates is, however, a large issue and one that the Review considers to be beyond its purview to recommend it be enshrined as a minimum condition of employment.

6.8 Recommendations

838. With respect to Term of Reference 5 the Review makes the following recommendations and observations:

54. The Amended IR Act include a Part that provides for minimum conditions of employment for employees covered by the State system to be called the Western Australian Employment Standards (WAES).

55. The WAES include:

(a) The minimum wage (including for employees who have a disability that has been assessed to affect their productive capacity to perform their particular job).

(b) Subject to (d), the National Employment Standards (NES), as contained in the FW Act, other than the long service leave NES.

(c) Conditions comparable to those contained in Division 3 of Part 3-6 (Employer obligations in relation to employee records and pay slips) and Division 2 of Part 2-9 (Payment of wages and deductions) of the FW Act.

(d) Any minimum condition of employment, as contained in the MCE Act, if the condition is, on the issue to which it relates, more beneficial to an employee or in addition to any NES condition of employment.

(e) The conditions set out in the *Termination, Change and Redundancy General Order* (TCR General Order) of the WAIRC in lieu of Part 5 of the MCE Act, but incorporating the provisions contained in the FW Act that are more beneficial to employees than the TCR General Order.

(f) Subject to [56] below, provision for long service leave.

(g) Provision for Family and Domestic Violence (FDV) leave as a minimum condition of employment, in accordance with recommendation [61] below.

56. The WAES condition with respect to long service leave include the following:

(a) Express provision for casual employees to be entitled to receive long service leave and guidance on how to calculate their continuous employment.

(b) Express provision for seasonal workers to be entitled to receive long service leave and guidance on how to calculate their continuous employment.

(c) A provision that the WAES entitlement to long service leave may not be "cashed out" until it is an entitlement that has accrued or crystallised as a legal entitlement.

(d) A statement that all forms of paid leave count towards an employee's continuous employment.

(e) A statement that there is continuous employment in circumstances equivalent to when there has been a transfer of business under Part 2-8 of the FW Act.

(f) A provision that, following a written request from any former employee, the employer be obliged to provide a copy of an employee's employment records, relevant to an assessment of if and when they will be entitled to long service leave, to any subsequent employer to whom the first employer's business has been transferred, at the time of or within one month of the transfer of the business.

(g) Provision for the taking of long service leave in alternative ways.

(h) Confirmation that service as an apprentice counts towards an employee's continuous employment.

(i) A statement that the term "one and the same employer" in s 8(1) of the *Long Service Leave Act 1958* (WA) (LSL Act) includes related bodies corporate within the meaning of s 50 of the *Corporations Act*.

57. The law is to be changed so that in the Amended IR Act, a failure to comply with the long service leave WAES will, like the other WAES, be able to be enforced by the imposition of a pecuniary penalty, compensation and/or associated orders made by the IMC, on application by an industrial inspector, the person who was the subject of the alleged failure to comply or an industrial organisation of which the person is a member.

58. In the Amended IR Act, the minimum wage WAES will be reviewed annually by the WAIRC in accordance with s 50A of the IR Act.

59. In the Amended IR Act, s 51B of the IR Act is to be retained, to enable the WAIRC to make a General Order in relation to a matter that is the subject

of a WAES, if the General Order is more favourable to employees than the minimum condition of employment.

60. (a) In the Amended IR Act, s 51I of the IR Act is to be retained.

(b) The Minister give consideration to applying for an order under s 51I of the IR Act to increase the minimum casual loading to 25 per cent.

61. The FDV leave to be included in the WAES in the Amended IR Act in terms consistent with Premier's Circular 2017/07 – being as follows:

(a) Ten (10) non-cumulative days of paid FDV leave per annum; and

(b) If these days of leave are completely taken in any year, up to two (2) days' unpaid FDV leave that may be taken if required on each occasion when FDV has occurred.

62. In the Amended IR Act, the WAES requests for flexible working arrangements contain an addition to the entitlement under s 65(1A)(a) of the FW Act to include any dependent of the employee.

Attachment 6A Comparison between the *Minimum Conditions of Employment Act 1993* and the *Fair Work Act 2009* Minima

The following table compares the statutory minima contained in the MCE Act and the FW Act.

Condition	MCE Act provision	FW Act provision
Minimum wages	• An employee is entitled to be paid, for each hour worked by the employee in a week, the minimum weekly rate of pay divided by 38 • Provides for minimum wages for adults, juniors, apprentices and casual employee	• Not part of the NES • The Fair Work Commission sets the national minimum wage • The national minimum wage order includes provision for supported wage system employees and casual loading for award/agreement employees
Hours of work	• An employee is not to be required or requested by an employer to work more than: • the employee's ordinary hours of work as specified in an industrial instrument • 38 hours per week if there is no industrial instrument that specifies the employee's ordinary hours of work • reasonable additional hours • The Act identifies factors to be considered in determining whether additional hours are reasonable[246]	• 38 hours for full time employees • For an employee who is not a full-time employee – the lesser of 38 hours and the employee's ordinary hours of work in a week • An award or agreement may provide for averaging of hours. There is no restriction on the period over which averaging may occur • Averaging of hours may also occur for award free employees but over no more than 26 weeks • Hours worked under an averaging arrangement must be reasonable in each week of the cycle i.e. hours worked in excess of 38 are additional hours and they must not be unreasonable, averaging notwithstanding • An employer must not request or require an employee to work more than the maximum unless the additional hours are reasonable • The Act identifies factors to be considered in determining whether additional hours are reasonable
Annual leave	• Paid annual leave for the number of hours an employee is required ordinarily to work in a four-week period during a year, up to 152 hours • Entitlement accrues pro rata on a weekly basis • An employee may forgo taking annual leave to which they became entitled in relation to that year of service if: ▪ the amount of annual leave forgone does not exceed 50% of the whole amount of annual leave to which the employee became entitled in relation to that year of service	• Four weeks' annual leave • Five weeks' annual leave for shift workers • Leave is accrued progressively and taken on the basis of the employee's ordinary hours of work • Awards may supplement this standard if they are not detrimental to employees e.g. half pay annual leave • Annual leave may only be cashed out in accordance with an award or agreement provided:

[246] These factors are similar to, but not the same, as the factors in the FW Act.

Condition	MCE Act provision	FW Act provision
	▪ the employee is given an equivalent benefit in lieu of the amount of annual leave forgone ▪ the agreement is in writing • An employee cannot be required to cash out annual leave • An employee can only cash out annual leave if it is provided for in an industrial instrument • Not entitled to a public holiday which falls during a period of annual leave	▪ four weeks' leave remains ▪ the arrangement is in writing ▪ the leave is not cashed out at a lower rate • An award/agreement free employer and employee may agree to cash out annual leave, subject to the same requirements as an award/agreement covered employer and employee • An award/agreement free employee can be directed to take annual leave at a particular time, but only where reasonable • Entitled to a public holiday that falls within a period of annual leave
Personal/carer's leave	• Paid leave for illness, injury or family care for the number of hours an employee is required ordinarily to work in a two-week period during that year, up to 76 hours • Entitlement accrues pro rata on a weekly basis • Leave to care for a family member is capped at 76 hours per annum • Employee must provide to the employer evidence that would satisfy a reasonable person of the entitlement	• 10 days' paid personal/carer's leave • Leave is accrued progressively according to the employee's ordinary hours of work • Personal/carer's leave may only be cashed out in accordance with an award or agreement, provided: ▪ 15 days' leave remains ▪ the arrangement is in writing ▪ the leave is not cashed out at a lower rate • An employee not covered by an award or agreement cannot agree to cash out personal/carer's leave • Employee must provide notice as soon as practicable (which may be a time after the leave has started) and advise the employer of the period, or expected period, of the leave • An employee must, if required by the employer, give the employer evidence that would satisfy a reasonable person • A modern award or enterprise agreement may include terms relating to the kind of evidence that an employee must provide
Unpaid carer's leave	• Unpaid carer's leave of up to two days where a member of the employee's family or household requires care or support because of an illness or injury or an unexpected emergency • Only entitled to unpaid carer's leave if the employee cannot take paid carer's leave during the period • Extends to casuals	• Unpaid carer's leave of up to two days where a member of the employee's family or household requires care or support because of an illness or injury or an unexpected emergency • Only entitled to unpaid carer's leave if the employee cannot take paid carer's leave during the period • Extends to casuals

Condition	MCE Act provision	FW Act provision
Bereavement leave	• Paid bereavement leave of up to two days on the death of a member of an employee's family or household • Employee must provide to the employer evidence that would satisfy a reasonable person of the entitlement	Nil (covered by compassionate leave)
Compassionate leave	Nil	• Two day's compassionate leave per occasion – being when a member of an employee's immediate family or household has: ▪ contracted or developed a personal illness ▪ sustained a personal injury that poses a serious threat to life ▪ died • Unpaid compassionate leave is available to casual employees
Parental leave	• Extensive parental leave provisions, notwithstanding that the FW Act parental leave provisions apply to State system employees and prevail over the MCE Act to the extent of any inconsistency that is not more favourable to the employee • More favourable provisions are: ▪ right to request a return to work on a modified basis following a period of parental leave ▪ right to request a reversion to working on the same basis as the employee worked immediately before starting parental leave (where the employee returned to work on a modified basis)	• Provisions apply to national and State system employees • More favourable State provisions can continue to apply • No provisions in parental leave regarding returning to work on a modified basis • The flexible work arrangements provisions (below) provide that an employee who: ▪ is a parent, or has responsibility for the care, of a child; and ▪ is returning to work after taking leave in relation to the birth or adoption of the child; may request to work part-time to assist the employee to care for the child
Flexible working arrangements	• Nil (with the exception of the above provisions in relation to parental leave)	• An employee may request the employer for a change in working arrangements where: ▪ the employee is the parent, or has responsibility for the care, of a child who is of school age or younger ▪ the employee is a carer ▪ the employee has a disability ▪ the employee is 55 or older ▪ the employee is experiencing violence from a member of the employee's family ▪ the employee provides care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing violence from the member's family

Condition	MCE Act provision	FW Act provision
		• An employer is only able to refuse on reasonable business grounds[247] and must give written reasons • State laws that provide more generous entitlements can continue to apply
Public holidays	• An employee, other than a casual employee, who is not required to work on a day solely because that day is a public holiday, is entitled to be paid as if they were required to work on that day	• An entitlement for an employee to be absent on prescribed public holidays (paid according to ordinary hours and base rate of pay) • An employer may make a reasonable request for an employee to work on a public holiday • An employee may refuse to work if they have reasonable grounds to refuse • State legislation relating to the prescription and substitution of public holidays continues to apply
Termination	Nil	• Notice of termination provisions apply to national and State system employers and employees • Notice of termination provisions in State awards that are more favourable to employees can continue to apply
Change	Refer to Attachment 6B of the Interim Report	Refer to Attachment 6B of the Interim Report
Redundancy	Refer to Attachment 6B of the Interim Report	Refer to Attachment 6B of the Interim Report
Employment record keeping	• Employers are required to keep employment records[248] • No requirement to keep a record of any cashing out of annual leave arrangement	• Employers are required to keep employment records • Requirement for an employer to keep a record of any cashing out arrangement, including the agreement between the parties to cash out the leave, the rate of pay for the amount of leave that was cashed out and when payment was made
Pay slips	No requirement to provide pay slips	• Employer must provide a payslip in either electronic form or hard copy • The payslip must specify: ▪ the employer's and the employee's name ▪ the period to which the payslip relates ▪ the date on which the payment was made ▪ any amount paid to the employee that is a bonus, loading, allowance, penalty rate, incentive based payment or other entitlement

247 Reasonable business grounds are not defined. An assessment of what is reasonable will be assessed according to the circumstance applying when the request is made. Grounds could include: the effect on the workplace and the employer's business; an inability to organise work among existing staff; or an inability to recruit a replacement employee.

248 These are similar to, but not the same as, the FW Act requirements.

Condition	MCE Act provision	FW Act provision
Community service leave	Nil	• A right to unpaid leave for community service work such as volunteer work with the SES and jury duty • The absence is limited to the time the employee is engaged in the activity, reasonable travelling time and reasonable rest time immediately following the activity • Provision for an employer to provide makeup payment to a permanent employee undertaking jury duty for up to 10 days (paid according to ordinary hours and base rate of pay) • State laws that provide more generous entitlements can continue to apply
Long service leave	Nil (contained in the LSL Act)	• Preservation of existing entitlements as per a range of industrial instruments, where they exist or, if not, in long service leave legislation • This entitlement is a transitional entitlement pending the development of a uniform, national long service leave standard with the States and Territories

Chapter 7 State Awards

7.1 The Term of Reference

839. The sixth Term of Reference reads as follows:

> 6. Devise a process for the updating of State awards for private sector employers and employees, with the objectives of:
>
> (a) ensuring the scope of awards provide comprehensive coverage to employees;
>
> (b) ensuring awards reflect contemporary workplaces and industry, without reducing existing employee entitlements;
>
> (c) ensuring awards are written in plain English and are user friendly for both employers and employees; and
>
> (d) ensuring that any award updating process is driven by the Western Australian Industrial Relations Commission, with appropriate input from the award parties and other relevant stakeholders.

7.2 The Interim Report

840. The Interim Report set out that there are currently 163 private sector awards, 16 private sector enterprise awards and 2 local government awards operating in the State industrial relations system. A full list of the private sector awards was attached to the Interim Report and for ease of reference is also attached to this chapter of the Final Report as Attachment 7A.

841. The Interim Report also set out the framework under the IR Act for the making, updating, varying and cancellation of State awards.[249]

842. In the Interim Report the Review said it was of the preliminary opinion that the awards system and the awards for the private sector in Western Australia were in need of some repair.

843. This was because, for a variety of reasons, awards for the private sector in Western Australia no longer could be relied upon to satisfy primary objectives of the award system of:

[249] See ss 36A, 40B, 40(1), 40(3), 38 and 47 of the IR Act.

(a) Providing a minimum safety net of terms and conditions of employment that provided protections for the workforce covered by the State system; and

(b) Providing a relatively straightforward document for a State system employer to look at and rely upon to understand the terms and conditions of employment they were obliged to provide for the employees within their business.

844. The Interim Report set out reasons for this including:

(a) In Western Australia, under the IR Act and in the past, employer associations and unions have been the drivers for the making and updating of awards in the private sector. However, that has not really occurred since about 2005.

(b) State awards that formerly applied to corporations and their employees no longer do so, because of the fundamental change to the regulation of industrial relations within Australia since the introduction of the WorkChoices legislation in 2005, followed by the FW Act.

(c) The lengthy and intensive period of Federal award "modernisation" that arose from the Work Choices legislation and FW Act has meant there has been a decline in the capacity, resources and interest of employers, employer organisations and unions to be involved in the updating of State awards.

(d) Section 40B of the IR Act, inserted in 2002, to try and effect significant change to State private sector awards turned out to be an ineffective method for the reviewing and updating of State awards, for the reasons set out in the Interim Report.[250] The Interim Report set out that the enactment of s 40B of the IR Act had not fulfilled the intention of the

[250] See also the paper quoted in the Interim Report at [1174], Kenner S, "State Awards: Are They Up to Date?" Paper Presented to the UnionsWA Industrial Officers and Lawyers Network Annual Conference, 2 November 2017 ("Commissioner Kenner's Paper").

legislature, as explained in the Explanatory Memorandum for the *Labour Relations Reform Act 2002*, and quoted at [1167]-[1168] of the Interim Report.

845. With respect to point (d), as set out at [1153]-[1154] of the Interim Report:

> 1153. The enactment of s 40B of the IR Act, referred to in detail below, could have led to some award regeneration, but for various reasons that did not occur.
>
> 1154. Firstly, there has been the Federal "award fatigue" referred to earlier. Secondly, the resources of employer and employee groups have been directed towards Federal award modernisation processes. There is a lack of resources available to be directed to the State system. Further, and significantly, this is because the State system has lost its importance in governing the working conditions of the larger employer and employee groups in Western Australia. Additionally, the WAIRC has taken the view that s 40B enabled it to review the awards to ensure they were up to date as a once only process. Whilst this construction of s 40B might be questionable it has meant the section has not provided the regular process for award review and regeneration as might have been thought.

846. The failure of the s 40B process to fulfil its task was illustrated at Attachment 7C to the Interim Report, which is also attached to this chapter of the Final Report as Attachment 7B. This sets out examples of State awards which contain:

(a) Wages less than the minimum wage.

(b) Conditions less than those in the MCE Act.

(c) Discriminatory provisions.

(d) Obsolete and out of date provisions.

847. In the Interim Report, the Review set out its view of what the current problems were with State private awards. Specifically, they were identified as being:

(a) Gaps in State award coverage. There is a lack of coverage of State awards over particular groups of employees. Attachment 7D to the Interim Report, also attached to the Final Report as Attachment 7C, provides examples of employees who are not covered by a State award but who work in industries or occupations that could be considered to be traditionally of a type to be covered by an award and/or who would be

covered by a modern award if employed in the Federal industrial relations system.

(b) The scope clauses of State awards are complex and many awards have not been varied in scope or content to reflect changes in industry and occupations over the last 40 years. The scope of the State awards often depends upon the respondent to the awards and the type of business conducted by the respondent. This means that understanding the scope and coverage of an award can be difficult.

(c) Awards are not being maintained and regularly updated.

(d) Outdated or non-existent apprenticeship and trainee provisions are contained in State awards.

(e) Awards do not reflect contemporary workplace arrangements. Examples were provided in [1203]-[1204] of the Interim Report and Attachment 7C, reproduced as **Attachment 7B** to this chapter in the Final Report. The Attachment contains examples of State awards with obsolete and out of date provisions.

848. The Review was of the opinion that these failings meant State awards were in need of repair and rejuvenation.

849. The Interim Report then set out the Federal system for the making and updating of awards and the possible approaches to the updating of State awards.

850. The Interim Report also set out the ways suggested to deal with problems of the State private sector awards as set out in the Amendola Report and the Green Bill.

851. The Interim Report then considered submissions that had been provided to the Review.

852. The Interim Report then canvassed four options for the updating of State awards in the context of the Term of Reference.

853. The Interim Report then set out that in the preliminary opinion of the Review a prescriptive approach involving the enactment of legislation providing for the WAIRC to undertake the making of new industry based awards was the preferable method of dealing with the current inadequacies.

854. Features of what was there set out included:

(a) The aim of removing uncertainties from the present system of State awards.

(b) Providing coverage under awards for employees not presently covered by State awards.

(c) The aim of the removal of the difficulties of amending or cancelling awards because of the scope and common rule principles that presently apply.

(d) An understanding that if the SES were provided for within the IR Act, it would be unnecessary to include clauses in awards about those subject matters unless the particular needs of an industry required it.

855. Following on from [854(a)] above, and as stated in the Interim Report at [1268], the Review had in mind in devising a method to redress what it saw were problems with private sector awards in the State system so that, "… the working people of the State, who for significant economic, political and/or industrial reasons, need to have a State endorsed construct to try and ensure they are paid an acceptable standard of living and treated at work in a way that provides fairness and dignity", have awards that apply to them.

856. The Interim Report contained the following proposed recommendations, for additional discussion and submissions and specific requests for additional submissions:

> 55. Subject to recommendation 56, the 2018 IR Act is to include a Part, or Transitional Provision, that requires the WAIRC to, within three years, review and replace the existing private sector awards of the WAIRC with New Awards, on the following basis:

(a) Subject to (b) the current conditions of employment of employees under existing awards are not to be reduced under the New Awards.

(b) Despite (a) the New Awards should not include any work practice or condition of employment that is obsolete and/or would breach any Australian or Western Australian equal opportunity legislation.

(c) Similar to the FW Act, the New Awards have either industry based or occupational scope clauses, in accordance with (d).

(d) The industries and occupational groups covered by the New Awards are, subject to the WAIRC deciding otherwise, to be those set out in Schedule A.

(e) Subject to (a), although a New Award should specify that conditions of employment are included in the SES they should not otherwise provide for any condition of employment contained in the SES, unless the WAIRC is of the opinion that the condition is required to be included in a New Award because of the particular circumstance or requirements of the industry or occupational group to be covered by the New Award.

(f) The New Awards are to be drafted in a plain English style, with the aim of being user friendly for employers and employees.

(g) In the process of making the New Awards, the WAIRC will give registered organisations and employer groups whose membership includes employees and employers to be covered by the New Award, and peak body organisations, the Minister and any other interested person or stakeholder the opportunity to make submissions about the terms of the New Award.

56. Within the first year of the three year period, the WAIRC, after consultation with and giving the organisations and people referred to in [55g] the opportunity to provide submissions, decide upon a priority list of the order in which the New Awards will be made, having regard to:

(a) The requirement to make the New Awards cover the industries and occupational groups set out in Schedule A, subject to the WAIRC deciding otherwise.

(b) The likely application and coverage of the New Award over employers and employees actually working in the State industrial relations system.

(c) The extent to which there is an existing State award that applies to the employment that is in need of being updated.

(d) The extent to which the industry or occupational group, or sections of it, are not covered by an existing State award.

The Review seeks additional submissions on these issues arising from Term of Reference 6.

57. The Review requests additional submissions upon the method to be included in the 2018 IR Act for the WAIRC to review and update New Awards, after they have been made by the WAIRC, under the methodology set out above.

Schedule A

List of State Private Sector Awards with Industry and Occupational Based Scope Clauses

	Industry or Occupation
1	Animal care
2	Building and construction
3	Child care
4	Cleaning and caretaking
5	Clerical (where not included in relevant industry award)
6	Community services
7	Dry cleaning and laundry
8	Farming and pastoral industries
9	Fitness industry
10	Food manufacturing and processing
11	Funeral industry
12	Hair and beauty
13	Health professionals and support services
14	Horticulture, gardening and turf management
15	Hospitality (Accommodation)
16	Hospitality (Food and Drink)
17	Independent schools
18	Local government
19	Manufacturing and associated industries (excluding food manufacturing)
20	Mining and associated industries
21	Performing and arts industries
22	Pest control
23	Professional employees
24	Retail and wholesale
25	Security
26	Supported employees
27	Transport
28	Miscellaneous

7.3 Stakeholder Meetings Post Interim Report

857. As set out in Chapter 1, the Review met with stakeholder bodies to discuss the Interim Report and proposed recommendations. Of particular relevance to this Term of Reference were stakeholder meetings with UnionsWA and affiliate unions, CCIWA and other employer bodies in the private sector including Master Builders, vegetablesWA, AMMA and the HIA.

858. It is fair to say that at the first stakeholder meeting with UnionsWA and affiliates following the publication of the Interim Report, there was trenchant criticism of the proposed recommendation. This was for these reasons:

(a) The unions did not accept that an award updating of the type proposed in the Interim Report could be achieved without reducing existing employee entitlements. This was so even if that was a specified requirement within any legislation requiring the process to occur. This fear was based on the experience of the unions within the Federal award modernisation process, and despite what was said to be similar legislative language existing at that time. The point was made, with some force, that although it was relatively easy to ensure that monetary payments were not reduced, this was more difficult to ensure with other conditions of employment. An example was given of rostering arrangements within some industries. The point was also made that if there were different terms and conditions of employment of two types of employees within the same industry, and they were brought together within the same award, either one set of conditions would have to change or both sets of conditions would have to remain; probably as a schedule to the award. It was submitted that in the former case, one of the types of employees may have their employment conditions reduced; and in the latter case, little was to be gained out of the award updating process.[251]

(b) The resource intense nature of an award updating process was emphasised. This submission was again based upon the experience of the resources expended in the sequences of modernisation of Federal awards over a considerable period of time. It was submitted that the unions simply did not have the resources to engage in such a process within the State system; so that if union involvement were to be achieved, it would be up to the State Government to provide resources. It was submitted that would represent a significant burden on the State. It was also submitted the WAIRC would require additional resources. It was submitted the resources would not be well expended if the inevitable

[251] The Review notes that a similar argument was presented at employer stakeholder meetings. There was a fear expressed that if the former case applied and there was no scope to reduce existing employee entitlements, there would inevitably be an additional cost for the employer of the employees who hitherto had the inferior working conditions.

result were poorer working conditions for the working men and women of Western Australia.

(c) It was submitted, at length, that a change of language in awards to reflect "plain English" almost inevitably led to an undermining of conditions, even if, as stated above, there was something within the language of the legislation that required a non-reduction of existing employee entitlements. Again this was submitted to have occurred within the Federal award modernisation process.

(d) It was suggested that the problems identified in the Interim Report could be fixed by other measures, apart from endeavouring to engage in a wholesale updating of State awards.

859. In response to this the Review held an additional meeting with UnionsWA and affiliates and requested additional submissions upon these matters. These written submissions were provided and are summarised below, along with all of the other submissions upon the Interim Report.

7.4 Written Submissions upon the Interim Report

860. The following made written submissions on the Interim Report and this Term of Reference: CCIWA, the City of Canning, the Department of Health, the HIA, Master Builders, Master Grocers, SBDC, vegetablesWA, WALGA, the AMWU, the WASU, the CFMEU, the HSUWA, UnionsWA, United Voice, the WAPOU, the UFU, the ELC, the ECCWA and WAiS. There were also confidential submissions from two employer associations, an employee association and by Hall & Wilcox, on behalf of four large metropolitan local governments.

7.4.1 Proposed Recommendations 55 and 56

55. Subject to recommendation 56, the 2018 IR Act is to include a Part, or Transitional Provision, that requires the WAIRC to, within three years, review and replace the existing private sector awards of the WAIRC with New Awards, on the following basis:

(a) Subject to (b) the current conditions of employment of employees under existing awards are not to be reduced under the New Awards.

(b) Despite (a) the New Awards should not include any work practice or condition of employment that is obsolete and/or would breach any Australian or Western Australian equal opportunity legislation.

(c) Similar to the FW Act, the New Awards have either industry based or occupational scope clauses, in accordance with (d).

(d) The industries and occupational groups covered by the New Awards are, subject to the WAIRC deciding otherwise, to be those set out in Schedule A.

(e) Subject to (a), although a New Award should specify that conditions of employment are included in the SES they should not otherwise provide for any condition of employment contained in the SES, unless the WAIRC is of the opinion that the condition is required to be included in a New Award because of the particular circumstance or requirements of the industry or occupational group to be covered by the New Award.

(f) The New Awards are to be drafted in a plain English style, with the aim of being user friendly for employers and employees.

(g) In the process of making the New Awards, the WAIRC will give registered organisations and employer groups whose membership includes employees and employers to be covered by the New Award, and peak body organisations, the Minister and any other interested person or stakeholder the opportunity to make submissions about the terms of the New Award.

56. Within the first year of the three year period, the WAIRC, after consultation with and giving the organisations and people referred to in [55g] the opportunity to provide submissions, decide upon a priority list of the order in which the New Awards will be made, having regard to:

(a) The requirement to make the New Awards cover the industries and occupational groups set out in Schedule A, subject to the WAIRC deciding otherwise.

(b) The likely application and coverage of the New Award over employers and employees actually working in the State industrial relations system.

(c) The extent to which there is an existing State award that applies to the employment that is in need of being updated.

(d) The extent to which the industry or occupational group, or sections of it, are not covered by an existing State award.

861. CCIWA said it supported a modernisation of WA State awards to ensure they are comprehensive, contemporary and user-friendly. It therefore supported recommendation 55. CCIWA submitted the parties set out in s 50 of the IR Act should consult and determine the terms of reference for the award consolidation and modernisation process.

862. CCIWA also submitted that consistent with the approach of the FW Act and provided in s 134 of the FW Act, the 2018 IR Act should set out the statutory purpose and intention of awards and their relationship with the proposed SES. To

that end a (New) Awards Objective should be framed for inclusion in the 2018 IR Act to guide the WAIRC for both the establishment and ongoing future "management" of the New Awards.

863. It also said: "However, with respect to the timetable indicated for the completion of the review and replacement of private sector awards within three years, caution should be exercised given the potential complexity of the process and the required resources necessary of all parties to achieve this objective. Thus, this timetable should be regarded as indicative only."

864. CCIWA also expressed concern about proposed recommendation 55(a), because the "direction places a significant limitation on the consolidation and modernisation process at the outset. It also would encourage the view that the process will be one of 'winners and losers'. It will not facilitate effective consolidation and modernisation." CCIWA elaborated, "the condition precedent offered by paragraph (a) of recommendation 55 needs to be reconsidered. It is of singular dimension to only consider that the terms and conditions of employees are not reduced and does not adequately consider or recognise the impacts on employers." The problem with this submission is that paragraph 55(a) of the proposed recommendation reflected the requirements of the Term of Reference of the Review. The Term of Reference directed the Review to devise a process for the updating of State private sector awards, with an objective of the process being "without reducing existing employee entitlements". Consistently with this, paragraph 55(a) of the proposed recommendation said the WAIRC was to review and replace the existing private sector awards of the WAIRC with New Awards on the basis that, subject to a presently immaterial exception, "the current conditions of employment of employees under existing awards are not to be reduced under the New Awards".[252]

865. With respect to proposed recommendation 55(g), the CCIWA submission noted that while it afforded the opportunity for submissions from relevant parties about

252 CCIWA did express the qualification that "CCIWA does not advocate that employees should be impacted by award modernisation", but it is difficult to harmonise the qualification with the substantive submission quoted in the above paragraph.

the terms of New Awards, it left the actual making of the New Award solely to the WAIRC. CCIWA submitted "this process should be made more consultative with a view to the parties working together with the WAIRC on the determination of content and structure of a New Award or that the New Award drafted by the WAIRC would then be the subject of further submissions and hearing before the New Award is ultimately determined."

866. As to the scope of the proposed New Awards, CCIWA submitted that, as "the process of consolidation and modernisation of current State awards is to create New Awards on an industry or occupation basis, the scope of any New Award should not be expanded to include employees that not are (sic) currently covered by an award." CCIWA referred to [10] of the Interim Report that said in the preliminary opinion of the Review *"priority ought to be given to employers and employees not presently covered by a State award and where the employers and employees are currently working within the State system"*. CCIWA submitted it was "uncertain how this preliminary opinion reconciles with Term of Reference 6 which only requires the Review to devise a process for the updating of State awards. It is acknowledged that paragraph (a) of Term of Reference 6 refers to ensuring the scope of awards provide comprehensive coverage to employees. However, there appears to be no direction given to expand the coverage outside existing awards such that would suggest the creation of additional new awards." CCIWA also submitted, "the 2018 IR Act should include explicit provisions, as provided in section 143(7) of the FW Act…". This subsection of the FW Act provides:

> A modern award must not be expressed to cover classes of employees:
>
> (a) who, because of the nature or seniority of their role, have traditionally not been covered by awards (whether made under laws of the Commonwealth or the States); or
>
> (b) who perform work that is not of a similar nature to work that has traditionally been regulated by such awards.
>
> Note: For example, in some industries, managerial employees have traditionally not been covered by awards.

867. Similarly, CCIWA submitted that high-income earners should be excluded from State awards in a manner akin to that prescribed by s 333 of the FW Act.

868. The Review does not accept the CCIWA's argument that the award updating system required by the Term of Reference is not to include employees who are not currently covered by a State award. The Term of Reference directed the Review to "devise a process for the updating of State awards for private sector employers and employees, with the objectives of … ensuring the scope of awards provide comprehensive coverage to employees". The announcement of the Review was accompanied by the Ministerial statement set out at [27] of the Interim Report. The Minister said, "the aim of the review is to deliver a State industrial relations system that is contemporary, fair and accessible. It will also develop a process to modernise State awards for private sector employers and employees". Given that context the Review does not accept the Minister intended that the devising of the process for the "updating" of State awards as specified in the Term of Reference did not contemplate the inclusion within State awards of groups of employees that are not presently protected by awards. The Review does not accept that the Minister had in mind that a State industrial relations system would be "fair" and "accessible" if employees who are not covered by State awards continued to be in that position, despite being engaged in the type of industries and occupations that would have traditionally had award protection.

869. CCIWA suggested that well-defined terms of reference be established for the WAIRC to undertake the award consolidation and modernisation process. The submission noted this approach was adopted by the Federal Government in 2008 when providing guidance to the AIRC when conducting the process that led to the making of modern Federal awards.

870. CCIWA also recommended the list of New Awards be expanded to include a Real Estate Industry Award that would contain provisions similar to those contained in clause 16 of the Federal *Real Estate Industry Award 2010*, to allow for the engagement of commission-only employees.

871. The City of Canning submitted that any award rejuvenation process should be finalised before any "Local Governments were transposed into the State IR

system", in accordance with any recommendation to that effect from the Review, as arising out of its consideration of Term of Reference 8.

872. A confidential submission made on behalf of four metropolitan local governments also made submissions about the timing of award updating, in the context of changes that may be made to bring local governments within the State system. The submission was that "it would be more appropriate to undertake a truer and more detailed assessment of the impact of declaring local governments not to be national system employers when the modernisation process of the State System has been completed." The submission added it was "unknown to what extent and under what timescale those recommendations will be implemented."

873. WALGA also made submissions about the implementation of award updating and the possible move of local governments to the State system. WALGA's position was that "modernisation" be undertaken prior to "Local Governments transitioning" to the State IR system. Additionally, it submitted that future State Local Government awards should be aligned to the modern Federal *Local Government Industry Award 2010*.

874. Thus WALGA supported and endorsed the inclusion of local government in the industry list for the implementation of "New Awards", regardless of the outcome of proposed recommendation 69 in the Interim Report about the State system covering local government. WALGA said if proposed recommendation 69 was not implemented, it endorsed recommendation 55 in full. It also said:

> However, given the complexities associated with the proposed transfer of Local Government to the State system and the unknown status of deemed industrial instruments should recommendation 69 be given effect, we oppose the restriction imposed by recommendation 55(a) as it applies to any award modernisation process involving Local Government awards in that instance. This limitation not to reduce current conditions of employment of employees is predicated on the modernisation of private sector awards of the WAIRC, and does not adequately anticipate the circumstances applicable to modernisation of the Local Government awards in the context of deeming of the LGIA[253] into the State system.

875. WALGA said, regarding the deeming of Federal industrial instruments to be State instruments:

[253] The Local Government Industry Award 2010 (Federal).

> There is complexity in transitioning Federal instruments to the State system as a consequence of changing the applicable safety net and underpinning awards. This process is further complicated by the uncertainty introduced by the proposed State system update and award modernisation process potentially resulting from this Review. The timeframe for each step in the process taking effect should be considered carefully by the State government as the likely impact of changes taking immediate effect are destabilisation of the Local Government sector with increased uncertainty regarding applicable terms of conditions of employment (as discussed in the 2017 Submission).

876. WALGA recommended the State Government consider undertaking the award modernisation process prior to Local Government's transition to the State system which would remove the requirement to deem a Federal award as a State instrument.

877. WALGA's submission also contained information on the differences between the relevant Federal awards and State awards and the history of the modernisation of the Federal local government awards.

878. The aspects of these submissions that are particularly relevant to Term of Reference 8, are discussed in Chapter 9 of the Final Report.

879. HIA supported a genuine review of State based awards in order to ensure they are reflective of modern industry practices, meet the needs of small businesses, and are simplified to form a basic set of industry/occupational specific minimum employment conditions.

880. It also submitted that "it is imperative that stakeholder and award parties are engaged in the award making process to ensure the implementation process is managed appropriately."

881. Master Builders supported the recommendation to review and replace State Awards "to reflect the 21st century workplace". Master Builders submitted: "Master Builders contends the comments of the Reviewer in paragraph 1150 of the Interim Report of no employee incurring reduced entitlements as part of the state award updating process is misplaced. Whilst this lofty ideal intends no employee is worse off, and seeks to appease unions, as the Reviewer points out, union membership is at all time lows in Western Australia. Further, there is no

equivalent test that employers will not incur additional labour cost increases in updating state awards. This stands in stark contrast to the Federal award modernisation process and how it was dealt with when merging over 2,000 federal and state awards into 122 federal modern awards. Master Builders say that process cannot be ignored in updating state awards."

882. With respect, this submission is flawed, if it is suggesting that the "lofty ideal" that "no employee is worse off" emanated from a desire of the Review "to appease unions". As set out above, it was a stated objective of the process the Review was required to devise, under the Term of Reference that there be no reduction of employee entitlements. Master Builders' submission about how the Federal award modernisation was effected adds weight to a submission made by UnionsWA, that the type of award updating process suggested by the Interim Report will inevitably lead to a loss of some conditions of employment.

883. More broadly, Master Builders submitted "the health of the state construction sector and multiplier employment effect which in this case is all negative provides a stark picture of the wider health of the WA economy in the private sector. Put simply, small and medium size employers in the state industrial relations framework cannot afford to have additional labour costs imposed on them as part of the State award updating process. To ignore the harsh realities of the present difficult circumstances is respectfully not a responsible stance to adopt." This is a relevant point and is one that militates against award updating taking place in the way envisaged in the Interim Report.

884. Master Builders then submitted that a transition period of five years was appropriate for an award updating process to allow parties to moderate any variations in wage rates and employment conditions.

885. Of the proposed removal from the exclusion of the IR Act of domestic service workers set out in Chapter 5 of the Interim Report, Master Builders contended the "2018 IR Act should expressly set out domestic employers captured by the Act be subject to the SES only, not any New Award."

886. The Master Grocers made a submission on the way in which award updating should be done:

> Like many other associations of employers and employees that have been involved in the modernization [sic] of Federal awards MGA is aware of the difficulties that have presented themselves throughout the Federal award modernization (sic) process. The proposal by the Interim Report that the process should initially be left to the WAIRC is an appropriate one, with opportunities for input from employer and employee associations later.

887. The Master Grocers stated:

> When the Federal award modernization [sic] process began in 2010, there were complexities from the outset, particularly when the highest penalty rates in Victoria were adopted as the norm for the one federal retail award. The issue of the penalties in that award are still being considered in 2018 as part of the second 4 yearly Interim Report. The Federal award modernization [sic] process has not been without difficulty and issues such as producing awards written in plain English are still not completed. The Interim Report's recommendation in respect of modernizing [sic] the State awards in the WAIRC will hopefully be less time consuming and quicker, thereby ensuring that employers and employees enjoy he (sic) benefits of simple and straightforward guides to their correct remuneration and entitlements.[254]

888. A confidential submission from an employer association supported the process of making New Awards, "subject to item 55(g) which provides that the WAIRC will give registered organisations and employer groups (whose membership includes employees and employers to be covered by the New Award, and peak body organisations, the Minister and any other interested person or stakeholder) the opportunity to make submissions about the terms of the New Award."

889. Another employer association in a confidential submission, said, "… the current system of State Awards should be downsized and simplified". The submission provided examples of a large number of awards within the same industry that it said increased complexities for business. The submission referred to the hospitality industry that currently has the *Hotel and Tavern Workers Award, Restaurant, Tearoom and Catering Workers Award* and *Club Workers Award* whereas in the Federal domain there is the single *Hospitality Industry (General) Award*. It submitted the same outcome should apply to other industries in the State. It submitted that the "new, more modern awards would be written in plain

[254] The reference to the penalty rates in Victoria seems to be a reference to the Victorian Shops Interim Award 2000, that provided the same penalty rates as in the *General Retail Industry Award 2010*, until the penalty rates commenced to be reduced in 2017, due to the decision made by the FWC to do so.

English with easy to understand terms and only the relevant Union and Employer Association would be permitted to provide input thereby taking ownership of the Award themselves. This would be facilitated and driven by the Western Australian Industrial Relations Commission."[255]

890. Within the same submission was the suggestion that consideration be given to "placing into legislation 'loaded rates' whereby a business can pay above the statutory minimum in order to satisfy monitory obligations under the relevant award". Whilst the Review is not entirely clear on the meaning of the submission, it seems to be a suggestion that it be permissible to make a "wrapped up" payment in place of payments of ordinary pay, overtime and any applicable allowances. Whilst it is beyond the Terms of Reference for the Review to make recommendations about the terms of any updated award, it notes advice received from the PSD that it can be hard to "disaggregate" such payments to see if there has been compliance with an award or not. Additionally, the submission carries at least the hint of a suggestion that there should be a capacity to contract out of monetary award provisions. If it is suggested that there be legislation to this effect, then it would involve an amendment to s 114 of the IR Act and would effect a very substantive change to the framework of industrial relations in the State. That issue is beyond the Term of Reference of the Review, but it is not one which the Review thinks is consistent with the intent of the future industrial relations system as contemplated in the statements made by the Minister at the time of announcing the Review; and the contents of the Terms of Reference.

891. The SBDC was generally supportive of the proposed recommendation except proposed recommendation 55(a). The SBDC submitted the WAIRC should undertake an award modernisation process within three years, reducing the number of awards and creating a new set of industry and occupation specific awards.

255 The Review notes, in any event that there are four federal awards that over the broader hospitality industry – the *Fast Food Industry Award 2010*, the *Hospitality Industry Award 2010*, the *Registered and Licensed Clubs Award 2010* and the *Restaurant Industry Award 2010*.

892. The SBDC submission also said the award modernisation process must include an opportunity for input from all key parties, including small business employers. The SBDC further submitted that:

> It is also important for the WAIRC to be conscious of industrial relations at a national level, particularly in relation to penalty rate provisions for some industries, such as hospitality and retail.
>
> …
>
> … the WAIRC must consider the interests of both employers and employees in the award modernisation process. It is appropriate for the WAIRC to consider the greater economic benefit of reviewing penalty rates (such as increased employment), and ensuring employers within the State industrial relations system are not in a position of competitive disadvantage when compared to businesses operating within the Federal Fair Work system.

893. In making the submission the SBDC acknowledged the Review said in the Interim Report, that the quantum of penalty rates issue is beyond the Terms of Reference. That is a position the Review adheres to.

894. The vegetablesWA submission noted the intensity of the Federal award making process:

> The modern award making process took around two years to complete. The first four yearly review of federal 'modern' awards now enters its fifth year. The effort and expense required to participate meaningfully in the review process, often requiring dedicated industry and legal counsel, year on year should not be understated. The focus of the state review would, presumably, be narrower and therefore less onerous, but the lessons should be heeded nonetheless. The framework and guidelines for this process should be strict least [sic – lest] it become lost in its own purpose.
>
> Dedicated support for industry stakeholders from the WAIRC would be helpful, especially where legal counsel is not available and industry representatives are required to provide input, submissions, advice and arguments to the process. The work is both financially and human resource heavy, and often taken on by industry people already spread thin across competing demands. Dedicated resources throughout the process may help alleviate the workload and guide submissions to those points most needing attention.

895. A confidential submission from an employee association agreed with the list of industries and occupations over which updated awards should be made.

896. The UnionsWA submission made this general comment about Term of Reference 6 and the proposed recommendation in the Interim Report:

> UnionsWA is opposed to this proposal for 'updating' state awards. The experience of award modernisation at the Federal level has shown that guarantees that 'no worker will be worse off' cannot prevent workers from losing conditions. An Award updating process will consume the resources of all parties involved and will require substantial state government financial (and other) support. There is no need for a wholesale updating of State Awards in order to ensure that WA workers without current coverage become covered by awards.

897. Consequently, UnionsWA recommended "a more targeted and cost effective approach that will ensure Award coverage is extended to all WA workers, by adjusting the scope and respondency clauses of existing Awards."

898. Specifically, with respect to proposed recommendation 55, UnionsWA submitted:

(a) There was no need in the State award system for a periodical award review process that replicates the failed Federal award modernisation.

(b) If any recommendations around award updating are adopted, a substantial resource allocation from State Government, employers and unions will be required in order to adequately engage in the proposed process. These are not expenses that the union movement or the State Government can afford.

(c) UnionsWA acknowledges the issues with State awards with respect to coverage and minimum conditions of employment. There are also issues concerning the workers identified by the Review who are essentially award free. However, these issues do not require a complete rewrite of the State award system in order to be addressed. Sections 40 and 40B of the current IR Act enable awards to be varied by application from parties or by the WAIRC on its own motion.

(d) UnionsWA and its affiliates argue that current legislation therefore provides sufficient scope to modify and update State awards without endangering award entitlements. State awards can be amended to address gaps in award coverage and lift employment conditions where they do not meet minimum conditions of employment. This process will

mean that State awards will be able to meet their intended objectives for working people, with a less expensive process for all stakeholders.

(e) With appropriate resources to enable stakeholders to engage, including the provision of at least one FTE to UnionsWA and concerned affiliates, this would be a viable alternative to the proposed award updating process.

(f) It was problematic to have a sequence of the rewriting of all awards as there "cannot be a 'low priority' Award, and that regardless of the order in which Awards are made, the first Award will effectively serve as a template for those that follow.

899. UnionsWA proposed the following:

> That the scope clauses of State awards be modified so that they are no longer defined by reference to the award's respondents (many of whom will either no longer exist, or will no longer operate within the WA industrial relations system). Instead there should be a description of their broader industry, consistent with the award's existing operation, usually expressed in its title.
>
> In carrying out this process, the object should be to make all State awards common rule awards. It is not the object of the process to amalgamate or cancel any existing State awards. Rather the process should ensure that no WA worker is award-free in regard to the state industrial relations system.

900. The HSUWA adopted the submission of UnionsWA.

901. As foreshadowed at the UnionsWA and affiliates stakeholder meeting mentioned above, the AMWU submitted:

> The Interim Report's proposed New Awards modernization [sic] process by its inherent structure cannot comply with the Term of Reference and creates an insurmountable resource barrier for unions, and possibly the government and employer groups. We commend to the Review an alternative process that is detailed in our substantive submission.

902. The AMWU contended:

> Recommendations 55 and 56 effectively propose an 'award modernising' process, very similar to the Federal award modernisation process that commenced in 2008….The AMWU recognises that there is a need to have a robust and comprehensive State award system that covers all State system employees. However, the proposed New Awards fall short of the Term of Reference and in our view has serious deficiencies.

903. This was not to say that the AMWU did not agree that the issues with awards identified in [1184] to [1205] of the Interim Report need to be addressed. The submission was however that "the proposed New Awards in trying to address these issues create new problems that are incompatible with the Term of Reference and unresolvable in light of current Government and union resources."

904. The AMWU submission referred to the analysis of s 40B of the IR Act in the Interim Report. The AMWU then proposed an alternative updating process, whereby the involved parties utilise s 40B of the IR Act:

> …to review awards with the following questions to be actioned (in order of priority):
>
> 1. Who does the award cover? How can it be amended to cover an industry?
> 2. Are there any obsolete clauses?
> 3. Are there any clauses that are less than the proposed SES?

905. The AMWU submitted "it would be sensible to apply this defined process to State awards through from highest coverage to lowest coverage, and in phases. This would allow the parties to assess the process and also monitor the list of award-free classifications."

906. The AMWU submitted with respect to the groups of employees identified in the Interim Report as being award free:

> All of [sic] classifications that are currently award-free are not isolated, in that they do not exist in an industry vacuum where they are not connected to classifications that are already award-covered.

907. The Review takes the reference in this submission to "classifications" to mean the categories of employees such as the examples set out in the Interim Report as not being covered by a State award.

908. Following a request from the Review for more information about how s 40B might be utilised to achieve this end, the AMWU referred the Review to Commissioner Kenner's Paper at [20]-[32].

909. The CFMEU adopted the UnionsWA submission and said:

> To the extent there are issues with the scope of awards under the IR Act, we are of the view that those issues can be resolved by the Commission under section 40B of the

IR Act. However, if the view were taken that a section 40B review was inappropriate, we note that a legislative instrument could direct and empower the Commission to deal with award coverage.

910. The CFMEU also expressed concern at trying to unduly simplify the language of awards. It stated, "awards are arbitral creatures. A simplification of language in those awards would amount to a reduction of their terms. The only way to guarantee existing entitlements through a simplification process is to in effect replicate those entitlements. Such an exercise would be and (sic) futile."

911. United Voice strongly opposed the proposed recommendations made under the Term of Reference. It submitted: "We have particular concern with recommendations 55 and 56 regarding the updating of State awards. The Interim Report does not provide sufficient evidence that a formal award updating process is necessary. Instead the report proposes an overly complex review process that is a throwback to the flawed federal award modernisation process and will come at a huge cost to government with little benefit for workers."

912. United Voice also disagreed that a periodical award review process was necessary for the State award system.

913. United Voice submitted, "The recommendations for a structured review process should be abolished in favour of a mechanism that enables parties to apply for an award variation where necessary to address gaps in award coverage and instances where award conditions fall below minimum conditions. This would address major concerns with State awards in an efficient and cost effective manner. We urge the Review to reconsider these recommendations for the final report."

914. United Voice said further that, "our experience with award reviews in both the national and state systems has been that worker entitlements are put at risk, resulting in the deterioration of conditions for workers."

915. With reference to the objective specified in the Term of Reference, and following the proposed recommendation that there be no reduction in existing employment entitlements, United Voice said: "It is naïve to suggest that in practice this will successfully protect workers from any reductions in their entitlements."

916. The submission asserted that:

> … hundreds of thousands of workers have had their pay cut, in some instances by up to 30%, as a direct result of the cuts to penalty rates under the federal award review process. This is despite the fact that the *Fair Work Act 2009 (Cth)* (**FW Act**) explicitly states that the award modernisation process is not intended to result in reductions to take home pay.

917. In a similar vein, United Voice submitted proposed recommendation 55(a) will not prevent employers from making applications to reduce entitlements that unions will have to respond to and defend.

918. United Voice also submitted: "We do not support recommendation 55(f) regarding plain English drafting of State awards." This was because of the union's concern about the outcome of a plain English drafting style, when applied to awards, as outlined at the stakeholder meeting mentioned earlier.

919. United Voice also emphasised the resources that award updating would require. It submitted: "The proposed recommendations will require a substantial resource allocation from State Government, employers and unions in order to adequately engage in the proposed process."

920. United Voice mentioned it had: "always been an advocate for industry based awards." It also said:

> We acknowledge that there are issues with State awards, primarily coverage and minimum conditions of employment. Further, there are workers who fall outside the coverage of all existing awards and are essentially award free. However, these issues do not necessitate the requirement for a complete overhaul of the State award system.

921. United Voice then submitted that the presence in the IR Act of s 40 and s 40B negated the need for a periodical award review process. The submission made was:

(a) The existing legislation provides sufficient scope to modify and update the safety net without causing unnecessary disputation or uncertainty in relation to award entitlements. State awards can be amended to address gaps in award coverage and lift employment conditions where they do not

meet minimum conditions of employment. This process will result in State awards that meet the intended objectives of a proper safety net for working people. This would be less expensive for all stakeholders and less resource intensive to engage in.

(b) With appropriate resources to enable stakeholders to engage there is no reason why this could not prove to be a viable alternative to the proposed award review process.

922. The WASU said it did not "support any review that follows the process of award modernisation conducted by the Fair Work Commission or creation of 'modern awards' which were a product of the passing of the *Fair Work Act 2009*. Any form of award modernisation would be costly and a drain on union resources. The state Government would need to fund Unions and UnionsWA to engage in this process."

923. The UFU submitted:

> The Union opposes the proposed award updating process which appears to be similar to the federal jurisdiction's model that has narrowed the content of awards, with the re-drafting creating a race to the bottom on conditions, and which has created an almost continual process of review which drains the resources of all parties. Ultimately such a recommendation would most likely create a burdensome, costly, time consuming process where conditions would be reduced.

924. As to the issue of categories of employees being award free the WASU submitted, "the current provisions of the Act enable the commission to deal with scope, to vary or cancel awards. The Commission and unions just need to exercise their rights."

925. As set out in the Interim Report though, the problem has been that this has not happened over the last decade.

926. The WASU also voiced its opposition to "any transitioning (or deeming) of federal modern awards into the State IR system." The WASU submitted that, in particular, the *Aboriginal Communities and Organisations Western Australian Interim Award 2011*, the *Crisis Assistance Supported Housing Industry Western Australian Interim*

Award 2011, the *Social and Community Services (Western Australian) Interim Award 2011* and "various State private sector 'Clerks' awards", should be maintained. The WASU submitted that the scope of these awards should be able to be amended to ensure all State system employees are covered by awards.

927. To not dissimilar effect, the WAPOU submitted it "does not support an Award modernisation, amalgamation or simplification process similar to what was experienced in the federal jurisdiction. We do however support steps to be taken to a redraft the scopes of various Awards to cover more workers in Western Australia. To this end WAPOU fully supports the submissions made by UnionsWA on Term of Reference 6."

928. The ELC said there "should be a process for the updating of State awards for private sector employers and employees, subject to a number of provisos, including that no employees be worse off under any changes. Awards should not be examined under the prism of employees 'being overall no worse off'. Rather, each entitlement should be examined to ensure that no employee is worse off in respect of each entitlement."

929. The ELC submitted "the focus of this review should first be on the scope clauses of the award, which often have the potential to cause the greatest confusion."

930. The ELC also voiced some concern about the use of the word "obsolete" in proposed recommendation 55(b), as "obsolete should not be interpreted as providing employers with the scope to argue a work practice or condition of employment is obsolete merely on the basis that there is a better or preferred way of doing it". Whilst the Review understands there can be an ambiguity about the word "obsolete", it was not the intent of the proposed recommendation to allow for the type of argument the ELC is concerned about. That was why, in part, the Review included a footnote example to proposed recommendation 55(b). The footnote was not reproduced in the ELC submission. The footnote was: "An example is clause 15 of the Printing Award: 'For each female employee employed on day work or on shift work there shall be an interval of ten minutes at a time

fixed by the employer between the second and third hour after the employee's ordinary commencing time for rest on each day on which the female employee is required to work'."

931. The ELC was also supportive of plain English drafting for awards because it makes the "legal system more accessible for laypersons (and vulnerable workers especially)". The ELC qualified however that, "the phrase "plain English drafting" incorporates the idea that no meaning is lost from the original text; the text is merely made easier to understand."

932. The ECCWA supported proposed recommendation 55 requiring the replacement of existing private sector awards with "New Awards", on the basis outlined in the Interim Report. The ECCWA strongly supported "the New Awards being drafted in a plain English style, with the aim of being user friendly for employers and employees." The ECCWA submission also said it "supports the view that in the process of making the New Awards, the WAIRC should give registered organisations and employer groups whose membership includes employee and employers to be covered by the New Award, and peak body organisations, the Minister and any other interested person or stakeholder the opportunity to make submissions about the terms of the New Award."

933. A submission from WAiS focused on the proposed recommendation to remove the exclusion in the IR Act for domestic service workers. WAiS submitted that: "for people with disability and families and any other private households who are privately employing workers in domestic arrangements, these arrangements [should] continue to be award free." This was particularly, according to the submission; given that there are "minimum conditions enshrined in legislation". The problem with this submission is that, at present the minimum conditions of employment under the MCE Act do not apply to domestic service workers. The WAiS submission was that should continue. The topic is addressed in Chapter 5 of the Final Report.

934. WAiS also submitted "awards have historically been developed for industries, on the foundations that organisations, companies and businesses operating in different industries require an instrument that provides for adequate protection of and conditions of employment to employees. What is to be afforded to employees may vary from industry to industry. WAiS submits that private households are not part of an industry and are, in fact, distinct from it."

935. The Review does not accept the entirety of that submission. In particular, the Review considers there are important reasons why domestic service workers require the protection of State imposed or sanctioned minimum conditions of employment. The issue is also addressed in Chapter 5 of the Final Report.

936. On this topic Master Builders said: "The 2018 IR Act should expressly set out domestic employers captured by the Act be subject to the SES only, not any New Award."

937. Master Builders' submission said: "As the New Award recommendation proposal contained in paragraph 55 can capture domestic home help under a New Award by having scope to cover this work, Master Builders proposes the 2018 IR Act expressly prescribe such employment circumstances are only subject to the SES. Absent that, there is no certainty the New Award process will not cover domestic homeowners. Should the protection currently provided under s 84A(5) of the IR Act 1979 be lost exposing breaches of the Act and Awards to jail, the risk of a home owner potentially facing a jail term arises. That is an outcome no WA Government would want to see as an outcome and not in the public interest."

938. The issue arising from this submission about s 84(5) of the IR Act is dealt with in Chapter 8 of the Final Report about "Enforcement".

7.4.2 Additional Submissions 57

The Review requests additional submissions upon the method to be included in the 2018 IR Act for the WAIRC to review and update New Awards, after they have been made by the WAIRC, under the methodology set out above.

939. The Review in proposed recommendation 57 requested additional submissions upon the method to be included in the 2018 IR Act for the WAIRC to review and update New Awards, after they have been made by the WAIRC, under the methodology set out above. Some of the submissions about this have been referred to above. CCIWA submitted there should be no requirement within the 2018 IR Act for periodic reviews of the New Awards, noting that the experiences of the Modern Award review process under the FW Act are "instructive".

940. CCIWA discussed the Federal award modernisation process, noting that the Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017 is currently before the Federal Parliament, and that the matter of regular award reviews was considered by the 2015 Review of the Queensland Industrial Relations Framework. CCIWA said: "Clearly, on the experiences under the FW Act and the QLD IR Act, the requirement to undertake mandatory periodic reviews of awards is flawed. A timed review results in a "collision" of reviews taking place at the same time incurring significant time and resources cost. For the private sector cohort covered by the State system, small and micro-businesses, time and resources are simply not in supply."

941. CCIWA recommended a proposed broad conceptual outline for the upkeep of the New Awards, containing 13 key elements. The submission summarised: "The general principle put forward is that only every three years and within six months of that date are the parties able to make application to the WAIRC to deal with specific significant matters within an award. Awards are not to be the subject of a broader review." CCIWA also said: "Importantly, it should be a requirement for the WAIRC to evaluate the impact of any proposed change to an award on the parties and provide that evaluation within any determination handed down."

942. The HIA said that "under the FW Act both a statutory review mechanism, and a 'by application' process are available." The HIA submission noted that, while "HIA sees merit in having a dual approach, the experience of the statutory 4 yearly review of the Modern Awards casts a shadow on the effectiveness of such statutory review mechanisms noting that legislation was introduced into the

Federal Parliament to abolish it." HIA submitted the 4 yearly review has established a number of procedural and evidentiary precedents which have caused delay and inefficiencies. HIA also said it was worth noting that interested parties may apply to make, vary or revoke modern awards under s 157 and s 160 of the FW Act, and said: "It has become clear that applications under s 157 are limited as it is considered that the Commissions scope to vary an award outside the 4 yearly review process is only permissible whereby an applicant can establish that the modern awards objective cannot be achieved unless the variation is made. HIA submit that any process contemplated by this Review avoid an outcome of this nature."

943. A confidential employer group submission said, "that any amendments to New Awards [should] occur only after consultation with registered organisations and employer groups whose membership includes employers to be covered by the New Award and that such groups be granted the opportunity to make submissions about the terms of the New Award."

7.5 Analysis of Submissions, Issues and Recommendations

944. The Term of Reference requires the Review to devise a process for the updating of State awards for private sector employers and employees, with particular objectives. In framing the Term of Reference in this way, the Minister appears to have reached a decision that it was necessary to devise the process specified. Given the facts, circumstances and issues described in the Interim Report the Review concurs that a process of the updating of State awards is necessary. As summarised earlier the awards in the private sector of Western Australia can no longer be relied on to satisfy the primary objectives of an award system.

945. Additionally, in requesting that the Review devise a process, the Minister appears to have in mind more than simply the provision of a recommendation that the existing processes within the IR Act be utilised with the objective of pursuing the four things specified in the Term of Reference.

946. Accordingly, the Review does not think it would satisfy its purpose to simply point to sections of the IR Act that could be used by unions, employer groups or the WAIRC to try to achieve the objectives set out in the Term of Reference.

947. The fact of the matter is that the existing processes within the industrial climate of the last 10 years have not worked to achieve the ends required for a State private sector award system.

948. In the opinion of the Review, given the State Government of Western Australia has since the Work Choices legislation been committed to maintaining the State industrial relations system for private sector employers and employees, it is a governmental responsibility to try and have and maintain State awards that achieve their aims. That is, to provide a relatively straightforward document that sets and provides a minimum set safety net of terms and conditions of employment that provide protections for the workforce covered by the State system and that can reasonably be applied by employers.

949. Consistently with what has been said, it is of little moment in the opinion of the Review to say that under s 38(2) of the IR Act employers may be named as a party to the award (and therefore increase its scope) and under s 40(2) an application may be made to the WAIRC to vary an award by a party to it. These sections could have been used to keep State awards up to date and to increase their coverage, but have not been. The same may be said about s 40B of the IR Act, whereby the WAIRC on its own motion may by order at any time vary an award for the purposes there specified.

950. As set out earlier, submissions made by some unions suggested that the s 40B process could in effect be reinvigorated to try and resolve some of the problems with awards that were set out in the Interim Report.

951. With respect, the Review is a little sceptical of whether this suggestion would actually work. Having failed to achieve its purpose once, the Review is reluctant to simply suggest that s 40B be used again, even if at the present time unions and others may have good intentions regarding its use. That is because the reasons

which caused the unions and others to be less than engaged in the s 40B process previously, may well recur; even if the long and involved process of Federal award modernisation may slow down in the immediate future. However other factors will remain, including the limited overall engagement that the major private sector employers, employer groups and unions have, with the State system.

952. Additionally, with respect to the union submissions there could be a case of "be careful what you wish for". That is because s 40B(1)(e) gives the WAIRC the power to, of its own motion, vary an award to "ensure that the award is consistent with the facilitation of the efficient organisation and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises". The Review suspects that if the WAIRC announced that it wanted to vary an award for these purposes it would send the sort of shock waves through the union movement that have occurred in response to the much more benign proposed recommendation contained in the Interim Report, that there be an updating of State awards containing a legislatively enshrined command that there be no reduction of existing employee entitlements.

953. As set out in the Interim Report there were other reasons that the s 40B process did not work. One of those was the decision taken by the WAIRC that it was a process that could only be engaged in once for each award.

954. In the 2018 State Wage Case decision, handed down on the day of the completion of the Final Report, the WAIRC addressed the issue of updating State awards. The WAIRC referred to the submission of the Minister that "s 40B of the Act allows awards to be reviewed at any time and more than once".[256] The WAIRC also said that UnionsWA submitted "a wholesale updating of awards is unnecessary, but that the Commission ought to adopt a targeted approach. UnionsWA says that it is important for many award-free employees in the State to have award coverage.

[256] [265].

This could be achieved by the extension of the scope and respondency of existing awards, and could be initiated by the Commission of its own motion."[257]

955. The WAIRC indicated that the CCIWA on the other hand is of the view that "the issue of reviewing and updating awards ought to await the finalisation of the Ministerial Review of the State Industrial Relations System and the Government's consideration of it."[258]

956. The WAIRC then expressed its views as follows:

> [268] We have considered those views. In respect of awaiting the final outcome of the Review, we are of the view that where an issue is raised and the Commission has the capacity to deal with it, the Commission has an obligation to deal with it unless circumstances are against it.
>
> [269] In this case, the outcome of the Review is not known. The Government's response and the possible establishment of a new award regime may take considerable time. In the circumstances, we see no good reason to delay.
>
> …
>
> [272] We also note UnionsWA's submission that there are large numbers of employees who are award-free. We observe, though, that to date, no applications have been brought by unions to expand the scope of existing awards to cover award-free employees, but rather it proposes that the Commission deal with this of its own motion. We will deal separately with the question of extending the scope of particular awards to cover award-free employers and employees where appropriate. However, issues of the Commission's powers in dealing with the scope of an award will need attention given the provisions of s 29A, s 36A and s 37 of the Act.

957. In the same way that the WAIRC said, quite properly in the respectful opinion of the Review, that, in effect its obligations are independent of the Review, the Review must operate upon the state of things at the present time and from the vantage point of a realistic assessment of what has happened in the past.

958. As such, the Review is not of the opinion that the best way forward is to try and reinvigorate s 40B, although a variant of this is something the Review will be recommending, as set out below.

---

257 [266].
258 [267].

959. Although the Review thought, on an interim basis that the best way to proceed was via the award updating mechanism put forward in the Interim Report, the stakeholder meetings and written submissions provided to the Review have caused the Review to now recommend something different.

960. That is not to say that the Review does not see the sense, in perhaps an ideal world, of a set of industry and occupation based awards that would comprehensively cover the employers and employees of a type that would be traditionally covered by awards, who are within the State system. But, the submissions and stakeholder meetings have been a reminder to the Review that little in industrial relations law and practice operates within an ideal world. The submissions and meetings have reinforced or pointed out these problems with the proposed recommendation:

(a) The resource intense nature of the proposal for the WAIRC, unions and employers or employer groups, when the resources of the latter three are already stretched and when Federal industrial relations is clearly the "main game".

(b) The fears that the union movement holds based on the Federal award modernisation experience, of a reduction of terms and conditions of employment, even if there is a statutory command that this not occur, in the combining of State awards. The unions provided examples in their submissions of when this has occurred Federally. It was submitted for example that in the Federal award modernisation process, unions broadly lost their status as custodians (on behalf of employees they covered) of awards. Modern Federal Awards also introduced mandatory Individual Flexibility Agreements (IFAs) into modern awards, which (so it is argued) undermine collective bargaining and promote more individual arrangements of work. Modern Federal Awards have dispute settling procedures that do not include compulsory, only consent arbitration,

leaving the "conciliation process powerless for the majority of workers."[259] Other examples have been provided to the Review.[260]

(c) The reality of these fears is not only reflected in what the experience of the unions was in the Federal award modernisation process, but also by the submissions from employer groups, cited earlier as to how they thought the award updating process might work.

(d) The strong submission from employer groups is that the outcome of the updating process should not be that there are industry based awards that impose greater employment costs on employers as an outcome; during a period of harsh economic times.

(e) As explained earlier this is not possible if one is to truly combine more than one award into a single industry or occupational based award, but at the same time there are not to be any reduction in the conditions of employment of the employees to be covered by the award. There is a problem when there are different terms and conditions of employees within the same broad industry. If those terms and conditions are brought within a single award, then either the terms and conditions stay the same, at which point there is more limited utility in bringing all employers and employees within the same award, or there must be a change. If there is a change and the terms and conditions of employment increase, then that is a cost on business which as the employer group submissions point out, business can ill afford in the present economic climate. If the conditions go down, then that is very harsh on the workers who are affected by the implementation of that decision and it immediately falls foul of the command not to reduce existing employee entitlements.

---

259 The Review adds there is no equivalent in the FW Act to s 44 of the IR Act, that would enable a registered organisation to readily proceed to an industrial commission to resolve an industrial matter

260 See for example the CFMEU submission to the Review in December 2017 with respect to the Building and Construction General On-Site Award 2010; and information from the WASU that the modern Clerks- Private Sector Award 2010, that replaced 20 Federal awards and led to a diminution of conditions with respect to shift work, the cashing out of annual leave, loss of conversions from casual employment after 6 months, district allowances, dispute resolution training leave and the loss of union status. Reference was also made to the to the Stage 3 Statement of the Federal award modernisation process (AM2008/25-63), which can be found here: http://www.airc.gov.au/awardmod/databases/vehicle_rsr/Decisions/2009aircfb100.pdf.

254. Accordingly, the Review is persuaded that it is best to try and redress the present award problems in a more piecemeal fashion. That is, to adopt the suggestions made, to try and address the more compelling problems with the current State awards without going through the updating process set out in the Interim Report with the aim of producing industry and occupationally based awards.

255. That will, inevitably, sacrifice on the aim of the proposed recommendation, which was the simplification of coverage that would apply for employers, employees and regulators; and that is regrettable that the simplification that would bring seems beyond present reach. For example, having 10 clerks awards, as set out in Attachment 7A to the Interim Report (and **Attachment 7A** of the Final Report) is hardly a hallmark of a simple and easy to use award system.

256. Given the above, the Review is of the opinion that the system to be devised is one which is to be driven by the WAIRC, as the Term of Reference mandates, to try and resolve problems with State awards. The system needs to not replicate one of the things that has let down the s 40B process; and that is the lack of a command to the WAIRC that certain things are to be done, within a specific time frame, and to achieve particular ends, via a reasonably fair process. It needs to be clear that in engaging in the process the WAIRC is not to be restricted to only examining each award once. The process does involve, and this is one of the complaints of the unions, that as in the Federal sphere the unions will not in the same way be joint "custodians" of the awards, although the Review is of the opinion that there ought to be no change to the status of unions as being parties to the awards. The Term of Reference however, requires the process to be devised by the Review to have the WAIRC as its "driver."

257. As set out in the Interim Report, one of the major concerns for the Review is that there are significant pockets of the workforce within industries that are not covered by an award where there are employees working within the State system and where the employment is of a type that would traditionally be expected to be covered by an award. Attachment 7D to the Interim Report set out these groups

of employees. For ease of reference this is attached to this chapter of the Final Report as **Attachment 7C**.

258. The Review is of the opinion that it is necessary for the WAIRC to act to try and ensure that these employees are covered by a State award.

259. At the request of the Review, the Secretariat had undertaken the exercise of trying to ascertain which award these groups of employees might have the closest affinity with. A table setting out this analysis is included as **Attachment 7D**. It can be seen that there are two broad categories within this list. There are employees that seem to be reasonably able to be more readily accommodated within an existing award; and those where there is no readily identifiable coverage.

260. To address this problem, the WAIRC should be legislatively required in the Amended IR Act to within a specified period review the scope clauses of the State private sector awards and make amendments to those awards to ensure that the employees listed in the schedule are covered by a State award.

261. This may be most readily achieved by the amendment to the scope clause of an award. This could be achieved by the award becoming a comprehensive common rule award as opposed to an award that had its scope dependent upon the work engaged in by the employer or employers who are respondents to an award. That would allow for an expansion of the industry covered by the award. If that process is not available as a method to ensure coverage, then the WAIRC should consider an amendment to the scope clause to cover the employers and employees who are award free. If that is not readily achievable then the WAIRC should engage in the process, with the assistance of the relevant employer and employee associations, of the drafting of an award. A ready example of where this might occur is for the domestic service workers, in aged care and disability services, where because of their hitherto exclusion from the IR Act, they will not have award coverage. The Review notes some stakeholders submitted that these types of employees not be covered by an award but only the SES. The Review does not accept that is appropriate. The WAIRC should still ensure there is an

award for the employees to provide a minimum of relevant conditions. The award will include the WAES as the minimum conditions, on the topics it covers, unless the evidence and information before the WAIRC persuades it to the view that more generous terms and conditions are required.

262. The WAIRC will need to consider whether these employees should be roped in to an existing award or whether a separate award should be made for them. The benefit of these employees becoming covered by the IR Act may be lost or diminished if they are not provided for in an award as well as the WAES.

263. There may be difficulties in this process where there is a multiplicity of awards that cover similar occupations. Earlier, there was mention of the 10 clerks awards within the State system. An issue is however that none of them would apply, according to the information before the Review, to a receptionist in a physiotherapy practice. In the process that the Review considers the WAIRC should engage in, it will be the responsibility of the WAIRC to ascertain which of these 10 awards will best apply to the employment of a clerk in a physiotherapy practice and order the necessary amendments to the applicable award.

264. Examples are readily obtainable of the sorts of problems that the award updating process is designed to resolve. For example the PSD has informed the Review it recently had an enquiry about award coverage for a clerk working for a swimming pool manufacturing business within the State system that employed a receptionist. Despite the fact that there are 10 clerks awards in Western Australia, none covered that particular employee.

265. Additionally, there is a Fruit Growing and Fruit Packing Industry Award in Western Australia but that does not cover the employees mainly engaged in packing of vegetables; for which there is seemingly no State award coverage. That is something that should obviously be corrected.

266. Another area of concern to the PSD is over beauty therapy and nail salons employment. It is a developing industry but as yet there is no State award to cover it. There is the *Hairdressers Award 1989* but that only applies to

hairdressers. It would not readily cover beauty therapy and nail salon employment but it is possible the scope of the award could be amended to do so. By contrast there is a Federal *Hair and Beauty Industry Award 2010* that more broadly covers the industry.

267. Issues of the scope of awards is most problematic according to information provided by the Secretariat in the retail industry, in building and construction and in hospitality. It would make sense for the WAIRC, to at an early stage address the coverage of these awards to ensure comprehensive coverage of employees.

268. Another key problem identified in the Interim Report is the awards that plainly have not been amended to redress the objectives in s 40B (1)(a) – (d). In addition to this, one of the clear problems with State awards at present is that, as set out in Attachment 7C to the Interim Report, reproduced at the end of this chapter as **Attachment 7B**, there are many examples of State award provisions which are inconsistent with these subsections of s 40B of the IR Act. The Amended IR Act should also contain a requirement that, within a specified period the WAIRC act to correct this, on notice to the relevant stakeholders.

269. As part of this process out-dated apprenticeship and trainee provisions contained in some State awards can be removed.

270. In the opinion of the Review, the Amended IR Act should require the WAIRC to amend State awards to ensure that these sorts of provisions do not remain. As indicated, differently to the s 40B process, the Review envisages the Amended IR Act not providing the WAIRC with a discretion to correct the awards, but a legislative requirement that it do so. As stated the WAIRC should be mandated to achieve this end within a specified time period and on notice to the parties covered by an existing award and the s 50 parties who should then participate in the updating process.

271. In the review of awards to ensure they do not have terms and conditions less than those currently in the MCE Act and those which might form the WAES, it would ordinarily be the case that terms and conditions of employment about those

matters could simply be removed from the award, unless the award already had superior conditions to the WAES; or there was some industry specific reason for the award to provide terms and conditions about the subject matter.

272. Additionally, such a State award should include by way of a schedule what the WAES are. That way an employer or employee covered by the award can readily ascertain what the WAES are and how they apply to their employment.

273. The Review takes note of the resource issues specified by UnionsWA and others. It is accepted that resources will be required for the WAIRC and participating parties to properly engage with the recommended process. Accordingly, the Review hopes that the Government can make funds available to ensure that the updating system works as best that it can.

274. The WAIRC can be expected to liaise with the Minister as to what resources may be required to ensure this occurs.

275. Accordingly, the Review anticipates the prospect that the Government may make funds available to s 50 parties and/or the parties to an award or other relevant stakeholders to engage in the updating process with the WAIRC. It will of course be up to the Government to decide whether it is prepared to do this and if so, how it would be funded. However, in the opinion of the Review it would be important to try and ensure that the funds are used for the particular purpose specified (that is in the updating of the State award process) as opposed to simply going into the "consolidated revenue" of the union or employer group.

276. As specified in the Terms of Reference one of the objectives of the updating of the State awards system the Review was to devise, was to ensure they are written in plain English and are user friendly for employers and employees. The sense behind this objective is obvious. An award sets out the minimum terms and conditions of employment that are required by an employer to be provided to their employees at the workplace. The employer needs to know how to comply with an award. The employers within the State system are, by and large, small employers. They are generally not sophisticated or have human resources officers

or managers within the business. Accordingly, the award needs to be able to be understood by or readily explained to them. Similarly, it should be able to be understood by an employee who should be able to ascertain, by and large for themselves, whether or not they are getting their award entitlements; although there will of course always be grey areas of interpretation in any industrial instrument.

277. Having said this, however, the Review is understanding of the sensitivity that the unions in particular have about the changing of the terms of awards to try and suit the command of "plain English"; and that if any change of wording is not carefully done it could lead to a diminution of terms and conditions, as the unions inform the Review they have experienced within the Federal award modernisation process. Accordingly, in any consideration of whether the words in the award should be changed, any particular industrial understanding of the meaning of the particular clause needs to be respected and not derogated from. That is not to say that in the drafting of any new clauses of an award the WAIRC should not direct its attention to try and create a document that is reasonably understandable by the parties who have to use the award.

278. In the process of reviewing the scope of State awards it may well be that the WAIRC comes across an award that is completely obsolete. In those instances, it should be empowered to cancel the award.

279. The Review accepts the position of CCIWA that in engaging in the updating of State awards to try to ensure comprehensive coverage, there ought to be a limit, such as that in s 143 and s 333 of the FW Act, so that there need not be award coverage of employee types not traditionally covered by awards or those earning in excess of a specified amount.

280. Consistently with what has been written in Chapter 4, consideration has been given to whether the awards should be varied in the award review process, if necessary, to ensure that they provide equal remuneration for work of equal or comparable value. Although the Review regards that as an important issue, it has

come to the view that requiring this to occur could, to a significant degree, slow up the award review process and make it impossible to complete within the timeframe envisaged by the Review. As noted in Chapter 4, the equal remuneration provision proposed to be included in the Amended IR Act will provide a clear avenue for a range of parties to make an application to the WAIRC for an equal remuneration order for employees covered by a particular award.

281. Consistently with the Term of Reference, it will be up to the WAIRC to drive the process to ensure that this is achieved within the timeframe allocated by the legislation. The Review is of the opinion that the time limit ought to be 18 months.

282. With respect to the updating of awards once this process has been gone through, the Review is of the opinion that the parties and the WAIRC itself should be able to move towards having an award updated as and when required. If the WAIRC were to initiate this process of its own motion then it would be on notice to the parties to the award and the s 50 parties. Likewise, if one party initiated the process then the other parties to the award and the s 50 parties would also be involved.

283. In the opinion of the Review the prospect of updating State awards will be enhanced if employers or employer groups and unions continue to be parties to the award and, hopefully, take some responsibility and ownership for them and their updating into the future.

284. Issues relating to awards in the local government sector will be addressed in Chapter 9 of the Final Report.

285. If the process envisaged by the Review comes to pass, then it will achieve or try to achieve comprehensive coverage of employees within the State system. Additionally, if awards are changed so that any clauses within them that have wages less than the minimum wage, conditions less than those in the WAES, discriminatory provisions or obsolete and out of date provisions removed then that will be a positive outcome.

7.6 Recommendations

961. The recommendations to be made to the Minister, to reflect the concepts referred to above will be as now set out:

63. The Amended IR Act is to include provisions requiring the WAIRC, within eighteen (18) months, to:

(a) Review and as necessary amend the scope of the awards of the WAIRC, and/or if required make new awards, with the aim of ensuring, subject to the following that all private sector employees within the State industrial relations system are covered by an award of the WAIRC, including but not limited to the categories of employees contained in Attachment A.

(b) Recommendation (a) does not apply to employees of the types referred to in s 143(7) of the FW Act or who have an income higher than the high income threshold set under s 333 of the FW Act.

(c) Review, and as necessary amend, each award of the WAIRC to:

(i) Include the contents of the WAES so that employers and employees can understand the requirements and entitlements of and pursuant to the WAES.

(ii) Ensure that the award does not contain any provision that:

(A) Is less than the amount of the minimum wage or any other WAES.

(B) Discriminates against an employee or employees on any ground on which discrimination is unlawful under the *Equal Opportunity Act 1984* (WA).

(C) Is obsolete.[261]

(D) Contains references to Boards of Reference that would be inconsistent with the repeal of s 48 of the IR Act.

(E) Contains a reference to an obsolete or outdated apprenticeship or traineeship scheme.

(d) The process engaged in by the WAIRC in (a)-(c) above is not to have the effect of reducing any employee entitlements under existing awards unless the entitlement is able to and should be removed in the process described in recommendation (c)(ii)(C).

64. The Amended IR Act is to contain a provision that states the award review process described in recommendation [63] may, if necessary or appropriate, be undertaken on more than one occasion by the WAIRC with respect to any particular award, within the eighteen (18) month period.

65. The Amended IR Act is to specify the award review process described in recommendation [63] is to be undertaken by the WAIRC on notice to all parties set out in s 50 of the IR Act and any party to the awards under review, or any other party the WAIRC thinks appropriate, and include these parties in the review of, consultation about and drafting of any awards and/or amendments to awards.

66. The Minister is to give consideration to the resources required for the award review process described in recommendation [63] to be reasonably carried out and take steps to ensure that the WAIRC and participating

261 Examples are clause 15 of the *Printing Award*: "For each female employee employed on day work or on shift work there shall be an interval of ten minutes at a time fixed by the employer between the second and third hour after the employee's ordinary commencing time for rest on each day on which the female employee is required to work"; clause 25 of the *Shop and Warehouse (Wholesale and Retail Establishments) Award 1977* that requires employers to provide "saloon fares" when employees are travelling by coastal boat for work; clause 11 of the *Clerks (Accountants Employees) Award 1984* that provides for a special allowance payable to comptometer or calculating or ledger machine operators; and clause 13(4) of the *Building Trades (Construction) Award 1987* that requires an employer to provide notification by "letter or telegram" of a change of meal break arrangement.

parties have adequate resources to engage in and perform the tasks required by the process.

67. The Amended IR Act contain a provision that any new awards or amendments required to be made to awards as part of the award review process described in recommendation [63] be drafted with the intent that they may be readily understood by the employers and employees covered by the State industrial relations system.

Attachment A Award free employees in Western Australia

The following are examples of employees who are not covered by a State award but who work in industries or occupations that could be considered as traditionally award-type work and/or who would be covered by a modern award if employed in the national industrial relations system.

- Aged and disability support workers employed directly by individuals
- Auto wreckers (excluding sales persons)
- Beauty therapists
- Car salespersons
- Clerical/administrative/reception employees working for:
  - Car yards
  - Caravan parks
  - Child care centres
  - Contract cleaners
  - Fundraising consultant businesses
  - Gyms
  - Interior designers
  - Interpreting services
  - Legal firms (e.g. legal secretary)
  - Mechanical garages
  - Nightclubs
  - Occupational therapists
  - Optometrists
  - Physiotherapists
  - Plumbers
  - Podiatrists
  - Removalists
  - Settlement agencies

  - Swimming pool manufacturers/retailers
  - Telecommunications businesses
  - Tourist centres
  - Veterinary clinics
- Dairy farm workers
- Dance instructors
- Dog/pet groomers
- Enrolled nurses working for doctors' surgeries
- Flower pickers
- Horse and greyhound breeders and trainers
- Interior designers
- IT workers – IT support workers, software developers, website designers etc.
- Market garden workers (if not planting, picking or packing fruit)
- Meter readers
- Nannies
- Shop assistants/salespersons working for:
  - Mobile phone shops
  - Party hire businesses
  - Video/DVD stores
- Newspaper delivery workers employed by Newsagents
- Nightclub employees, including bar staff, glassies, front door staff
- Phlebotomists
- Property managers
- Real estate agents
- Reticulation installers/repairers
- Sign installers
- Swimming pool technicians
- Telemarketers
- Tow truck drivers
- Tree loppers
- Waste industry workers (excluding local government employees)
- Workers in the outer suburbs of Perth making or repairing:
  - Bags, sacks and textiles
  - Boots
  - Particle boards
  - Plywood and veneer products
  - Cases and boxes
  - Rope and twine

Attachment 7A Private Sector State Awards

- Aboriginal Communities and Organisations Western Australian Interim Award 2011
- Aboriginal Medical Service Employees' Award
- Aerated Water and Cordial Manufacturing Industry Award 1975
- Aged and Disabled Persons Hostels Award 1987
- Air Conditioning and Refrigeration Industry (Construction and Servicing) Award No. 10 of 1979
- Ambulance Service Employees' Award 1969
- Animal Welfare Industry Award
- Artworkers Award
- Australian Workers Union Road Maintenance, Marking and Traffic Management Award 2002
- AWU National Training Wage (Agriculture) Award 1994
- Bag, Sack and Textile Award
- Bakers' (Country) Award No. 18 of 1977
- Bakers' (Metropolitan) Award No. 13 of 1987
- Bespoke Bootmakers' and Repairers' Award No. 4 of 1946
- Breadcarters (Country) Award 1976
- Breadcarters' (Metropolitan) Award
- Brick Manufacturing Award 1979
- Brushmakers' Award No. 30 of 1959
- Building and Engineering Trades (Nickel Mining and Processing) Award, 1968
- Building Trades (Construction) Award 1987
- Building Trades Award 1968
- Case and Box Makers' Award, 1952
- Catering Employees' (North West Shelf Project) Long Service Leave Conditions Award 1991
- Catering Workers' (North Rankin A) Long Service Leave Conditions Award No. A 40 of 1987
- Child Care (Out of School Care - Playleaders) Award
- Child Care (Subsidised Centres) Award
- Children's Services (Private) Award 2006
- Children's Services Consent Award 1984
- Cleaners and Caretakers (Car and Caravan Parks) Award 1975
- Cleaners and Caretakers Award, 1969
- Clerks' (Accountants' Employees) Award 1984
- Clerks (Bailiffs' Employees) Award 1978
- Clerks (Commercial, Social and Professional Services) Award No. 14 of 1972
- Clerks' (Customs and/or Shipping and/or Forwarding Agents) Award
- Clerks' (Grain Handling) Award, 1977
- Clerks' (Hotels, Motels and Clubs) Award 1979

- Clerks (Racing Industry - Betting) Award 1978
- Clerks (Timber) Award
- Clerks (Unions and Labor Movement) Award 2004
- Clerks' (Wholesale & Retail Establishments) Award No. 38 of 1947
- Clothing Trades Award 1973
- Club Workers' Award
- Commercial Travellers and Sales Representatives' Award 1978
- Contract Cleaners' (Ministry of Education) Award, 1990
- Contract Cleaners Award, 1986
- Crisis Assistance, Supported Housing Industry - Western Australian Interim Award 2011
- The Contract Cleaning (F.M.W.U.) Superannuation Award 1988
- Dairy Factory Workers' Award 1982
- Dampier Port Authority Port Officers Award 1989
- Deckhands (Passenger Ferries, Launches and Barges) Award
- Dental Technicians' and Attendant/Receptionists' Award, 1982
- Drum Reclaiming Award
- Dry Cleaning and Laundry Award 1979
- The Draughtsmen's, Tracers', Planners' and Technical Officers' Award 1979
- The Dried Vine Fruits Industry Award, 1951
- Earth Moving and Construction Award
- Egg Processing Award 1978
- Electrical Contracting Industry Award R 22 of 1978
- Electrical Trades (Security Alarms Industry) Award, 1980
- Electronics Industry Award No. A 22 of 1985
- Engine Drivers' (Building and Steel Construction) Award No. 20 of 1973
- Engine Drivers' (General) Award
- Engine Drivers' (Gold Mining) Consolidated Award, 1979
- Engine Drivers' (Nickel Mining) Award 1968
- Engine Drivers' Minerals Production (Salt) Industry Award, 1970
- Enrolled Nurses and Nursing Assistants (Private) Award No 8 of 1978
- Family Day Care Co-Ordinators' and Assistants' Award, 1985
- Farm Employees' Award 1985
- Fast Food Outlets Award 1990
- Food Industry (Food Manufacturing or Processing) Award
- Foremen (Building Trades) Award 1991
- Fruit and Produce Market Employees Award No. 50 of 1955
- Funeral Directors' Assistants' Award No. 18 of 1962
- Furniture Trades Industry Award
- The Fruit Growing and Fruit Packing Industry Award
- Gate, Fence and Frames Manufacturing Award
- Golf Link and Bowling Green Employees' Award, 1993

- Hairdressers Award 1989
- Health Attendants Award, 1979
- Health Care Industry (Private) Superannuation Award 1987
- Hospital Salaried Officers (Dental Therapists) Award, 1980
- Hospital Salaried Officers (Nursing Homes) Award 1976
- Hospital Salaried Officers (Private Hospitals) Award, 1980
- Hospital Workers (Cleaning Contractors - Private Hospitals) Award 1978
- Hotel and Tavern Workers' Award
- The Horticultural (Nursery) Industry Award No. 30 of 1980
- Independent Schools (Boarding House) Supervisory Staff Award
- Independent Schools Administrative and Technical Officers Award 1993
- Independent Schools Psychologists and Social Workers Award
- Independent Schools' Teachers' Award 1976
- Industrial Spraypainting and Sandblasting Award
- The Iron Ore Production & Processing (Locomotive Drivers) Award 2006
- Landscape Gardening Industry Award
- Laundry Workers' Award, 1981
- Licensed Establishments (Retail and Wholesale) Award 1979
- Marine Stores Award
- Masters, Mates and Engineers Passenger Ferries Award
- Meat Industry (State) Award, 2003
- Metal Trades (General) Award
- Mineral Sands Industry Award 1991
- Miscellaneous Workers' (Security Industry) Superannuation Award, 1987
- Monumental Masonry Industry Award, 1989
- Motel, Hostel, Service Flats and Boarding House Workers' Award
- Motor Vehicle (Service Station, Sales Establishments, Rust Prevention and Paint Protection) Industry Award No. 29 of 1980
- Musicians' General (State) Award 1985
- Nurses' (Aboriginal Medical Services) Award No. A 23 of 1987
- Nurses (Child Care Centres) Award 1984
- Nurses' (Day Care Centres) Award
- Nurses (Dentists Surgeries) Award 1977
- Nurses (Doctors Surgeries) Award 1977
- Nurses' (Independent Schools) Award
- Nurses' (Private Hospitals) Award
- Optical Mechanics' Award, 1971
- Particle Board Employees' Award, 1964
- Particle Board Industry Award No. 10 of 1978
- Pastrycooks' Award No. 24 of 1981
- Performers Live Award (WA) 1993

- Pest Control Industry Award
- Photographic Industry Award, 1980
- Pipe, Tile and Pottery Manufacturing Industry Award
- Plaster, Plasterglass and Cement Workers' Award No. A 29 of 1989
- Plywood and Veneer Workers Award
- Plywood and Veneer Workers' Award, 1952
- Port Hedland Port Authority Port Control Officers Award 1982
- Poultry Breeding Farm & Hatchery Workers' Award 1976
- Printing Award
- Printing Industry Superannuation Award 1991
- Private Hospital Employees' Award, 1972
- Prospector and AvonLink on Train Customer Service Officers Award
- Quarry Workers' Award, 1969
- Radio and Television Employees' Award
- Restaurant, Tearoom and Catering Workers' Award
- Retail Pharmacists' Award 2004
- Rope and Twine Workers' Award
- The Rock Lobster and Prawn Processing Award 1978
- Saddlers and Leatherworkers' Award
- Saw Servicing Establishments Award No. 17 of 1977
- School Employees (Independent Day & Boarding Schools) Award, 1980
- Security Officers' Award
- Shearing Contractors' Award of Western Australia 2003
- Sheet Metal Workers' Award No. 10 of 1973
- Ship Painters' and Dockers' Award
- Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977
- Show Grounds Maintenance Worker's Award
- Soap and Allied Products Manufacturing Award
- Social and Community Services (Western Australia) Interim Award 2011
- Soft Furnishings Award
- Supported Employees Industry Award
- Teachers' Aides' (Independent Schools) Award 1988
- Thermal Insulation Contracting Industry Award
- Timber Workers Award No. 36 of 1950
- Timber Yard Workers Award No. 11 of 1951
- Transport Workers (General) Award No. 10 of 1961
- Transport Workers (Mobile Food Vendors) Award 1987
- Transport Workers' (North West Passenger Vehicles) Award, 1988
- Transport Workers' (Passenger Vehicles) Award
- University, Colleges and Swanleigh Award, 1980
- Vehicle Builders' Award 1971

- The Western Australian Professional Engineers (General Industries) Award 2004
- The Western Australian Surveying (Private Practice) Industry Award, 2003
- Watchmakers' and Jewellers' Award, 1970
- Wine Industry (WA) Award 2005
- Wool, Hide and Skin Store Employees' Award No. 8 of 1966

Attachment 7B Examples of State Award Provisions Which are Inconsistent with Section 40B of the *Industrial Relations Act 1979*

Section 40B provision	Component of criteria	Award provisions inconsistent with section 40B
Awards not to contain wages that are less than the minimum award wage	40-hour working week and minimum wages	Some State awards still provide for a 40-hour working week, despite the fact a 38-hour week has been an award standard since the 1980s. Awards that have a 40-hour working week include the: • *Bespoke Bookmakers' and Repairers' Award* • *Farm Employees' Award* • *Fruit and Produce Market Employees Award* • *Fruit Growing and Fruit Packing Industry Award* • *Dried Vine Fruits Industry Award* • *Fast Food Outlets Award*. The rates of pay in the most of above awards are now below the statutory minimum. In 2008, the WAIRC issued a General Order amending the adult wages in a number of State awards to bring them into line with the minimum award wage determined under s 50A of the IR Act. Notwithstanding this General Order, the rates of pay in some awards have now fallen below the minimum award wage.[262] This is because the annual State Wage Order provides for an increase to State awards based on a 38-hour week and, over the last few years, it has not taken account of the fact some State awards still provide for a 40-hour working week.
	Junior employees	Some of the wages listed in State awards for junior employees are below the statutory minimum rates of pay determined pursuant to s 13 of the MCE Act. In particular, the 2008 General Order amending adult wages in a number of State awards did not address the issue of junior award wages. The *Restaurant, Tearoom and Catering Workers Award* – one of the most widely utilised awards in the State industrial relations system – has not been varied to provide for junior employees to be paid the applicable percentage of the appropriate adult classification they are working under. Instead, clause 22 of the award provides for junior employees to be paid a percentage of the "lowest adult male or female total rate."[263] By pegging junior wages to the lowest classification, workers below the age of 20 are disadvantaged under the award, as there is no difference in the rate of pay for a 19-year-old performing the work of a Level 1 employee and a 19-year-old performing the work of a Level 3 employee. All the other hospitality awards have been amended to link junior rates of pay to the appropriate adult classification.

[262] The minimum award wage is currently the same as the Adult Minimum Wage determined pursuant to MCE Act s 12.

[263] The wording of this provision dates back to a time when the award provided higher rates of pay for adult males than adult females.

Section 40B provision	Component of criteria	Award provisions inconsistent with section 40B
	Apprentices and trainees	A substantial number of State awards contain apprenticeship and traineeship provisions that are outdated. Furthermore, most of the awards that have apprenticeship and traineeship wages provide for rates of pay that are well below the comparable minimum rates in national modern awards. The annual State Wage Order provides that the minimum rate of pay for apprentices and trainees to whom an award applies is the rate of pay for that class of apprentice or trainee under the award. This can be problematic, as many State awards contain apprenticeship and traineeship provisions that are so outdated it is unclear whether they are still legally binding, and therefore what the minimum rate of pay is for these employees.
Awards not to contain conditions of employment less than MCE Act		Almost all State awards contain conditions of employment that are less favourable to employees than the minimum conditions of employment provided for in the MCE Act. Pursuant to s 5 of the MCE Act, the minimum conditions of employment are taken to be implied into any award, agreement or contract of employment. Although a provision in an award, agreement or contract of employment that is less favourable to the employee than a minimum condition of employment has no effect, the fact that many awards do not reflect these minimum conditions is a source of confusion for employers and employees.
	Sick/carer's leave	• Very few awards enable employees to access up to 10 days of their sick leave for caring purposes each year; • Many awards provide that employees may not access more than 10 weeks of sick leave in any one year of service; and • Many awards provide for sick/carer's leave to accrue on a monthly, rather than a weekly, basis.
	Annual leave	• Some awards provide that an employee must be employed for 12 months before they can access annual leave; • Many awards provide for annual leave to accrue on a monthly, rather than a weekly, basis.
	Bereavement leave	• Many award clauses contain bereavement leave provisions that are less favourable than the MCE Act in relation to the range of family or household members for whom an employee may access bereavement leave; and • Many awards restrict access to bereavement leave to the death of a family member within Australia, or provide that bereavement leave is only granted to attend funerals.
	Parental leave	Almost all State awards contain maternity or parental leave provisions that are less favourable than the MCE Act and the FW Act.
Awards not to contain discriminatory provisions		A number of State awards contain provisions that are discriminatory under the *Equal Opportunity Act 1984* (the EO Act) and/or Commonwealth equal opportunity legislation.

Section 40B provision	Component of criteria	Award provisions inconsistent with section 40B
	Discrimination on the grounds of sex	The following examples illustrate award clauses that discriminate on the grounds of sex: *(a) Plywood and Veneer Workers Award No.28 of 1981* 7. JUNIOR WORKERS *The number of junior workers employed shall not exceed the proportion of one in eight of the total of adult male workers employed.* *(b) Printing Industry Award* 15. REST INTERVAL FOR FEMALES *(1) For each female employee employed on day work or on shift work there shall be an interval of ten minutes at a time fixed by the employer between the second and third hour after the employee's ordinary commencing time for rest on each day on which the female employee is required to work.* *(2) The rest period shall be counted as time worked and shall be taken without loss of pay. A piece employee shall be paid during such rest interval the corresponding time employee's wage. Reasonable facilities shall be provided by the employer for the employee to have refreshments during such interval if the employee so desires.* 17. PART-TIME EMPLOYEES *(1) Subject to subclause (2) of this clause, notwithstanding anything contained in this award, an employer and a female employee who, for personal reasons, is unable to attend for work for 38 hours per week and who desires and applies for permanent employment for a lesser number of hours per week may agree that the ordinary working week of such female shall be of such lesser number of hours than 38 but not less than 19, as they shall mutually determine. Such agreement shall be in writing signed by both parties and shall not become operative until deposited with and approved by the appropriate union or branch thereof having members employed in the establishment upon the type of work on which the part-time employee is to be engaged, and, failing such approval being given by such union, be ratified by the Board of Reference. In the event of an establishment not employing a member of a union in the work upon which a part-time employee is to be employed the approval of the union is required as if employees in that establishment were members of the union or failing approval then by ratification of the Board of Reference. Where approval or ratification is given the following conditions shall apply to the employment of such persons.* *…*

Section 40B provision	Component of criteria	Award provisions inconsistent with section 40B
		(g) Unless otherwise agreed to by the union concerned or in default of such agreement as determined by the Board of Reference, a part-time employee under this clause shall not be employed or continued in employment while a member of the union concerned who is ready and willing to undertake the work as a full-time weekly employee is unemployed. 46. PLATEN MACHINES USED FOR CARTON CUTTING *A female shall not be required or permitted to feed any platen machine used for carton cutting.* *(c) Clothing Trades Award 1973* 6. DEFINITIONS *"Utility machinist" means a machinist who, from time to time performs production work on one or more machines other than the one or ones on which she is constantly engaged. The term does not include a female employee who, as part of the same function operates more than one machine.* 15. ABSENCE THROUGH SICKNESS *…Provided that where a female employee is regularly absent because of menstrual disorder it shall be sufficient for the employer to require the production of a medical certificate with respect to such absence no more than once in any twelve months.* 21. JUNIOR EMPLOYEES *Limitation* *No female under the age of 18 years shall work on a Hoffman type manually operated press.* *(d) Fast Food Industry Award 1990* 27. LIMITATION OF WORK *(1) No female employee may be required to climb ladders or any substitute therefore for any purpose whatsoever.* *(e) Bag, Sack and Textile Award* 16. JUNIOR WORKERS *(1) Subject to the following paragraphs the proportion of junior male employees to adult male employees employed*

Section 40B provision	Component of criteria	Award provisions inconsistent with section 40B
		under classification (b) of the wages schedule shall be not more than one junior to every three adult male employees, and the proportion of junior females to adult females shall be not more than two junior females to every one adult female employed.
	Discrimination on the grounds of marital status	The following examples illustrate awards clauses that are discriminatory on the grounds of marital status; they either discriminate against employees in same sex defacto relationships, or against defacto relationships in general. *(a) Crisis Assistance, Supported Housing Industry - Western Australian Interim Award 2011* *24.2 Definitions* *24.2.1The term **immediate family** includes:* *Spouse or partner (including a former spouse, a de facto spouse and a former de facto spouse) of the employee. A de facto spouse means a person of the opposite sex to the employee who lives with the employee as his or her husband or wife on a bona fide domestic basis;* *(b) Clerks (Timber) Award* 29. COMPASSIONATE LEAVE *A worker shall, on the death of the spouse, father, mother, brother, sister, child, step-child, or guardian of dependent children of the worker be entitled to leave up to and including the day of the funeral of such relation; such leave, for a period not exceeding two days in respect of any such death, shall be without loss of any ordinary pay which the worker would have received if he had not been on such leave.*
	Discrimination on the grounds of age	A number of clerical awards contain lower rates of pay for employees aged between 21 and 25 years of age. Part IVB of the EO Act prohibits discrimination on the grounds of age in a variety of areas, including the terms and conditions of employment that may be provided to employees. While there are exemptions allowing provisions in awards and the MCE Act to provide for lower rates of pay to junior employees, this is restricted to employees under the age of 21 years. It therefore appears the provision of lower rates of pay for employees under the age of 25 years is discriminatory, and could put employers in breach of the EO Act.
Awards are not to contain provisions that are obsolete or need updating	Obsolete award provisions	Numerous State awards contain provisions that are obsolete or in need of updating, as the following examples demonstrate. *(a) Building Trades (Construction) Award*

Section 40B provision	Component of criteria	Award provisions inconsistent with section 40B
		The following clause from the *Building Trades (Construction) Award* describes the process that must be followed in order to vary the midday meal break from 30 to 45 minutes: *Variation of Meal Breaks* *Provided further that where, because of the area of location of a project, the majority of on-site employees on the said project request, and agreement is reached, the period of the meal break may be extended to not more than 45 minutes with a consequential adjustment to the daily time of cessation of work, subject to the following procedure being observed.* *(a) The employer shall, within 24 hours from when he/she reaches agreement with his/her employees, notify by letter or telegram, the unions registered to represent all the occupations he/she has working on the site (and who have reached agreement with him) of the site decision to vary the meal break.* *(b) The employer shall also inform any registered unions of employers to which he/she belongs of this agreement.* *(c) A period of five ordinary working days shall be allowed to pass from the day on which the employer informs the unions, before the agreement is implemented.* *(d) Such an agreement shall be put into effect after passage of the five days' period of notice unless a party to the award with membership involved in the agreement refers the matter to a Board of Reference in which event the agreement will not be implemented until a decision is made by such a Board or a further period of five ordinary working days has passed, whichever is the shorter.*[264] *(b) Clothing Trades Award* The following clause demonstrates the difficulty that obsolete references in State awards can create for employers and employees. Clause 9 (Hours of Work) of this award provides that: *1. Where an employee is employed in a retail store he/she may be rostered for ordinary duty on five and a half days of the week at ordinary rates of pay within the hours prescribed from time to time by the Shop Assistant*

[264] Clause 13(4) of the *Building Trades (Construction) Award*.

Section 40B provision	Component of criteria	Award provisions inconsistent with section 40B
		(Metropolitan) Award. *(2) Any employee, other than a casual employee, who is employed in a retail store on a five-and-a-half-day week basis shall be paid such additional rates for work performed on Saturday as is prescribed from time to time by the Shop Assistants (Metropolitan) Award. Provided that any employee who has completed his ordinary hours of duty by Friday of each week shall not be entitled to the additional rates for Saturday work but shall be paid overtime rates in respect of all work performed on a Saturday.* Apart from the fact the *Shop Assistants (Metropolitan) Award* was replaced 40 years ago, the cross references to this obsolete award are impossible to comply with. For instance, the hours of duty prescribed in the *Shop Assistants (Metropolitan) Award* varied significantly depending on whether a retail business was a non-exempted shop, a wholesale establishment, an exempted shop or a special category shop. They also reflected the retail trading hours prevailing in the 1970s. Furthermore, the additional rate prescribed under the *Shop Assistants (Metropolitan) Award* for work performed on Saturday before 12.00pm was a lump sum payment of $1.25 (payable regardless of the number of hours worked). If such a loading were applied to clothing trades employees today, it would represent less than 2% of the hourly wage. *(c) Other examples* Many other awards contain clauses that, while not necessarily burdensome on employers and employees, are obsolete. For example: • Clause 25 of the *Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977* requires employers to provide "saloon fares" when employees are travelling by coastal boat for work. • Clause 11 of the *Clerks (Accountants Employees) Award* provides for a special allowance that is payable to stenographers, comptometer or calculating or ledger machine operators. • Clause 27 of the *Electrical Contracting Industry Award* provides for an allowance of $34.70 per week, which is payable whenever employees do not take strike action. • Clause 4 of the *Performers Live Award (WA)* provides that the award does not apply to persons employed as a Father Christmas or a Talking Tree. However, the award does not appear to exclude persons employed as elves.
	Outdated right of entry provisions	Most State awards in Western Australia contain a clause restricting union right of entry to workplaces, pursuant to legislation from the 1990s that has since been repealed. The clause in question is generally worded in the following terms:

Section 40B provision	Component of criteria	Award provisions inconsistent with section 40B
		<u>*RIGHT OF ENTRY*</u> *Consistent with the terms of the Labour Relations Legislation Amendment Act 1997 and S.23(3)(c)(iii) of the Industrial Relations Act a representative of the Union shall not exercise the rights under this clause with respect to entering any part of the premises of the employer unless the employer is the employer, or former employer of a member of the Union.* *On notifying the employer or his representative, the secretary or any authorised officer of the union party to this part of the award shall have the right to visit any job at any time when work is being carried on, whether during or outside the ordinary working hours and to interview the employees covered by this award provided that he does not unduly interfere with the work in progress.* The restrictive right-of-entry provisions referred to in the above clause were repealed 15 years ago by the *Labour Relations Reform Act 2002*.
	Ambiguous provisions	Many State awards contain provisions that are ambiguous and/or difficult to interpret. In some instances, the wording contained in various award clauses was inserted up to 70 years ago, reflecting prevailing industry patterns or norms at the time. Clause 15(3) from *Building Trades (Construction) Award* is a case in point: *If an employer requires an employee to work during the time prescribed by Clause 13. - Hours or Clause 18. - Shift Work of this award for cessation of work for the purpose of a meal, he/she shall allow the employee whatever time is necessary to make up the prescribed time of cessation, and the employee shall be paid at the rate of double time for the period worked between the prescribed time of cessation and the beginning of the time allowed in substitution for the prescribed cessation time; provided however, that the employer shall not be bound to pay in addition for the time allowed in substitution for the cessation time; and provided also that if the cessation time is shortened at the request of the employee to the minimum of thirty minutes prescribed in Clause 13. - Hours or Clause 18. - Shift Work of this award or to any other extent (not being less than thirty minutes) the employer shall not be required to pay more than the ordinary rates of pay for the time worked as a result of such shortening, but such time shall form part of the ordinary working time of the day.*

Attachment 7C Award free employees in Western Australia

The following are examples of employees who are not covered by a State award but who work in industries or occupations that could be considered as traditionally award-type work and/or who would be covered by a modern award if employed in the national industrial relations system.

- Aged and disability support workers employed directly by individuals
- Auto wreckers (excluding sales persons)
- Beauty therapists
- Car salespersons
- Clerical/administrative/reception employees working for:
  - Car yards
  - Caravan parks
  - Child care centres
  - Contract cleaners
  - Fundraising consultant businesses
  - Gyms
  - Interior designers
  - Interpreting services
  - Legal firms (e.g. legal secretary)
  - Mechanical garages
  - Nightclubs
  - Occupational therapists
  - Optometrists
  - Physiotherapists
  - Plumbers
  - Podiatrists
  - Removalists
  - Settlement agencies
  - Swimming pool manufacturers/retailers
  - Telecommunications businesses
  - Tourist centres
  - Veterinary clinics
- Dairy farm workers
- Dance instructors
- Dog/pet groomers
- Enrolled nurses working for doctors' surgeries
- Flower pickers
- Horse and greyhound breeders and trainers
- Interior designers
- IT workers – IT support workers, software developers, website designers etc.
- Market garden workers (if not planting, picking or packing fruit)
- Meter readers

- Nannies
- Shop assistants/salespersons working for:
  - Mobile phone shops
  - Party hire businesses
  - Video/DVD stores
- Newspaper delivery workers employed by Newsagents
- Nightclub employees, including bar staff, glassies, front door staff
- Phlebotomists
- Property managers
- Real estate agents
- Reticulation installers/repairers
- Sign installers
- Swimming pool technicians
- Telemarketers
- Tow truck drivers
- Tree loppers
- Waste industry workers (excluding local government employees)
- Workers in the outer suburbs of Perth making or repairing:
  - Bags, sacks and textiles
  - Boots
  - Particle boards
  - Plywood and veneer products
  - Cases and boxes
  - Rope and twine

Attachment 7D Possible State Award Coverage for Award Free Employees

Award free employee	Possible State award coverage
Aged and disability support workers employed directly by individuals	No appropriate award
Auto wreckers (excluding sales persons)	Vehicle Builders Award
Beauty Therapists	Hairdressers Award
Car salespersons	Motor Vehicle (Service Station, Sales Establishments, Rust Prevention and Paint Protection) Industry Award
Clerical/ administrative/ reception employees working for:	**Could be under relevant industry award*
• Car yards	Clerks (Wholesale and Retail Establishments) Award
• Caravan parks	Clerks (Commercial, Social and Professional Services) Award
• Child care centres*	Clerks (Commercial, Social and Professional Services) Award
• Contract cleaners*	Clerks (Commercial, Social and Professional Services) Award
• Fundraising consultant businesses	Clerks (Commercial, Social and Professional Services) Award
• Gyms*	Clerks (Commercial, Social and Professional Services) Award
• Interior designers	Clerks (Commercial, Social and Professional Services) Award
• Interpreting services	Clerks (Commercial, Social and Professional Services) Award
• Legal firms (e.g. legal secretary)	Clerks (Commercial, Social and Professional Services) Award
• Mechanical garages*	Clerks (Commercial, Social and Professional Services) Award
• Nightclubs	Clerks (Hotels, Motels and Clubs) Award
• Occupational therapists	Clerks (Commercial, Social and Professional Services) Award
• Optometrists	Clerks (Commercial, Social and Professional Services) Award
• Physiotherapists	Clerks (Commercial, Social and Professional Services) Award
• Plumbers*	Clerks (Commercial, Social and Professional Services) Award
• Podiatrists	Clerks (Commercial, Social and Professional Services) Award
• Removalists*	Clerks (Commercial, Social and Professional Services) Award
• Settlement agencies	Clerks (Commercial, Social and Professional Services) Award
• Swimming pool manufacturers/ retailers	Clerks (Wholesale and Retail Establishments) Award

Award free employee	**Possible State award coverage**
• Telecommunications businesses	Clerks (Commercial, Social and Professional Services) Award
• Tourist centres	Clerks (Commercial, Social and Professional Services) Award
• Veterinary clinics*	Clerks (Commercial, Social and Professional Services) Award
Dairy farm workers	Farm Employees Award
Dance instructors	Health Attendants Award
Dog/ pet groomers	Animal Welfare Award
Enrolled nurses working for doctors' surgeries	Nurses (Doctors Surgeries) Award
Flower pickers	Horticultural (Nursery) Industry Award or Farm Employees Award
Horse and greyhound breeders and trainers	No appropriate award
Interior designers	No appropriate award
IT workers – IT support workers, software developers, website designers etc.	No appropriate award
Market garden workers (if not planting, picking or packing fruit)	Farm Employees Award
Meter readers	No appropriate award
Nannies	No appropriate award
Shop assistants/ salespersons working for: • Mobile phone shops • Party hire businesses • Video/ DVD stores	Shop and Warehouse (Wholesale and Retail Establishments) Award
Newspaper delivery workers employed by newsagents	Shop and Warehouse (Wholesale and Retail Establishments) Award or Transport Workers (General) Award
Nightclub employees, including bar staff, glassies, front door staff	Club Workers Award
Phlebotomists	Hospital Salaried Officers (Private Hospitals) Award 1980
Property managers	No appropriate award
Real estate agents	No appropriate award
Reticulation installers/ repairers	Landscape Gardening Industry Award
Sign installers	Building Trades (Construction) Award
Swimming pool technicians	No appropriate award
Telemarketers	Clerks (Commercial, Social and Professional Services) Award
Tow truck drivers	Transport Workers (General) Award
Tree loppers	Landscape Gardening Industry Award
Waste industry workers (excluding local government employees)	No appropriate award

Award free employee	**Possible State award coverage**
Workers in the outer suburbs of Perth making or repairing: • Bags, sacks and textiles • Boots • Particle boards • Plywood and veneer products • Cases and boxes • Rope and twine	Bag, Sack and Textile Award Bespoke Bootmakers and Repairers Award Particle Board Industry Award Plywood and Veneer Workers Award Case and Box Makers Award Rope and Twine Workers Award

Chapter 8 Compliance and Enforcement

8.1 Term of Reference

962. The seventh Term of Reference reads as follows:

> The Ministerial Review of the State industrial relations system is to consider and make recommendations with respect to the following matters…
>
> 7. Review statutory compliance and enforcement mechanisms with the objectives of:
>
> (a) ensuring that employees are paid their correct entitlements;
>
> (b) providing effective deterrents to non-compliance with all State industrial laws and instruments; and
>
> (c) updating industrial inspectors' powers and tools of enforcement to ensure they are able to effectively perform their statutory functions.

963. As set out in the Interim Report the Term of Reference requires the Review to consider the statutory compliance mechanisms that facilitate employees being paid their correct entitlements and industrial inspectors' powers and "tools of enforcement". As also set out in the Interim Report the Term of Reference is aspirational insofar as it refers in 7(a) and 7(c) to "ensuring" that employees are paid their correct entitlements and inspectors are able to effectively perform their statutory functions. There is of course no methodology the Review could devise which would necessarily and in all cases provide for these things to occur. As set out in the Interim Report, the Review has taken the view that the Term of Reference means it should consider and make recommendations with the aim of improving the prospects of employees being paid their correct entitlements and inspectors effectively performing their statutory functions.

964. The Interim Report set out that the Term of Reference had been construed to include a review of the "right of entry" provisions in the IR Act, because they are part of the statutory compliance and enforcement mechanisms within the State and which, for example, may be used to try and ensure there is compliance with State industrial laws and instruments. A reconsideration of that position is contained later in the chapter.

8.2 The Interim Report

965. The Interim Report said the preliminary opinion of the Review was that the enforcement mechanisms under the IR Act and LSL Act were inadequate and set out the reasons for the opinion.

966. The sole enforcement mechanism to facilitate employees being paid their correct entitlements in the State industrial relations system is a court proceeding being brought in the IMC, under s 83 of the IR Act. Section 83 applies to the enforcement of awards, industrial agreements, statutory minimum conditions of employment and some orders of the WAIRC.[265] Proceedings can also be brought in the IMC for the enforcement of LSL entitlements under s 11 of the LSL Act. Many State awards also incorporate the provisions of the LSL Act into an award. Enforcement proceedings can therefore be brought as a breach of an award, rather than a breach of the LSL Act.

967. The Interim Report contrasted the position under the FW Act, where Fair Work Inspectors have a range of enforcement mechanisms available to them in addition to court proceedings. Amongst other things, Fair Work Inspectors may issue:

(a) Infringement notices for the breach of record keeping and pay slip obligations.

(b) Compliance notices.

(c) Enforceable undertakings.

968. The Interim Report then set out and analysed:

(a) The people who may institute proceedings in the IMC under s 83 of the IR Act or s 11 of the LSL Act.[266]

---

265 Section 7 of the MCE Act provides: A minimum condition of employment may be enforced —(aa) where the condition is implied in an employer-employee agreement, under s 83 of the IR Act; or (b) where the condition is implied in an award, under Part III of the IR Act; or (c) where the condition is implied in a contract of employment, under s 83 of the IR Act as if it were a provision of an award, industrial agreement or order other than an order made under s 32 or 66 of that Act.

266 Interim Report, [1289] – [1291].

(b) Impediments to employees being paid their correct entitlements in the State industrial relations system, according to the regulator, currently the PSD of DMIRS.[267]

(c) A discussion of the FW Act enforcement mechanisms.[268]

(d) The tools of enforcement in other State jurisdictions.[269]

(e) The mechanisms that might provide effective deterrents to non-compliance with State industrial laws and instruments, including wages theft.[270]

(f) The differential in penalties between the FW Act and the IR Act.[271]

(g) Issues of accessorial liability under the FW Act.[272]

(h) Instances where the FW Act has a reverse onus of proof which could be followed in State legislation.[273]

(i) Industrial inspectors' powers and tools of enforcement including the problems with the current powers of inspectors under the IR Act in the view of the PSD.[274]

(j) The issue of contraventions of the LSL Act, including an absence of penalties for breaches of the LSL Act, regarded by the PSD as a significant impediment to enforcement.[275]

(k) The issue of contraventions of LSL provisions in awards and agreements.[276]

(l) The issue of contraventions of the LSL General Order.[277]

---

267 Interim Report, [1292].
268 Interim Report, [1293] – [1298].
269 Interim Report, [1299] – Attachment 8A.
270 Interim Report, [1300 – [1307]. As stated in the Interim Report the issue of the imposition of prison terms for "wages theft" was raised in submissions to the Review. The Review therefore brought the issue to the attention of the Attorney General by letter dated 12 April 2018.
271 Interim Report, [1308] – [1311].
272 Interim Report, [1312] – [1317].
273 Interim Report, [1318] – [1320].
274 Interim Report, [1321] – [1323].
275 Interim Report, [1324] – [1332].
276 Interim Report, [1333] – [1335].
277 Interim Report, [1336] – [1343].

(m) The submissions received on the Term of Reference.[278]

(n) Issues relating to s 84A of the IR Act.[279]

(o) Issues relating to the right of entry provided for under Division 2G of Part II of the IR Act.[280]

969. The analysis set out in the Interim Report led to the Review putting forward the following proposed recommendations for further submissions and discussion.

58. Under the 2018 IR Act, industrial inspectors are to be empowered to:

(a) Issue infringement notices for breach of record-keeping and pay slip obligations.

(b) Issue compliance notices, based on the model contained in s 716 of the FW Act, if it is in the public interest to do so.

(c) Issue enforceable undertakings, based on the model contained in s 715 of the FW Act, if it is in the public interest to do so.

59. The penalties in enforcement proceedings brought in the IMC be amended to be equivalent to the penalties set out in s 539 of the FW Act, and contain a method for indexation of the penalties, so that the maximum penalties change over time to take into account inflationary change.

60. The 2018 IR Act is to include provisions comparable to s 550 of the FW Act to enable those involved in any contravention of a relevant breach to be penalised and/or ordered to rectify any non-payment, or ordered to pay compensation or any other amount that the employer may have been ordered to pay.

61. The 2018 IR Act is to include provisions to enable the IMC to impose penalties for a breach of the SES or any applicable award, agreement, or other industrial instrument, including but not limited to breaches of long service leave obligations.

62. The 2018 IR Act is to include a section comparable to s 557C of the FW Act to the effect that, if, in a contravention proceeding against an employer where an applicant makes an allegation in relation to a matter and the employer was required to make and keep a record, make available for inspection a record or give a pay slip, in relation to the matter, and the employer has failed to comply with the requirement, the employer has the burden of disproving the allegation.

63. The 2018 IR Act is to include sections comparable to s 535(4) and s 536(3) of the FW Act prohibiting an employer from wilfully making, keeping or maintaining a false or misleading employment record or wilfully providing a false or misleading pay slip.

64. The 2018 IR Act is to include provisions comparable to s 112 and s 113 of the Fair Trading Act 2010 (WA) to provide for the ability of industrial inspectors to share information acquired during an investigation within DMIRS or with other State

278 Interim Report, [1344] – [1375].
279 Interim Report, [1376].
280 Interim Report, [1377] – [1413].

Government agencies, or to obtain relevant information within DMIRS or from another State Government agency.

65. Section 98 of the IR Act be amended so that there is no restriction on the powers of industrial inspectors only being exercised at an "industrial location". Instead, consistent with the FW Act, an industrial inspector may exercise their powers at either:

    (a) The premises where work is or was being performed; or

    (b) Business premises where the inspector reasonably believes there are relevant documents or records.

66. The present s 84A(5) of the IR Act be amended to empower the Judicial Bench to impose a maximum penalty for a breach of $12,000 or imprisonment for not more than 12 months or both.[281]

67. The right of entry provisions in the 2018 IR Act be amended to:

    (a) Include a requirement that a person must be a fit and proper person to obtain, hold or maintain a right of entry permit.

    (b) Provide that an application may be made to the WAIRC by the Registrar or an industrial inspector for the suspension or revocation of a right of entry permit on the basis that the holder is no longer a fit and proper person to hold the permit; and

    (c) In any application made under (b), or in considering an application for a right of entry permit, the WAIRC must take into account, as a relevant consideration, any suspensions, revocations or other sanctions imposed on the holder by or under the FW Act with respect to any corresponding rights of entry.

68. The 2018 IR Act include a provision that amends what is presently s 49I of the IR Act to include:

    (a) An entitlement under what is presently s 49I(2)(b) of the IR Act to make copies of entries in records and documents by way (that is relevant to the suspected breach of a photograph) video or other electronic means.

    (b) An entitlement to photograph, or record by video, tape or other electronic means the work, material, machinery or appliance that is inspected under what is presently s 49I(2)(c) of the IR Act, that is relevant to the suspected breach.

    (c) A civil penalty provision to apply in circumstances comparable to s 504 of the FW Act, for any misuse of any documents or other materials obtained in exercise of the rights contained in s 49I(2) of the 2018 IR Act.

970. It is appropriate to consider the submissions received on each of the proposed recommendations in the Interim Report before deciding whether and what final recommendations should be made.

[281] This is consistent with *Magistrates Court Act 2004* (WA) s 16(4).

8.2.1 Proposed Recommendation 58

Under the 2018 IR Act, industrial inspectors are to be empowered to:

(a) Issue infringement notices for breach of record-keeping and pay slip obligations.

(b) Issue compliance notices, based on the model contained in s 716 of the FW Act, if it is in the public interest to do so.

(c) Issue enforceable undertakings, based on the model contained in s 715 of the FW Act, if it is in the public interest to do so.

971. Submissions about this proposed recommendation were made by AMMA, CCIWA, the DWER, the HIA, Master Builders, the SBDC, vegetablesWA, UnionsWA, the AMWU, the CFMEU, the CPSU/CSA, the HSUWA, United Voice, the WASU, the WAPOU, the ELC and the ECCWA. There were also confidential submissions received by an employer association and an employee association. These submissions have been taken into account even though the stakeholders will not be identified in the Final Report.

972. AMMA submitted that record keeping is a complex and often changing set of requirements and suggested therefore that alleged breaches should be enforced in a court of competent jurisdiction. Nevertheless, it supported enforceable undertakings as an alternative to prosecution particularly if the breach was of an unintentional nature.

973. CCIWA did not oppose the proposed recommendation, particularly as it provides alignment with the provisions of the FW Act and therefore consistency within Western Australia. CCIWA submitted, and the Review accepts, that a significant contributor to the solution with respect to compliance and enforcement is that employers and employees have improved access to resources, information and knowledge. This issue is dealt with again later.

974. vegetablesWA also submitted that information, education and resources for employers were "weapons in the compliance armoury" and the notion that "prevention is better than cure" should be the focus of any compliance structure or system. It submitted however that wilful non-compliance and practices devised to exploit employees caused real damage to industry reputations and should be dealt

with accordingly. The point was made that those engaging in these practices damage industry reputations and gain a competitive advantage by unfair means.

975. DWER was supportive of the proposed recommendation.

976. By contrast the HIA submitted there was a lack of substantive evidence to support the introduction of further enforcement mechanisms and so recommended the status quo be maintained. With respect, the Review does not accept this proposition. The Review regards the information set out in the Interim Report, including from the PSD, to be sufficient information upon which to base the introduction of further enforcement mechanisms.

977. Master Builders submitted the proposed recommendation be subject to appropriate checks and balances as part of the regulator's prosecution policy to ensure the processes were not used in a manner not intended. With respect, that is a sensible suggestion insofar as it refers to there being a defined enforcement policy so that in a particular instance whether one or other enforcement mechanism is appropriate, can be checked against some form of objective measure. Master Builders also supported enforceable undertakings as long as the "model" was based on what might be called a plea bargain concept. That is, Master Builders submitted the parties should be able to enter into a legally enforceable written arrangement, which negates the need for "expensive litigation" and provides for a more equitable outcome, having regard for the lack of sophistication of many small employers in the State IR system. The Review does not entirely understand what is meant by the "plea bargain" concept, but notes that within other States of Australia the enforcement mechanisms under the FW Act apply. The Review thinks there is no particular reason why the same enforcement mechanisms cannot exist in the State system in Western Australia.

978. The confidential submission from an employer group submitted that given the State IR system covers unincorporated and typically small employers, the IR Act should be amended to contain mechanisms for an assisted voluntary resolution as a first step alternative to fines, compliance notices and enforceable undertakings. It also submitted that education about compliance was more important than penalties and

court action. The Review sees no inconsistency between this submission and the proposed recommendation.

979. The SBDC said it was generally supportive of the proposed recommendation. The ECCWA also supported the proposed recommendation.

980. The unions that made submissions on this proposed recommendation were all supportive of it. UnionsWA said the use of infringement notices should however be limited to where there are "technical breaches". It was also submitted there should be legislative protections to ensure that "fines" should not become a "substitute" in circumstances where prosecutions should occur. The submission underlined the importance of possible prosecutions for the purposes of education, denunciation and (hopefully) general deterrence.

981. The ELC submitted that industrial inspectors played a critical regulatory role in ensuring employers comply with their obligations and that it was important they have a range of powers and alternative mechanisms to enforce compliance and deter wrongdoing and sufficient resources to carry out their duties.

982. Based upon the thrust of the submissions, as analysed above, together with the analysis set out in the Interim Report, the Review proposes to make a recommendation in accordance with proposed recommendation 58 in the Interim Report. The Review also recommends that the PSD prepare a written public policy to guide the use of the new enforcement mechanisms. The Review also notes the submissions on the need for the education of employers about a new enforcement regime and need for compliance and will recommend to the Minister that this occur and be appropriately resourced. The issue of the appropriate resourcing of the PSD is also one that the Minister should engage.

8.2.2 Proposed Recommendation 59

The penalties in enforcement proceedings brought in the IMC be amended to be equivalent to the penalties set out in s 539 of the FW Act, and contain a method for indexation of the penalties, so that the maximum penalties change over time to take into account inflationary change.

983. There were two aspects to this proposed recommendation. The first was that the penalties and enforcement proceedings be amended to be equivalent to the penalties set out in s 539 of the FW Act. The second was that the IR Act contain a method for indexation of penalties, so that the maximum penalties change over time to take into account inflationary change.

984. The same stakeholders as for proposed recommendation 58 made submissions upon this proposed recommendation. With respect to the alignment of penalties to those set out in the FW Act there was support from CCIWA, the DWER, Master Builders, the AMWU, the CFMEU, the CPSU/CSA, the HSUWA, UnionsWA, the WASU and the ELC.

985. The submission from United Voice provided general support to there being increased deterrents to "unscrupulous employers from taking advantage of vulnerable workers". United Voice also said that there was a concern the recommendations could have unintended punitive consequences for unions and that penalties should be confined to identified conduct by employers such as "wages theft" and "modern slavery". It was submitted that unions should be entitled to retain penalties or fines from employers that would then be used for the "sole purpose of recovering money for workers". It was also submitted the Review should make recommendations "confirming the ability for unions to run prosecutions for breaches".

986. As the meaning of "unintended punitive consequences" was not clear to the Review, clarification was sought from United Voice. The Review received a reply saying that:

> While United Voice supports the recommendations for increased penalties for employers engaged in worker exploitation, as the proposed recommendations are drafted quite broadly, we are concerned they could have unintended consequences for unions and workers.
>
> The intention of the proposed amendments to penalties should be to act as a deterrence for improper conduct. In our opinion, this would be better served by introducing penalties that targeted the various forms of worker exploitation and would be significant enough to act as a deterrence to employers.
>
> As was considered in our initial submission in November 2017, the inadequacy of the existing penalties and their inability to act as deterrence has been an issue taken up by unions in both the state and national system as contributing to the rising inequality in our country. Practices of worker exploitation have become normalized [sic] and are particularly prevalent in some sectors. For example, wages theft in Australia is now so common that in some places it's the business model. The 'savings' for employers

generated by robbing employees of their wages are far greater than the fines that can be incurred.

Increased penalties for employers who are found to have breached awards or agreements in the state system on a number of identified categories of worker exploitation could help deter this level of conduct against workers. This would include instances of wages theft and modern slavery.

987. On "wages theft" the proposed recommendation was to the effect of increasing the maximum penalties that could be imposed upon employers who breach their obligations to pay employees the amount to which they are entitled, to the same levels as under the FW Act. If an employer has breached these requirements wilfully and systematically, so as to create a "business model" of exploitation, the Review would expect that to be reflected in the penalties to be imposed by the IMC. The Review does not, with respect, see how the proposed recommendation could have "unintended punitive consequences" for unions.

988. With respect to the United Voice submission that unions should be able to prosecute breaches and receive monetary penalties or fines, this is, in the opinion of the Review, already adequately covered by the IR Act. Under s 83(1)(c) of the IR Act, an organisation or association, such as a union, named as a party to an award or agreement, can apply for enforcement. There is therefore already capacity for unions to bring proceedings for enforcement. Additionally, under s 83F(2) of the IR Act, the IMC may order that any penalty be paid to a person directly affected by the conduct to which the contravention relates; the Treasurer; or the applicant. So, when the applicant is a union the IMC may order the penalty to be paid to it.

989. The Review understands the nature and extent of the concern by United Voice about "wages theft". As mentioned above, the issue of more condign penalties for "wages theft" is something the Review considers is within the purview of the Attorney General, who has been written to on the subject.

990. AMMA submitted the penalties prescribed by the Amended IR Act should reflect the nature of the relatively small scale of private sector employers that remain within the WA system. A similar point was made by the HIA in not supporting the proposed recommendation. It was submitted there was no demonstrated case that the increasing of penalties results in a "more favourable outcome", notwithstanding an

acknowledgement of the difficulties that different penalty regimes can create. It is noted that this opposition to the proposed recommendation is not shared by CCIWA who, as stated, favoured alignment with the FW Act penalties.

991. The Review agrees with the CCIWA position for the reasons set out in the analysis contained in the Interim Report, as well as in stakeholder submissions to the Review, both before and after publication of the Interim Report. The issue of the extent of the penalty given the size of the employer is something the IMC will be expected to take into account in assessing the penalty to be imposed. This was also set out in the Interim Report.

992. The second part of the proposed recommendation was not supported to the same extent. CCIWA, for example, said it did not support the indexation of penalties, as the penalties in Western Australia should remain consistent with those of the FW Act. AMMA submitted amendments or increases to penalties should not be automatic; the WA Parliament should enact them. Master Builders made the same point by saying that as the FW Act does not have indexation according to inflation there could be a loss of consistency between the penalties under the IR Act and the FW Act over time.

993. This aspect of the proposed recommendation was not specifically engaged with in the submissions made by the unions.

994. The Review thinks however, there is merit in the points made by the employer stakeholders referred to above.

995. There is clearly a need to ensure that penalties increase over time so they do not again become out of date or unacceptably low. The FW Act has a methodology for the increase of penalties. The Review considers that the position of amending penalties under the IR Act could be accommodated by increases, as and when increases to penalties under the FW Act are made. A mechanism for this to occur could be achieved either by a relevant amendment to the IR Act, regulations or a combination of both.

996. This will be reflected in the recommendation to be made.

8.2.3 Proposed Recommendation 60

The 2018 IR Act is to include provisions comparable to s 550 of the FW Act to enable those involved in any contravention of a relevant breach to be penalised and/or ordered to rectify any non-payment, or ordered to pay compensation or any other amount that the employer may have been ordered to pay.

997. This proposed recommendation was supported by the ELC, WASU, United Voice, UnionsWA, the HSUWA, the CPSU/CSA, the CFMEU, the AMWU, the DWER and AMMA. It was opposed by CCIWA on the basis that it could not support the introduction of accessorial liability provisions without the Review articulating what types of contraventions accessorial liabilities intended to attach.

998. The Review does not, with respect, think that is a sufficient reason not to make the proposed recommendation. In the opinion of the Review, accessorial liability can apply to each and every breach that may be before the IMC. That is the same approach, broadly, as under the FW Act. The FW Act contains provisions that delimit the nature and extent of the accessorial liabilities and the Review is of the opinion that the same can apply to enforcement proceedings under the IR Act.

8.2.4 Proposed Recommendation 61

The 2018 IR Act is to include provisions to enable the IMC to impose penalties for a breach of the SES or any applicable award, agreement, or other industrial instrument, including but not limited to breaches of long service leave obligations.

999. UnionsWA, United Voice, the WASU, the HSUWA, the CPSU/CSA, the CFMEU, the AMWU, the ELC, AMMA and DWER and a confidential employee association submission, supported this recommendation. CCIWA urged the Review to consider the particular characteristics of the private sector cohort covered by the State system when addressing the matter of breaches by small and micro businesses. It was submitted the first priority must be a process that focuses on education and guidance to remedy any breach, which should be done in a cooperative manner with the rectification of breaches being the primary object. It was submitted these required actions might be achieved through a range of options including enforceable undertakings without "immediately resorting to a penalty". CCIWA submitted

government strategies to provide improved access to information and knowledge were more effective in bringing about change than prosecution. The Review accepts much of the thrust of the submission of CCIWA insofar as it applies to businesses working to comply with their obligations, but this does not provide a reason not to amend the IR Act in the manner envisaged in the proposed recommendation.

1000. Master Builders was concerned that it would follow from the recommendation that a "home owner who would be captured by the SES as an employer who may be in breach of the SES, in one way or another, would potentially face pecuniary penalties, compensation or associated orders." It was submitted this was "an outcome which must be made known to the public."

1001. Insofar as this submission implies there should be education for "new" employers who are situated in their own homes as to their responsibilities as an employer, the Review takes no issue. If it is suggested that somehow because an employer's work is in their own home they should be immunised from being prosecuted for breaches of the WAES or applicable awards, agreements and other industrial instruments, including LSL obligations, then it is not supported by the Review. That issue is referred to further in Chapter 6 of the Final Report.

1002. The Review intends to make a recommendation to the Minister in terms of the proposed recommendation.

8.2.5 Proposed Recommendation 62

The 2018 IR Act is to include a section comparable to s 557C of the FW Act to the effect that, if, in a contravention proceeding against an employer where an applicant makes an allegation in relation to a matter and the employer was required to make and keep a record, make available for inspection a record or give a pay slip, in relation to the matter, and the employer has failed to comply with the requirement, the employer has the burden of disproving the allegation.

1003. The unions who made submissions on the Term of Reference also supported this recommendation. UnionsWA made the point that employers can be effectively protected from prosecution when they have breached their record keeping requirements, as applicants are not able to obtain supporting evidence. Similarly, the ELC said that in circumstances where an employer has failed to meet its record

keeping obligations it should not then be able to gain the advantage of that failure by the burden of proving a relevant allegation falling on the employee. It submitted the burden should be borne by the employer. The recommendation was also supported by the ECCWA, a confidential employee association submission, DWER and AMMA.

1004. It was opposed however by a confidential employer group submission.

1005. CCIWA submitted there ought to be an inclusion of a provision like s 557C(2) of the FW Act so an employer does not have the burden of disproving an allegation if they have a reasonable excuse for not complying with record keeping arrangements. That submission is consistent with the proposed recommendation included in the Interim Report. That is because in suggesting the enactment of a section comparable to s 557C of the FW Act, the Review had in mind that would include an equivalent to s 557C(2) of the FW Act.

1006. The Review intends to make a recommendation consistent with the proposed recommendation.

8.2.6 Proposed Recommendation 63

The 2018 IR Act is to include sections comparable to s 535(4) and s 536(3) of the FW Act prohibiting an employer from wilfully making, keeping or maintaining a false or misleading employment record or wilfully providing a false or misleading pay slip.

1007. This proposed recommendation was supported by all stakeholders who made submissions on the topic, being AMMA, CCIWA, DWER, the AMWU, the CFMEU, the CPSU/CSA, the HSUWA, UnionsWA, United Voice, the WASU, the ELC, the ECCWA and a confidential submission from an employee association.

1008. The Review will include a final recommendation in the terms of the proposed recommendation.

8.2.7 Proposed Recommendation 64

The 2018 IR Act is to include provisions comparable to s 112 and s 113 of the *Fair Trading Act 2010* (WA) to provide for the ability of industrial inspectors to share information acquired during an investigation within DMIRS or with other State Government agencies, or to obtain relevant information within DMIRS or from another State Government agency.

1009. The unions making submissions on the Term of Reference, as well as a confidential submission from an employee association, DWER and the ELC, all supported this proposed recommendation. The submission from the ELC also referred to the prospect of the sharing of information with Federal Government agencies, with reciprocal arrangements to obtain information.

1010. By contrast both AMMA and CCIWA did not support the proposed recommendation. AMMA said there was no demonstrated need for the provision. CCIWA expressed concern about the sharing of information obtained by industrial inspectors. It was submitted that further specific details would be required as to the inclusion of appropriate safeguards of the information that could be obtained and for what purpose that information would be shared and subsequently used. It was suggested, "information and data security is of particular and significant concern".

1011. As a consequence of receiving the submissions from AMMA and CCIWA the Review sought additional information from the PSD. The Executive Director of the PSD advised that, as regulator it strongly supported an ability for industrial inspectors to share information with other State and Federal government agencies (similar to s 718 of the FW Act). It was said that it is currently unclear under the IR Act whether information can be shared. An express ability to share information with and obtain information from other agencies would assist the PSD with:

(a) Joint investigations with the Fair Work Ombudsman and Border Force, typically involving vulnerable and exploited workers.

(b) Locating respondents who are seeking to avoid an investigation or enforcement proceedings for example – DMIRS is responsible for licensing/registration of various occupations, including electrical contractors, builders, painters, plumbers and real estate agents. While industrial inspectors are also part of DMIRS, they cannot necessarily obtain information from other areas of DMIRS – for example the current contact details for an employer who is licensed/registered with DMIRS.

(c) "Breaking the business model" of employers who intentionally avoid employment and other related obligations such as tax (an inspector could pass on relevant information to State Revenue or the ATO about an employer relating to unpaid superannuation, income tax or payroll tax).

(d) Obtaining information that may assist with an investigation, for example, from WorkCover or the Department of Training and Workforce Development (in relation to apprentices).

1012. It was also pointed out that any concerns about the misuse of information could be dealt with by a similar provision to s 112(2) of the *Fair Trading Act 2010* (WA).

1013. The Review is persuaded by this reasoning, the submissions made in support of the proposed recommendation and the analysis in the Interim Report, to make a recommendation in accordance with the proposed recommendation, with the addition that there also be permission to share information with Federal Government agencies, subject to any restrictions that may exist in applicable Commonwealth legislation.

8.2.8 Proposed Recommendation 65

Section 98 of the IR Act be amended so that there is no restriction on the powers of industrial inspectors only being exercised at an "industrial location". Instead, consistent with the FW Act, an industrial inspector may exercise their powers at either:

(a) The premises where work is or was being performed; or

(b) Business premises where the inspector reasonably believes there are relevant documents or records.

1014. This proposed recommendation was supported by AMMA, DWER, a confidential employee association submission, the AMWU, UnionsWA, the CFMEU, the HSUA, United Voice, the WASU and the ELC. The CPSU/CSA also supported the proposed recommendation and added it was an appropriate response "to the changing nature of work".

1015. A confidential employer association submitted concern that the suggested power "will allow industrial inspectors to enter the residential premises of small businesses (many of whom operate their accounts from home) and will infringe on the

occupant's right to privacy in their own home". A second confidential employer association submitted that "businesses should have the right to refuse requests from Industrial Inspectors on the grounds it may incriminate or lead to further proceedings." With respect, the Review considers this submission to be outside of the recommendation and on a topic that was not the subject of submissions by others and is not something that ought to be the subject of comment by the Review.

1016. CCIWA submitted the extension of powers was too broad, in particular with respect to the implications of proposed recommendation 42 for private residences and the application of the definition provided at proposed recommendation 63(i). CCIWA did not support any change to the current provisions of s 98 of the IR Act. It said that any proposed variation to the current provisions must specifically provide for "exclusion on the exercise of powers at any location, premises or part of premises that are used mainly for residential purposes".

1017. The latter issue is discussed in Chapter 5 of the Final Report, in the context of the proposed recommendation to amend the IR Act to remove the exclusion of domestic service workers from the coverage of the IR Act.

1018. Subject to that issue, the Review notes the support of the proposed recommendation from those cited above, as well as the points that favoured the proposed recommendation, as set out in the Interim Report. The Review therefore intends to make a recommendation in the terms of the proposed recommendation.

8.2.9 Proposed Recommendation 66

The present s 84A(5) of the IR Act be amended to empower the Judicial Bench to impose a maximum penalty for a breach of $12,000 or imprisonment for not more than 12 months or both.[282]

1019. This proposed recommendation was supported by DWER, the ELC, a confidential submission from an employee association, United Voice and UnionsWA. The UnionsWA submission was endorsed by the CFMEU, the HSUA and the WASU.

1020. There was also some opposition to this proposed recommendation.

[282] This is consistent with *Magistrates Court Act 2004* (WA) s 16(4).

1021. AMMA submitted the legislation should only prescribe fines as penalties not imprisonment.

1022. A confidential submission from a State government department also disagreed with a possible sanction of imprisonment; and submitted that a $12,000 fine was "inconsistent with a no costs jurisdiction".

1023. The Department of Health submitted that consideration should be given to reviewing the penalties available at s 84A(5) of the IR Act. It submitted it would be appropriate to increase the maximum penalty under the sub-section to $10,000, in the case of an employer, organisation or association, and up to $3,000 in any other case.

1024. Master Builders strongly opposed the proposed recommendation insofar as there was a reference to possible imprisonment. It was concerned that this would "set a precedent" and said there ought to be no penalties of imprisonment in the legislation. Master Builders was concerned it was a precedent "which converts a civil jurisdiction to arguably a quasi-criminal jurisdiction." It argued that once such a precedent is set it is a small step by Parliament to "extend the reach of jail terms under the legislation to include breaches set out under s 83A [sic] of the current IR Act 1979." Master Builders referred to the non-imposition of a "jail term" as a penalty under s 84A(5) of the IR Act as a "protection". It said: "Should the protection currently provided under s 84A(5) of the IR Act be lost exposing breaches of the Act and Awards to jail, the risk of a home owner potentially facing a jail term arises. That is an outcome no WA Government would want to see as an outcome and not in the public interest." Master Builders argued there was "no moral or ethical basis to call for a 12 month jail term".

1025. To assess the opposition to the proposed recommendation it is necessary to consider some background and context. Section 84A of the IR Act is as follows:

> 84A. Certain contraventions of Act, enforcement of before Full Bench
>
> (1) Subject to this section, if a person contravenes or fails to comply with —
>
> (a) any provision of this Act (other than section 42B(1), 44(3), 51S or 74) or an order or direction made or given under section 66 —
>
> (i) the Minister; or

(ii) the Registrar or a deputy registrar; or

(iii) an industrial inspector; or

(iv) any organisation, association or employer with a sufficient interest in the matter;

or

(b) section 44(3) or a direction, order or declaration given or made under section 32 or 44, the Registrar or a deputy registrar at the direction of the Commission,

may make application in the prescribed manner to the Full Bench for the enforcement of that provision, order, direction, declaration or section.

[(2) deleted]

(3) Subsection (1) does not apply to a contravention of or a failure to comply with —

(a) a civil penalty provision; or

(b) a provision of this Act if the contravention or failure constitutes an offence against this Act.

(4) In dealing with an application under subsection (1) the Full Bench —

(a) shall have regard to the seriousness of the contravention or failure to comply, any undertakings that may be given as to future conduct, and any mitigating circumstances; and

(b) before proceeding to a hearing of the application, shall invite the parties to the application to confer with it, unless in the opinion of the Full Bench such a conference would be unavailing, with a view to an amicable resolution of the matter to which the application relates.

(5) On the hearing of an application under subsection (1) the Full Bench may —

(a) if the contravention or failure to comply is proved —

(i) accept any undertaking given; or

(ii) by order, issue a caution or impose such penalty as it considers just but not exceeding $2 000 in the case of an employer, organisation, or association and $500 in any other case; or

(iii) direct the Registrar or a deputy registrar to issue a summons under section 73(1);

or

(b) by order, dismiss the application,

and subject to subsection (6), in any case with or without costs, but in no case shall any costs be given against the Minister, the Registrar, a deputy registrar, or an industrial inspector.

(6) In proceedings under this section costs shall not be given to any party to the proceedings for the services of any legal practitioner or agent of that party unless, in the opinion of the Full Bench, the proceedings have been frivolously or vexatiously instituted or defended, as the case requires, by the other party.

(7) Where the Full Bench, by an order made under this section, imposes a penalty

or costs it shall state in the order the name of the person liable to pay the penalty or costs and the name of the person to whom the penalty or costs are payable.

(8) The standard of proof to be applied by the Full Bench in proceedings under this section shall be the standard observed in civil proceedings.

1026. The Interim Report contained the following about s 84A of the IR Act:[283]

> Under s 84A of the IR Act, the Full Bench of the WAIRC is responsible for enforcing certain provisions of the IR Act and orders of the WAIRC. Section 84A was proposed to be repealed by the Green Bill,[284] on the basis that transferring the jurisdiction to the IMC could help to streamline the enforcement provisions of the IR Act.[285] The basis for such an assertion is uncertain. The Review is not aware of specific instances where there was a problem in enforcement of orders under s 84A that needed streamlining. Given that s 84A orders are made by the Full Bench headed by the President, there seems little reason why the orders of the WAIRC should be enforced by the IMC. The penalties under s 84A have, however, been noted as too low for some time by the Full Bench and should be increased.[286] They are much lower, as the cases discuss, than the penalties that may be imposed in other courts for breaches of their orders. That should be rectified. The Review is of the preliminary opinion that a maximum penalty comparable to that of the Magistrates Court of Western Australia would be appropriate. That penalty, under the *Magistrates Court Act 2004* (WA), is a fine of $12,000 or imprisonment for 12 months, or both.

1027. It can be seen that there were two aspects of s 84A of the IR Act that were discussed in the Interim Report. The first was whether there ought to be a transfer of the jurisdiction to the IMC as was included in the Green Bill on the basis that transferring the jurisdiction to the IMC could help to streamline the enforcement provisions of the IR Act. As set out in the Interim Report the Review was not convinced of the need for that to occur. No one has made submissions to the Review subsequent to the publication of the Interim Report which have argued against that position.

1028. One of the reasons given in the Interim Report about not transferring the jurisdiction to the IMC was that the President headed the Full Bench.

1029. In Chapter 2 of the Final Report of the Review it is recommended that the position of the President be abolished and the role and powers of the President in effect be

283 [1376].

284 Labour Relations Legislation Amendment and Repeal Bill 2012 s 220. The repeal of s 84A was also a recommendation of the Fielding Review, 275.

285 Draft Explanatory Memorandum for the Labour Relations Legislation Amendment and Repeal Bill 2012 [951].

286 *The Registrar of the Western Australian Industrial Relations Commission v The State School Teacher's Union of W.A. (Incorporated)* 88 WAIG 333; 2008 WAIRC 00270 [90]–[97]; *The Registrar of the Western Australian Industrial Relations Commission v Liquor, Hospitality and Miscellaneous Union, Western Australian Branch* 88 WAIG 1937; 2008 WAIRC 01393 [194]-[213], [218]-[220]; *The Registrar, Western Australian Industrial Relations Commission v Jones* 93 WAIG 1369; 2013 WAIRC 00368 [5].

subsumed into the role of Chief Commissioner. Given the suggested change to the qualifications of the Chief Commissioner and the Senior Commissioner, as outlined in Chapter 2, the Review remains of the view that the s 84A jurisdiction can be retained by the Full Bench.

1030. The second issue was the penalties that can be imposed under s 84A(5). As stated in the Interim Report, the preliminary opinion of the Review was that the maximum penalty ought to be the same as the penalty that could be imposed for contempt under the *Magistrates Court Act 2004* (WA).

1031. That penalty is contained in s 16 of the *Magistrates Court Act 2004* in respect of "contempt of court" as defined in s 15 of that Act.

1032. It is appropriate to quote both of these sections as follows:

> 15. Contempts of Court
>
> (1) A person is guilty of a contempt of the Court if the person —
>
> (a) while the Court is sitting, wilfully —
>
> (i) interrupts the proceedings;
>
> (ii) misbehaves before the Court;
>
> (iii) insults a person constituting the Court;
>
> (b) wilfully insults or obstructs —
>
> (i) a person going to a courtroom for the purpose of constituting the Court;
>
> (ii) a person leaving a courtroom having constituted the Court;
>
> (c) when required by the Court to take an oath or affirmation, does not do so;
>
> (d) when required by the Court to give evidence that the person is competent and compellable to give, does not do so;
>
> (e) does not, in the face of the Court, comply with a lawful direction of the Court.
>
> (2) A person who —
>
> (a) having been served with a summons to attend as a witness, without reasonable excuse, does not attend as required by the summons; or
>
> (b) having been required by the Court to produce a record or thing to the Court, without reasonable excuse, does not do so,
>
> is guilty of a contempt of court unless the omission is an offence.
>
> (3) A person is guilty of a contempt of the Court if —
>
> (a) the Court makes a lawful order ordering a person to do an act (other than to pay money) or to cease (temporarily or permanently) doing an act; and
>
> (b) the person, without reasonable excuse, does not comply with the order; and

(c) another written law does not provide a means for punishing non-compliance with or enforcing the order.

(4) This section applies in relation to an act or omission by a person outside the State as if it were an act or omission by the person in the State.

[Section 15 amended by No. 7 of 2008 s. 156.]

16. Contempts of Court, powers to deal with

(1) In this section —

contempt means a contempt of the Court, whether under section 15 or under another written law.

(2) If a person commits a contempt then —

(a) if it is committed in the face of the Court, the presiding Court officer may —

(i) orally or by issuing a warrant, order the person to be arrested and brought before the Court to be dealt with for the contempt; or

(ii) issue a summons that requires the person to appear before the Court to be dealt with for the contempt;

(b) in any other case, a magistrate may —

(i) issue a warrant to have the person brought before the Court to be dealt with for the contempt; or

(ii) issue a summons that requires the person to appear before the Court to be dealt with for the contempt.

(3) Without limiting section 40, rules of court may provide for the procedure for dealing with a person who is allegedly guilty of contempt and may provide for the person to be dealt with without a formal charge and in a summary way.

(4) A person guilty of a contempt is liable to a fine of not more than $12 000 or imprisonment for not more than 12 months or both.

(5) If the Court fines a person for contempt it may order that if the person does not pay the fine immediately, the person is to be imprisoned —

(a) until the fine is paid; or

(b) for not more than 12 months,

whichever is the shorter period.

(6) If a person who has been punished for contempt apologises to the Court for the contempt, the Court may amend or cancel the order imposing the punishment and, if it does, may order the refund of some or all of a fine that has been paid.

(7) The punishment of a person for contempt due to failing to obey an obligation does not relieve the person from the obligation.

1033. The focus of the Review was on the contempt committed under s 15(3) of the *Magistrates Court Act* of, in substance, not complying with an order of the Court, without reasonable excuse. That type of contempt has some similarities to some of the contraventions captured by s 84A of the IR Act; being a failure to comply with an

order or direction given under s 66, s 32 or s 44 of the IR Act. That was what the Review had in mind in suggesting the proposed recommendation.

1034. As stated in the Interim Report, the Full Bench has noted that the penalties under s 84A of the IR Act have been too low for some time. In the footnote to that observation, there was the citation of three decisions of the Full Bench. In the first of these decisions *The Registrar of the Western Australian Industrial Relations Commission v The State School Teacher's Union of WA (Incorporated)* the following was said in the reasons of Ritter AP at [91]-[97]:

> 91 The penalty has not been amended since s84A was first inserted into the Act in 1984. Clearly the real value of and punishment and possible deterrent effect constituted by the imposition of a financial penalty of $2000 to an organisation or association in 1984 was much greater than now. Since 1984 there have been many amendments to the Act by state governments of both political persuasions, but the financial penalty contained in s84A has been untouched. I am not aware of any governmental policy that a breach of an order of the Commission is less serious now than in 1984. It may therefore be that there has simply been an oversight in not increasing the penalty.
>
> 92 I earlier referred to the contrasting regimes for contempt that exist in the Magistrates Court and the SAT. Sections 15 and 16 of the *Magistrates Court Act 2004* (WA) have the effect that a contempt, constituted by a failure to comply with an order of the court without reasonable excuse, may be penalised by a fine of not more than $12000 or imprisonment for not more than 12 months or both. Section 100 of the *State Administrative Tribunal Act 2004* (WA) provides that the President of the SAT, if satisfied that an act or omission of a person would constitute a contempt of the Supreme Court if a proceeding of the SAT were a proceeding in the Court, may report that act or omission to the Supreme Court and the Court has jurisdiction to deal with the matter as if it were a contempt of the Court. As set out earlier the powers of the Supreme Court to deal with contempt are broad and large fines may be imposed. A contempt of the Federal Court constituted by breaches of orders in an industrial context have at times attracted heavy penalties, for example $50 000 in BHP Steel and $20 000 against officials of a union, in *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union (2000)* 97 IR 474. As I have said, it is not clear on the face of the Act why the maximum financial penalty which can be imposed by the Full Bench is at the low amount that it is, or why there has been no amendment since 1984. As I have intimated it is a matter which may well benefit from legislative attention.
>
> 93 I then said that if the maximum financial penalty that can be imposed is low, it undermines at least part of the purpose of imposing a fine in proceedings which involve the contravention of a court order.
>
> 94 In Registrar of the *Court of Appeal v Maniam [NO 2]* (1992) 26 NSWLR 309 Kirby P (with whom Hope A-JA agreed) in a paragraph at page 314 emphasized that the purposes of "punishment" of someone that had committed a contempt were "deterring the contemnor and others in the future from committing like contempts; and denouncing the conduct concerned in an approximately emphatic way". This

paragraph has been quoted with approval in other Australian state jurisdictions including by Malcolm CJ in *Kennedy v Lovell* at [7]. It is also consistent with the paragraphs I earlier quoted from *BHP Steel* and *Pelechowski*. Additionally as the nomenclature suggests the imposition of a financial penalty is for the purpose of penalising the transgressor, when it is not appropriate to accept an undertaking, issue a caution or make a s73 direction. As stated in the context of the criminal law, the purpose of a fine is ordinarily to "punish the offender" and should contain a "sting" (*Perez v The Queen* (1999) 21 WAR 470 at 482 per Owen Jin part quoting *Sgroi v The Queen* (1989) 40 A Crim R 197 per Malcolm CJ at 200-201; Wallwork J agreeing).

95 Given that the maximum financial penalty which can be imposed under s84A(5)(a) is $2000, this will not in all cases be sufficient to penalize or "sting" an organisation or association, act as a deterrent or in my opinion adequately denounce a failure to comply or a contravention.

96 I acknowledge that there are differences between the position of registered organisations and associations under the Act and litigants in the other courts mentioned above and the SAT. In those courts and for the SAT the ultimate sanction for contempt is imprisonment. An organisation or association cannot be imprisoned and for them the sanction of deregistration or suspension is severe. But where a s73 direction is not appropriate, s84A(5)(a) of the Act contains a maximum financial penalty of $2000. This is much less than can be imposed for a breach of an order of the Magistrates Court (which when constituted as the Industrial Magistrates Court is subject to appeals to the Full Bench), the SAT and the Supreme Court. There has been no submission put to the Full Bench which would explain why this is so and the reason is not apparent to me. One could ask rhetorically: "why is a breach of an order of a Commissioner less significant than that of the SAT or Magistrates Court", or "why are parties, including organisations and associations, appearing before Commissioners in a more protected position than litigants in other courts and tribunals?". This was not addressed in these proceedings and so I do not think any more can be said about it on this occasion.

97 The Full Bench must of course dispose of the application within the penalties provided for in the Act. I do think however that the Full Bench is justified in categorising the maximum financial penalty as low given the legislative and judicial comparisons I have referred to, the purposes of a financial penalty for the contravention of a court order and the economic capacity of some organisations or associations. Accordingly I do not think the Full Bench should necessarily reserve a financial penalty of $2000 or something close to it for only the worst type of case not warranting a s73 direction. A financial penalty of close to or at the maximum can be achieved by decreasing the differentiation in penalty that results from one type of case being less serious than another and giving less of a "discount" for mitigation. That is there will be a truncation of the impact, in dollar terms, of these two factors.

1035. Senior Commissioner Smith at [168] and [169] of her reasons agreed with the Acting President that the purpose of an application under s 84A of the IR Act was similar to applications for contempt of court. The Senior Commissioner stated the purpose of s 84A proceedings is to protect the efficient administration of the WAIRC by enforcing its orders. The Senior Commissioner said the Full Bench does so by the

imposition of a penalty on a party to an order who breaches the terms of that order. The Senior Commissioner said the intention is to compel obedience of orders made by the WAIRC.

1036. In the second of the three cases cited in the Interim Report, the reasons of Ritter AP involved some restating of what had been said in the *State School Teacher's Union* case. Smith SC and Wood C expressly agreed with these reasons. Relevantly, the reasons were as follows:

> 204 An argument of the respondent that I do accept is that it is the statutory scheme under *the Act* which needs to be the reference point in assessing the penalty. It is unnecessary and possibly productive of error to look at whether the maximum penalty of $2000 is low compared to other courts and tribunals which exercise a different jurisdiction.
>
> 205 This is reinforced by an understanding that *the Act* is about the industrial relations system of Western Australia. An important part of that system is the rights and responsibilities of a registered organisation and the role of the Commission in their registration, control and sanction. As I will set out, in addition, *the Act* pays specific attention to the differing ways in which and consequences of a person or entity contravening an order of the bodies and/or offices established under it, or otherwise committing contempt. The jurisdiction of the Full Bench and the penalty provided for in s84A needs to be considered within these contexts. The contents of s84A(3), limiting the jurisdiction of the Full Bench to particular types of contraventions, reaffirms this point.
>
> 206 In the respondent's outline of submissions the different jurisdiction of the Industrial Magistrate's Court and that of the Commission is described. For example if a person contravenes a "civil penalty provision" as described in *the Act*, the Industrial Magistrate's Court and not the Full Bench have jurisdiction to deal with it (s82, s83E and s84A(3)). The Industrial Magistrate's Court may, amongst other things, make an order imposing a penalty, not exceeding $5000 in the case of an employer, organisation or association, and $1000 in any other case. (See s83E(1) and for example s49F, s49O, s70(3), s97XY and s102(3)). If an order is made to prevent further contravention of a civil penalty provision and that is not complied with, a penalty of $5000 and a daily penalty of $500 may be imposed.
>
> 207 The Industrial Magistrate's Court also has jurisdiction to enforce contraventions of industrial instruments (s83) and unfair dismissal orders made by the Commission (s83B). In each case *the Act* provides that if certain orders of the Court are not complied with a penalty of $5000 and a daily penalty of $500 may be imposed (s83(8) and s83B(10)).
>
> 208 Under s83D of *the Act* the Industrial Magistrate's Court has "jurisdiction to hear and determine, under the *Criminal Procedure Act 2004*, prosecutions for any contravention or failure to comply with this Act that constitutes an offence"; see for example s78, s96C-E and s112A(2). Again s82 and s84A(3) makes it clear the Full Bench does not have that jurisdiction. Relevantly s78 of the Act provides that a person who is or has been a finance official of an organisation who fails to comply with an order under s77(2)(e) by an Industrial Magistrate's Court to do or cease

doing something, commits an offence and is liable to a penalty of $5000 and a daily penalty of $500.

209 A contravention of two types of orders made by an Industrial Magistrate's Court may be enforced by the Supreme Court and the Industrial Appeal Court as for a contempt. Firstly there is s80(3) which deals with a person who performs or attempts to perform the functions of an officer of an organisation when they have been disqualified from holding office under s80(1). This is "an offence punishable by the Supreme Court as for a contempt". Secondly under s96J(4) the failure of a person to comply with an order made by an Industrial Magistrate under s96J(1), to do or cease doing something to prevent any further breach of s96C (discrimination because of membership of an organisation), s96D (refusal to employ and discriminatory and injurious acts against people performing work for employers because of membership or non-membership of an organisation) or s96E (discrimination because of non-membership of an organisation) "is to be taken to commit a contempt of the Industrial Appeal Court and is punishable by that Court under section 92".

210 Section 92(1) of *the Act* provides that the Industrial Appeal Court "has the same power to punish contempts of its power and authority as has the Supreme Court in respect of contempts of Court...". The sub-section goes on to say that "without prejudicing the generality of the power" the Industrial Appeal Court "may inflict a fine". The breadth of the scope of this power was described in Re SSTU at [72]. Section 92(3) expressly provides that that where a person contravenes an order made by the Industrial Appeal Court in the exercise of authority conferred by *the Act* a contempt of court is committed. Section 92(4) provides that:

> "(4) The President, in the exercise of the jurisdiction conferred on him by this Act and when presiding on the Full Bench or sitting or acting alone, has and may exercise like powers as are conferred on the Court by this section."

211 As stated therefore the legislature has had regard to the differing roles and status of the bodies and offices which may make orders under the Act and quite deliberately set up different regimes and sanctions for breaches of orders or contempt. This is an important part of the context of the maximum financial penalty under s84A of the Act. It should also not be forgotten that in a s84A application against an organisation the ultimate sanction the Full Bench has in its armoury is to make a s73 direction leading to the possible suspension or cancellation of registration.

212 I accept therefore the thrust of the respondent's submissions about the unanswered questions I posed at [96] of my reasons in Re SSTU; which is that they should be answered, "because in the context of *the Act* as a whole the legislature says so".

213 To me the problem however, as described in *Re SSTU* at [90], is the "chasm" between the sanction of a s73 direction and the maximum financial penalty. As mentioned below however, it is up to the legislature to decide if this is a problem and if so how to bridge the gap.

1037. In the third decision cited, *Registrar, Western Australian Industrial Commission v Jones,* the Full Bench summarised the position at [4] and [5]:

> 4 The purpose of s 84A of the *Industrial Relations Act 1979* (WA) (the Act) is not just to enforce an order made by the Commission in the sense of trying to coerce or ensure compliance with particular orders of the Commission or sections of the Act. The

focus of s 84A is also to reinforce the requirement for parties to comply with the Act and the orders of the Commission and to allow the Commission to publicly admonish and impose sanctions against transgressors. Consequently, the purpose of s 84A is similar to an application for contempt of court: *The Registrar of the Western Australian Industrial Relations Commission v The State School Teacher's Union of WA (Inc) (SSTU)* [2008] WAIRC 00270; (2008) 88 WAIG 333 [70] - [71] (Ritter AP), [168] (Smith SC).

5 The maximum fine that can be imposed on an employer for a breach of an order of the Commission is $2,000. This amount is low in an absolutist and comparative way. This maximum amount has stood unamended by any increase since s 84A was inserted in the Act in 1984: SSTU [90] - [91] (Ritter AP).

1038. Accordingly, the proposed recommendation of the Interim Report reflected concerns expressed by the Full Bench of the WAIRC for more than 10 years. Additionally, that concern was about a maximum penalty that has not been increased for 34 years.

1039. As set out in those decisions of the Full Bench, the penalty for effectively breaching an order made by the WAIRC is low in an absolutist and comparative sense. That was part of the purpose of the proposed recommendation to increase the penalties to be imposed.

1040. It is relevant that the applications before the Full Bench in the first two decisions quoted from involved failures by unions to comply with orders of the WAIRC, and UnionsWA has supported the proposed recommendation.

1041. In assessing the opposition to the proposed recommendation it should be noted that s 84A does not apply to a contravention or failure to comply with a civil penalty provision or an offence. In addition, s 84A(5) presently provides for alternative penalties of accepting an undertaking or issuing a caution or directing the Registrar to issue a summons under s 73(1) of the IR Act with the possible cancelling or suspending of registration of an organisation. The Review considers that those alternative penalties ought to continue.

1042. In reconsidering the proposed recommendation, the Review notes there are differences between s 84A of the IR Act and the type of contempt covered by s 15 and s 16 of the *Magistrates Court Act*. For example, under s 84A(8) the standard of proof is the standard observed in civil proceedings. Proceedings under the *Magistrates Court Act* for contempt are criminal proceedings and the criminal

standard of proof is to be applied. Additionally, there is the industrial relations context in the IR Act referred to in the reasoning quoted above from the *Liquor, Hospitality and Miscellaneous Union* decision.

1043. For these reasons and having regard to the submissions against the proposed recommendation referred to earlier, the Review is of the opinion that it would be appropriate to recommend to the Minister that the maximum penalty that could be imposed under s 84A(5) would be one of $10,000 in the case of an employer, organisation and association and $2,000 in any other case, but not to recommend any possible prison term as a penalty upon the establishment of any contravention, or failure to comply, under s 84A(5) of the IR Act.

8.2.10 Proposed Recommendation 67

The right of entry provisions in the 2018 IR Act be amended to:

(a) Include a requirement that a person must be a fit and proper person to obtain, hold or maintain a right of entry permit.

(b) Provide that an application may be made to the WAIRC by the Registrar or an industrial inspector for the suspension or revocation of a right of entry permit on the basis that the holder is no longer a fit and proper person to hold the permit; and

(c) In any application made under (b), or in considering an application for a right of entry permit, the WAIRC must take into account, as a relevant consideration, any suspensions, revocations or other sanctions imposed on the holder by or under the FW Act with respect to any corresponding rights of entry.

1044. This proposed recommendation and the others affecting rights of entry, not unsurprisingly, generated a significant set of comments at stakeholder meetings and in written submissions.

1045. Proposed recommendation 67 was supported by CCIWA, DWER, the HIA, a confidential submission from an employee association and the ECCWA.

1046. AMMA submitted its primary position was that issues relating to rights of entry should be governed by the provisions set out in Chapter 3, Part 3-4 of the FW Act. AMMA submitted it would be efficient and practical to have State industrial relations legislation adopt the federal right of entry provisions. This would, AMMA contended:

(a) Provide one uniform set of right of entry provisions across both Federal and State jurisdictions.

(b) Eliminate the need for the WA IR system to maintain and administer a system for the issuance of right of entry permits.

(c) Ensure that there was no confusion as to the primacy of the Federal right of entry provisions.

1047. Alternatively, AMMA submitted that if the Review is minded to recommend a State based right of entry regime be maintained, then such a regime should encompass the checks and balances found in the Federal right of entry regime. AMMA submitted that this would mean that permit holders must:

(a) Give notice to exercise a right of entry.

(b) Produce their permit if requested prior to exercising right of entry.

(c) Comply with OSH requirements that apply at the premises.

(d) Not intentionally hinder or obstruct any person whilst carrying out a right of entry.

(e) Not misrepresent their authority whilst carrying out their right of entry.

(f) Not delay or obstruct the entry of other persons onto premises whilst carrying out a right of entry.

1048. CCIWA supported the proposed recommendation.

1049. CCIWA also submitted that the right of entry to be exercised for the investigation of a suspected breach of an OSH matter should be separated from employment matters under the IR Act, the MCE Act and the LSL Act, as OSH is not an "industrial relations matter". CCIWA also submitted that right of entry for OSH matters should then be aligned with the FW Act requiring 24 hours' notice to be provided.

1050. Master Builders submitted that although it supported the proposed recommendation, it did not go far enough. Master Builders also submitted a recommendation should be made that those who hold right of entry permits be employees of the State union on whose behalf they are exercising the right of entry. Master Builders referred to the issue in the context of permit holders possibly having a right of entry into private homes – so that it was a reasonable position that the person exercising the right of entry is a union employee.

1051. Master Builders submitted:

(a) Right of entry permits be issued similarly to the FW Act.

(b) Right of entry to private homes be restricted to appointed inspectors under the IR Act and WA safety laws.

(c) Union officials exercising a right of entry should only be authorised to request documents "directly related" to an alleged breach.

(d) Right of entry in connection with safety investigations by union officials should be dealt with only under the proposed 2019 Work Health and Safety laws.

(e) Applications to revoke a right of entry permit should be allowed to be made by a registered organisation of employers or employees; so that this power did not reside solely with the Registrar or an industrial inspector.

1052. The proposed recommendation was opposed by all of the unions who made submissions about it. In a stakeholder meeting with UnionsWA and affiliates it was said that the Interim Report did not contain sufficient evidence to support a change to the right of entry provisions so as to include a fit and proper person test.

1053. The written submissions amplified this and other themes.

1054. UnionsWA submitted the proposed recommendation is not warranted. It said there is no evidence of any problems with the current right of entry provisions in the State system that requires such a recommendation from the Review.

1055. This submission was supported by the WASU and the HSUWA; and the CPSU/CSA and United Voice made a similar submission.

1056. The opposition to the proposed recommendation by the CFMEU was the most strident and detailed. The CFMEU submitted that s 49J(2) and s 49J(5) of the IR Act provide the WAIRC, on application by any person, the ability to stop the misuse of authorities issued under the IR Act.

1057. These subsections provide:

> 49J(2) The Registrar must not issue an authority for the purposes of this Division to a person who has held an authority under this Division that has been revoked under subsection (5) unless the Commission in Court Session on application by any person has ordered that the authority be so issued…
>
> 49J(5) The Commission constituted by a commissioner may, by order, on application by any person, revoke, or suspend for a period determined by the Commission, the authority if satisfied that the person to whom it was issued has —
>
> (a) acted in an improper manner in the exercise of any power conferred on the person by this Division; or
>
> (b) intentionally and unduly hindered an employer or employees during their working time.

1058. The CFMEU submitted that the Interim Report's "findings" at [1409]-[1411] led to a conclusion that the current mechanisms under s 49J work effectively and are not in need of review.

1059. To consider this argument and for ease of reference paragraphs [1409]-[1412] of the Interim Report are reproduced:

> 1408. The Secretariat is only aware of one instance of an authorised representative having their authority revoked under the IR Act – that of Mr Joe McDonald of the CFMEU in 2006.[287] Senior Commissioner Gregor revoked Mr McDonald's authority in that case, having found that he acted improperly by:
>
> (a) Using abusive/indecent language towards senior managers of the employer in question (BGC).
>
> (b) Urging another CFMEU representative to "thump" BGC employees.
>
> (c) Charging with considerable violence and force into a group of men standing outside a doorway (Mr McDonald was convicted of a criminal assault in relation to this incident).
>
> 1409. Senior Commissioner Gregor also took into account Mr McDonald's record, which showed that he was a "recidivist" in the identified type of improper behavior.

[287] *Lee v McDonald* (2006) 86 WAIG 1094; 2006 WAIRC 04220.

1410. In 2011, the Secretary of the CFMEU sought an order from the Commission in Court Session under s 49J(2) of the IR Act that Mr McDonald be issued with another authority.[288] The Commission in Court Session declined to issue the authority on the basis that Mr McDonald had "continued to behave improperly" in the 5½ years that had passed since his authority was revoked, and that it was likely he would again act in an improper manner or intentionally and unduly hinder an employer or employee during their working time.

1411. There have been other limited instances of authorised representatives having their right of entry authority suspended.[289]

1412. The Review, at this preliminary stage, believes that these cases demonstrate the limited circumstances in which rights of entry can be revoked or suspended, supporting the preliminary view that there ought to be a "fit and proper person test" as previously mentioned.

1060. There is one part of the reasoning in [1412] the Review should correct. The cases do not necessarily demonstrate the limited circumstances in which rights of entry "can be revoked or suspended"; they only demonstrate the limited circumstances in which they have been revoked or suspended. Understood that way, the submission made by the CFMEU has some weight.

1061. The CFMEU also contended that the interaction between the FW Act and IR Act makes it necessary for CFMEU officials to hold both an authority under the IR Act and an entry permit under the FW Act (for OSH matters).

1062. The CFMEU submitted, therefore that introducing a "fit and proper person" test has no utility as officials will, in any event, have to hold both an authority under the IR Act and an entry permit under the FW Act. The argument was as follows.

1063. The FW Act permits CFMEU officials to enter premises to:

(a) Investigate suspected contraventions of the FW Act or a term of a fair work instrument under s 481 of the FW Act; and

(b) Hold discussions with members or people eligible to be members under s 484 of the FW Act.

288 *Re: Application for Authority to be Issued to Mr Joseph McDonald* (2011) 91 WAIG 2345; 2011 WAIRC 01045.

289 *Building Industry and Special Projects Inspectorate v McDonald and Buchan* (2004) 84 WAIG 2587; 2004 WAIRC 12071; *Building Industry and Special Projects Inspectorate v Powell* (2006) 86 WAIG 1017; 2006 WAIRC 04212.

1064. However, under s 494(1) of the FW Act CFMEU officials cannot exercise a "State or Territory OHS right" unless they hold an entry permit under the FW Act.

1065. The CFMEU submitted that, relevantly:

(a) Section 494(2) of the FW Act defines "*State or Territory OHS right*" as a right if that right is conferred by a "*State or Territory OHS law*" in relation to certain premises or employers;

(b) Section 494(3) of the FW Act provides that a "*State or Territory OHS law*" is a law of a State or Territory prescribed by the regulations; and

(c) Regulation 3.25, item 4 of the *Fair Work Regulations 2009* (Cth) prescribes:

> Sections 49G and 49I to 49O of the [IR Act] of Western Australia, but only to the extent to which those provisions provide for, or relate to, a right of entry to investigate a suspected contravention of:
>
> (a) the *Occupational Health and Safety Act 1984* of Western Australia; or
>
> (b) the *Mines Safety and Inspection Act 1994* of Western Australia.

1066. The CFMEU submitted this interaction between the FW Act and IR Act thus made it necessary for its officials to hold both an authority under the IR Act and an entry permit under the FW Act. The CFMEU submitted that introducing a "fit and proper person" test therefore has no utility as officials will have to have been "passed" as "fit and proper" to obtain a right of entry permit under the FW Act. The CFMEU argued that where an official has met the permit qualification matters set out in the FW Act, replication in the IR Act is unnecessary.

1067. The CFMEU also referred to s 513 of the FW Act that outlines "permit qualification matters" that the FWC must take into account before issuing an entry permit. It provides:

> 513(1) In deciding whether the official is a fit and proper person, the FWC must take into account the following ***permit qualification matters***:
>
> (a) whether the official has received appropriate training about the rights and responsibilities of a permit holder;
>
> (b) whether the official has ever been convicted of an offence against an industrial law;
>
> (c) whether the official has ever been convicted of an offence against a law of

the Commonwealth, a State, a Territory or a foreign country, involving:

(i) entry onto premises; or

(ii) fraud or dishonesty; or

(iii) intentional use of violence against another person or intentional damage or destruction of property;

(d) whether the official, or any other person, has ever been ordered to pay a penalty under this Act or any other industrial law in relation to action taken by the official;

(e) whether a permit issued to the official under this Part, or under a similar law of the Commonwealth (no matter when in force), has been revoked or suspended or made subject to conditions;

(f) whether a court, or other person or body, under a State or Territory industrial law or a State or Territory OHS law, has:

(i) cancelled, suspended or imposed conditions on a right of entry for industrial or occupational health and safety purposes that the official had under that law; or

(ii) disqualified the official from exercising, or applying for, a right of entry for industrial or occupational health and safety purposes under that law;

(g) any other matters that the FWC considers relevant.

513(2) Despite paragraph 85ZZH(c) of the *Crimes Act 1914*, Division 3 of Part VIIC of that Act applies in relation to the disclosure of information to or by, or the taking into account of information by, the FWC for the purpose of making a decision under this Part.

Note: Division 3 of Part VIIC of the *Crimes Act 1914* includes provisions that, in certain circumstances, relieve persons from the requirement to disclose spent convictions and require persons aware of such convictions to disregard them.

1068. The CFMEU submitted the "permit qualification matters detrimentally impede on the democratic right of working people to elect officials to represent in their workplaces." An alternative position that the Review assumes at least some stakeholders would have, is that these matters place a check or balance on who may exercise the important and significant right of entry powers under the FW Act.

1069. The CFMEU also submitted that contradictors could intervene in applications made by a registered organisation to have an entry permit issued under s 512 of the FW Act.

1070. The CFMEU informed the Review that the Commissioner of the Australian Building and Construction Commission (ABCC Commissioner) frequently intervenes or makes submissions in applications made under s 512 of the FW Act. It was contended that

having the ABCC Commissioner as a contradictor delays the determination of matters and significantly increases the costs associated with the same.

1071. The effect of the submission of the CFMEU was that any replication of these types of hurdles to obtaining a right of entry permit under the IR Act was unnecessary and inappropriate. It was submitted the introduction of a "fit and proper person" test in the IR Act will give contradictors a second opportunity to act as contradictors. Such an outcome was, so the argument went, oppressive to registered organisations.

1072. The CFMEU also submitted that a fit and proper person test would be contrary to the public interest. This was because there are currently over 400 authorised representatives who have been issued authorities under the IR Act. It was submitted that the introduction of a "fit and proper person" test would necessitate the WAIRC having to determine over 400 authorised representatives. It was contended that such an exercise is contrary to the public interest given the impact it would have on the resources of the WAIRC and the CFMEU.

1073. With respect to these last two points, the Review notes that they are contingent on any "fit and proper person" test applying to people who are already authorised to enter work premises under the IR Act, as opposed to applying from the time that an amendment to introduce a fit and proper person test came into operation. The Review also notes that the issue of who may be a contradictor is a separate albeit related issue to whether a fit and proper person test ought to apply.

1074. As to the interaction between right of entry permits under the FW Act and the IR Act, the Review accepts the submission of the CFMEU up to a point. To the extent that an authorised representative under the IR Act is seeking to investigate a suspected breach of the OSH Act under s 49I(1), and the right of entry is in relation to an occupier of premises or employer that is a constitutional corporation, then Division 3 of Part 3-4 of the FW Act will apply. Among other things, this means that the authorised representative must also be a permit holder under the FW Act to exercise the right of entry under s 49I(1) of the IR Act.

1075. However, the submission of the CFMEU does not deal with situations in the State IR system where:

(a) An authorised representative of the CFMEU (or any other union) seeks to investigate a suspected breach of the OSH Act under s 49I(1) and the employer/occupier is not a constitutional corporation. In that instance there will be no requirement for the authorised representative to also hold an entry permit under the FW Act.

(b) An authorised representative seeks to investigate a suspected breach of the LSL Act, MCE Act, or an award, order, industrial agreement or employer-employee agreement that applies to any such employee, or to hold discussions with employees under s 49H of the IR Act.

1076. In these instances the FW Act has no application and so there is no requirement for the authorised representative to hold an entry permit under the FW Act.

1077. Accordingly, there will only be a requirement for an authorised representative under the IR Act to hold an entry permit under the FW Act, including being assessed as a fit and proper person, if the right of entry under the IR Act relates to a suspected breach of the OSH Act or the *Mines Safety and Inspection Act 1994* (WA) and the occupier/employer is a constitutional corporation. It cannot therefore be assumed that all union officials/employees who hold an authority under the IR Act also hold an entry permit under the FW Act. For example, some unions may only be registered in the State system and do not operate in the national system. An example may well be employee organisations operating in the public sector in Western Australia.

1078. Master Builders responded to some of the submissions made by the CFMEU. It contended that the effect of the CFMEU's submission was that "its union officials are not to be held accountable to the same standards of behaviour as they are required to meet under the FW Act when it comes to holding the privilege of a State right of entry authorisation", and such "a position is not sustainable in the 21st century industrial relations framework and has no merit". Master Builders submitted "there needs to be checks and balances in allowing union officials to operate with a right of

entry permit." The Review does not understand the CFMEU submission to be that there should not be checks and balances, but that such checks and balances already exist, having regard to s 49J(2) and s 49J(5) of the IR Act.

1079. The Master Builder's submission was supported by an example of a CFMEU official. According to Master Builders, from a list downloaded from the WAIRC website on 10 May 2018 the official is a registered "right of entry card holder" in Western Australia. Additionally, however, according to Master Builders the official has also had his Federal right of entry permit indefinitely revoked by an order of a Deputy President of the FWC, in November 2017. The decision of the Deputy President was attached to the submission.[290] The decision was, in fact, one to dismiss the application of the CFMEU for an entry permit, on the basis that the official was not a fit and proper person to hold an entry permit. The Deputy President said of the official: "His most serious contraventions involve him using obscene and offensive language".[291] The Deputy President concluded: "I am not satisfied that [the official] is a fit and proper person to hold an entry permit or that there are conditions which might be imposed which would lead me to a different conclusion."[292] This followed the Deputy President's consideration of the nature and extent of the contraventions of the FW Act by the official, "suggestive of a lack of genuine contrition and a propensity to continue to engage in unlawful conduct."[293]

1080. At least on its face this is a concerning example of an official who has been found not to be a fit and proper person for the purpose of holding a right of entry permit under the FW Act, but who can exercise rights of entry under the IR Act in the situations described earlier in which he does not need to hold a FW Act right of entry permit. It is possible, albeit not clear, that something could be done about this, if thought necessary or appropriate, by Master Builders, the regulator, or "any [other] person" under s 49J(5) of the IR Act. There are however limits on the circumstances in which the powers under s 49J(5) may be exercised. In the case under consideration for

290 *Construction, Forestry, Mining and Energy Union-Construction and General Division, WA Divisional Branch* (RE2017/657) [2017] FWC 5824, Binet DP.
291 [47].
292 [49].
293 [41].

example it is not clear that the official's actions could be characterised as either acting improperly in the exercise of powers conferred by the IR Act, as opposed to the FW Act; or that his actions "intentionally and unduly hindered an employer or employees during their working time". Whilst it is beyond the scope of the Review to thoroughly consider this issue, it may well be that this limb of s 49J(5) means the intentional and undue hindering of an employer or employee(s) needs to be within the IR Act jurisdictional limits and in the exercise of the authorised person's powers under the IR Act.

1081. Given the limited circumstances in which the powers to revoke or suspend a right of entry authorisation may apply, it may well be that there are, at least, gaps in those circumstances that might be reviewed or amended.

1082. Master Builders also submitted the CFMEU was overstating the difficulties of registration under the federal system.

1083. The WAPOU was also opposed to any introduction of a fit and proper person test. It submitted there was "no compelling evidence collected since the introduction of the 1979 IR Act that would warrant such an amendment" and it would be "an unsubstantiated hurdle to union activity".

1084. The UFU made similar points that:

(a) The proposed changes to right of entry are not needed, with mechanisms already existing to address undesirable behaviour by officials under current s 49J(5).

(b) The onus would shift to the proposed right of entry cardholder to prove they are a "fit and proper" person in the absence of contradictory evidence, as in the federal jurisdiction, and that has proved administratively burdensome.

(c) Such a recommendation is also a limit on "freedom of association" and the ability of unions to "organise and access workplaces".

1085. The AMWU opposed the proposed recommendation and made what was, in the respectful opinion of the Review, a quite considered submission. The AMWU questioned how the recommendation fitted into "the framework of the term of reference: it will not ensure that employees are paid their correct entitlements; it will not enhance deterrence to non-compliance with State industrial laws and instruments; and it does not relate to updating industrial inspectors' powers and tools of enforcement."

1086. The AMWU said the Interim Report canvassed what appeared to be the one case of a right of entry revocation in the State system, and two cases of a right of entry being suspended under s 49J(5) of the IR Act. The submission cited the paragraphs quoted above that contain reference to these cases.

1087. The AMWU then said that despite "the recognition that there is already a provision in the Act that addresses undesirable behaviour from authorised representatives, and identifying evidence that the provision works" the Interim Report reached what it submitted was a curious conclusion at paragraph [1412], that cases demonstrate the limited circumstances in which rights of entry can be revoked or suspended, supporting the preliminary view that there ought to be a "fit and proper person test" as previously mentioned. That point has been noted, as set out above.

1088. The AMWU then submitted:

> The AMWU submits that s 49J(5) already covers the behaviour of right of entry permit holders, and that there are no identified deficiencies in its scope that would be rectified by the introduction of a fit and proper person test.
>
> There would be some who would ask why the Union opposes the introduction of such a test, if it is to the same effect as s 49J(5). The difference between s 49J(5) and a fit and a proper person test is the point in the process where the onus is loaded. Under s 49J the WAIRC must issue a right of entry authority on request of a union secretary. This is balanced by s 49J(5), which permits any person to make an application that the right of entry authority should be revoked or suspended, and s 49J(2), which prohibits the issuing of an authority if the individual has previously fallen foul of s 49J(5).
>
> This is different to a fit and proper person test to obtain the authority, which has to be discharged at the time of the authority application. Unions that operate in the Fair Work system can attest to the significant administrative burden that this has created for unions. Given that there is no identified problem with how right of entry operates in the State system, there is no appropriate reason to shift this onus and make it administratively harder for unions to access workplaces and hear the concerns of their members.

1089. The Review has given careful consideration to all of these submissions. There is no doubt that the "right of entry" provisions of both the FW Act and the IR Act are a contentious issue between unions and employers and employer groups. The interaction between the two Acts on "rights of entry" is set out in some detail in the Interim Report.

1090. The submission of the AMWU in particular has given the Review reason to pause and refocus on the contents and meaning of the Term of Reference. As set out in the Interim Report, the initial stance taken by the Review was that right of entry issues were outside of the Terms of Reference. The alteration of this opinion by the Review is set out in the Interim Report at [1288]. The Review there said that right of entry provisions are part of the statutory compliance and enforcement mechanisms within the State and which, for example, may be used to try and ensure there is compliance with State industrial laws and instruments.

1091. Whilst that is correct, the consequence of that statement for the scope of this Review needs to be linked to the other words in the Terms of Reference. The preamble to the Term of Reference referred to the Review of the "statutory compliance and enforcement mechanisms" for a stated purpose. That purpose was set out in the three sub paragraphs that followed. Of these, only 7(a) or 7(b) could apply to right of entry permits for authorised representatives of organisations; as 7(c) refers to the powers of industrial inspectors. The relevant objectives the Review was required to look at, therefore were to (try to) ensure employees are paid their correct entitlements and to provide deterrents to non-compliance with State industrial laws and instruments. The Review considers the AMWU makes a good point when it submits, in effect, that there is a missing link between the imposition of a "fit and proper person" test and the enhancement or attainment of these objectives. The Review also emphasises, again, that it was not involved in the drafting of the Terms of Reference; they were provided to the Review for the purpose of setting its course and charting its boundaries. The Terms of Reference could have, but did not, expressly raise issues of the authorisation or qualification of people to exercise rights of entry and the suspension or revocation of those rights. In this context it is also relevant in the opinion of the Review that the imposition of a

"fit and proper person" test was provided for in the Green Bill; yet as mentioned it was not something that the Terms of Reference expressly embraced. This provides, in the opinion the Review some indication that although the issue had potentially been on the "industrial relations reform agenda" of the previous State Government, it was not something the present Government, through the Minister, thought needed to be considered by the Review. In this context the Review also notes that the Minister did not mention rights of entry or any issue of a "fit and proper person test" in the announcement of the Review, the media statement published on 22 September 2017 or in the Legislative Assembly Estimates Committee hearing on 21 September 2017. That combination of factors leads the Review to infer that the Minister did not consider a review of "rights of entry" generally or the imposition of a "fit and proper person test" something that was particularly required to be reconsidered as part of this Review. Upon reconsideration therefore the Review does not think that the possible imposition of a fit and proper person test is within the Terms of Reference of the Review unless it can be said that the issue somehow has a link to the effectiveness of ensuring employees are paid their correct entitlements and providing effective deterrents to non-compliance with State industrial laws and instruments. None of the employer groups made submissions to the effect that there was such a link, either before or after the publication of the Interim Report.

1092. The Review also notes that whilst the "fit and proper person test" was part of the Green Bill, the previous Barnett Government took no steps to introduce the Bill or legislate for any aspect of it. The Review may infer therefore that the previous Coalition Government also saw no need to effect the type of legislative change now being promoted by, for example, AMMA, CCIWA or Master Builders, despite being in office for 8 years.

1093. Additionally, the Review makes these points, some of which were also discussed in the Interim Report:

(a) As stated by the WAIRC the right of entry prescribed by s 49I of the IR Act "seems to acknowledge the legitimate role of registered organizations [sic] in

the process of observance and enforcement of awards, industrial agreements and other legislation relevant to the workplace, as recognized in a long line of authority of industrial courts and tribunals throughout the various jurisdictions."[294]

(b) The Review accepts the importance of the role of unions in relation to occupational health and safety issues on worksites.

(c) The issue of rights of entry in that context is being considered by the Ministerial Advisory Panel on Work Health and Safety Reform (MAP) as part of its role in advising the Government on the proposed Work Health and Safety Bill. The Review understands that MAP has reported to the Minister but the report has not as yet been made public. The position of the Review remains consistent with what was stated at [1404] of the Interim Report, that any broader consideration of right of entry provisions may be best deferred until the opinions of MAP are known and considered.

(d) There are differences between the legal nature and extent of the industrial relations system providing for or effecting rights of entry under the FW Act and the IR Act. Therefore, it should not necessarily be assumed that FW Act right of entry permit laws, qualifications (including the "fit and proper person" test) suspensions and disqualifications can or should be transposed into the IR Act.

(e) The IR Act contains a process whereby "any person" can apply to have another person's authorisation revoked or suspended. It is in some ways a broad entitlement but as set out in the Interim Report has been seldom exercised. That does not necessarily suggest a system that is in need of change. If employers or employer groups are of the view that a particular person ought to have their authorisation revoked or suspended because of the way they have carried out their powers under the IR Act then there is an avenue for the issue to be pursued.

---

294 *The Construction, Forestry, Mining and Energy Union of Workers v SNC-Lavalin (SA) Inc & Other* [2004] WAIRC 10880 [36]; (2005) 85 WAIG 139 [36].

(f) Those who are authorised to enter into workplaces under the IR Act have an important entitlement, for and on behalf of the members of the organisation they represent. The laws that give rise to the possession of that entitlement, under the IR Act, for the purposes set out in s 49I of the IR Act, should not be lightly interfered with; as to do so could upset rather than enhance an enforcement mechanism aimed, in part, at ensuring employees are paid their correct entitlements.

1094. In all of the circumstances, the Review does not think it appropriate or necessary to make a recommendation that the IR Act be amended so that a person must be a fit and proper person to obtain, hold or maintain a right of entry permit. That will not, the Review anticipates, satisfy employer groups or quell their view that there ought to be such an amendment to the laws of the State. The submissions made to the Review can of course be reiterated to the Minister to try and persuade him to look at rights of entry issues generally under the IR Act; or the Minister could of course decide to do so anyway as a consequence of the public submissions made to the Review.

1095. Additionally, there may well be a case for amendment to s 49J(5), as referred to above, to broaden the circumstances in which an application may be made for revocation or suspension of an authority to enter a site. That is an issue that may of course still be considered by the Minister.

8.2.11 Proposed Recommendation 68

The 2018 IR Act include a provision that amends what is presently s 49I of the IR Act to include:

(a) An entitlement under what is presently s 49I(2)(b) of the IR Act to make copies of entries in records and documents by way (that is relevant to the suspected breach of a photograph) video or other electronic means.

(b) An entitlement to photograph, or record by video, tape or other electronic means the work, material, machinery or appliance that is inspected under what is presently s 49I(2)(c) of the IR Act, that is relevant to the suspected breach.

(c) A civil penalty provision to apply in circumstances comparable to s 504 of the FW Act, for any misuse of any documents or other materials obtained in exercise of the rights contained in s 49I(2) of the 2018 IR Act.

1096. This proposed recommendation led to some significant divergence of views on the need for the change, the possible consequences of the change and the need for safeguards.

1097. AMMA submitted that there was no demonstrated need to allow a permit holder to make electronic recordings or records. It submitted however that should the Review be minded to make a final recommendation in the nature of recommendation 68, this should be subject to:

(a) Compliance with relevant legislation, particularly the *Surveillance Devices Act 1998*.

(b) Compliance with site safety requirements applying at the premises. The submission gave the example of telephones and cameras being an ignition source on oil and gas refineries.

(c) Protection of intellectual property, patents and copyrights.

(d) Prior and continuing disclosure that the video or electronic means will and is being used for obtaining records.

(e) A sole purpose test in respect of use or disclosure of any video or electronic record, proof of which is on the permit holder.

1098. CCIWA did not support recommendations 68(a) and 68(b) for the following reasons:

(a) Issues concerning intellectual property rights and market/commercial confidentiality.

(b) Significant issues about "data security". CCIWA said electronic files are subject to "use and distribution without appropriate protocols and safeguards. There is no guarantee that can be provided for the protection of the business and the individuals if records are electronically made and stored. Further, there are no controls and protections as to where a video recording may be displayed or broadcast".

(c) An entitlement to record by video or tape would appear to contradict the protections afforded by the *Surveillance Devices Act 1998*.

(d) The electronic recording of employee records would compromise the obligations that an employer has in protecting the privacy of employees. CCIWA said this was of additional concern "regarding data security once the employee records become electronic". An example given was of possible "identity theft".

(e) There is no ability to verify or certify the authenticity of an electronic file.

(f) The provisions present an "unacceptable risk and do not provide adequate controls and safeguards to both business and individuals".

1099. The HIA did not support the proposed amendments to s 49I of the IR Act. It said there is no substantive evidence to support the expansion of the method of copying documents, nor has it been established that the current methods of copying are ineffective.

1100. Master Builders was more forceful in its submissions. Master Builders referred to its supplementary submission of late 2017 in connection with union right of entry and said proposed recommendation 68(b) reinforced its view that s 49I(2)(a) should include the word "directly" before the words "related to the suspected breach".

1101. As to this issue, the Review has considered it and the submissions of Master Builders in support but does not think there has been presented a compelling case to recommend an amendment to the form of a section as it has been in existence for some time. To so amend the section could well give rise to industrial disputes at sites about whether, for example, a document was or was not "directly related to the suspected breach". That would not be consistent with the objects of the IR Act as a whole, and those set out in s 6(a) s 6(c) in particular.

1102. Master Builders also raised concerns about proposed recommendation 68(a) and 68(b) due to:

(a) The prospect of interference with intellectual property rights.

(b) The decision in *BPL Adelaide Pty Ltd v National Union of Workers*.[295] Master Builders said O'Callaghan SDP dealt with the issue of an "employer barring the taking of photos on site during production by anyone, not just a union, with that bar included in the site induction procedure. The bar was in place as the employer was in dispute with an animal activist rights group which had entered the site to illegally take photos. The employer was also in an industrial dispute with the union and did not want the union officials taking photos inside the factory and passing those photos onto the activist group". Master Builders submitted O'Callaghan SDP decided the bar on taking photos by union officials was legitimate as it did not "derogate the federal union right of entry provisions and was not directed to any union". Referring to the FW Act, O'Callaghan SDP said:

> [56] Part 3-4 does not operate so as to limit or restrict a property owner or an employer from specifying the ownership rights which are of concern to it and requiring that all visitors to its premises comply with those particular policy requirements. That is, Part 3-4 does not replace property ownership rights. It simply establishes qualified rights on the part of permit holders so as to allow access to employees.
>
> [57] In this case, I consider that the generally applied restriction on taking imaging capable devices onto the BPL site does not stop NUW permit holders from entering premises for the purposes of holding discussions with employees who work on those premises, whose industrial interests the NUW is entitled to represent, and who wish to participate in those discussions. It may make those discussions less efficient than they could otherwise have been and it may mean that the union needs to attend the site more frequently, but it does not contradict the rights established under Part 3-4. In terms of those efficiency issues, I note that there are many factors which may contribute to the efficiency of discussions. These range from union membership systems and software to the quality of hardware. Indeed, as technological advances continue, those efficiency opportunities will no doubt become even more pronounced.

Master Builders contended that the desire of the CFMEU to obtain the proposed amendment was to overcome the import of the *BPL Adelaide* decision.

[295] RE 201S/397, [2015] FWC 3905.

(c) Master Builders also referred to s 43(1)(h) of the OSH Act 1984 that empowers WorkSafe inspectors to take photographs and recordings as part of the inspector's investigations at a workplace. Master Builders contended the CFMEU seeks to overcome a "deficiency" under s 49I(1) of the IR Act which has no similar provision.

(d) The lack of any provision in the IR Act similar to s 148 of the *Work Health and Safety Act 2011* (Cth) (WHS Act), which imposes a "bar on the unauthorised use, or disclosure of information or documents". Master Builders submitted any expansion of what material a union can "capture" under s 49I of the IR Act must have similar prohibitions as per s 148 of the WHS Act. Section 148 is a civil penalty provision with a maximum penalty of $10,000 in the case of an individual and $50,000 for a body corporate. Master Builders submitted that the prospect of there being a right of entry into people's homes, if domestic service workers were no longer excluded from the coverage of the IR Act, heightened the need for a protective measure such as s 148 of the WHS Act. Master Builders pointed out that as s 148 of the WHS Act makes no distinction between a union official and an inspector when it comes to barring the improper use of material obtained during investigations on site, there can be no distinction in the IR Act.

(e) An allegation that the "CFMEU going back many years has published in its own media outlets allegations of unsafe work practices on building sites including photos with little regard for the efficacy of doing so, or the need for constraint on the improper use of photos or information obtained as part of exercising right of entry...". In support of this proposition Master Builders attached copies of particular issues of the CFMEU Construction Worker publication in 2016 and 2017, which, it asserted "contain photos taken on site presumably by union officials conducting a right of entry visit and identify alleged safety issues."

(f) Master Builders also alleged, "the CFMEU in late February 2018 posted comments on its Facebook page alleging unsafe practices on a major shopping centre redevelopment project south of Perth which covered a lack of personal

protective equipment, electrical cables covered in water and workers allegedly breathing in silica dust on site. Those comments were subsequently removed as a result of legal action taken against the union for alleged defamation filed in March 2018 in the Supreme Court of Western Australia."

(g) Master Builders said reforms to WA safety legislation in 2019 would be "highly likely" to allow union officials to conduct safety investigations at a workplace and take "photos/vision as part of the investigation". It was submitted it was not desirable to have two pieces of legislation covering the same issue of safety investigations. It was submitted that it was preferable not to change the existing laws and that when new safety laws took effect in 2019, the IR Act should be amended to delete the union right of entry arrangements which allow entry to investigate alleged safety breaches.

1103. Due to the fact that some of these submissions made direct allegations against the CFMEU, the CFMEU was provided with the opportunity to comment on them. The CFMEU availed itself of this opportunity, in a confidential submission to the Review, that is referred to below.

1104. DWER, the AMWU, a confidential employee submission, and the CPSU/CSA supported the proposed recommendation. The CPSU/CSA added that the proposed recommendation would be an update in line with developments in technology and introduces a civil penalty comparable to s 504 of the FW Act for the misuse of documents or materials collected.

1105. UnionsWA supported the proposed recommendation, except for 68(c). It submitted that no explanation has been provided about why a civil penalty is necessary in this situation. The submission was supported by affiliate unions the HSUWA and the WASU.

1106. The contention that proposed recommendation 68(c) was not necessary was elaborated upon by the CFMEU in its non-confidential submission. It said there is no evidence of any misuse of any documents or other materials obtained in the exercise of rights under s 49I(2). It submitted the proposed recommendation was made on

the presumption of authorised representatives misusing their rights and was "offensive". The CFMEU also said s 504 of the FW Act does not apply to s 494 of the FW Act and to this extent, recommendation 68(c) "inexplicably goes further than s 504 of the FW Act".

1107. The Review does not accept these criticisms of the proposed recommendation. Firstly, powers to take electronic copies of documents and records have not been held before in Western Australia under the IR Act so there is not going to be evidence of misuse. Secondly, if these powers were granted, there are additional dangers of misuse as addressed in the employer body submissions above. Thirdly, like the enactment of any penalty the proposed recommendation does not assume that representatives will misuse their powers, the purpose of having a penalty is both educative and to try and ensure that they do not; or if they do, to set out that there are consequences. The CFMEU should not be offended that the Review considers there is a possibility that an authorised right of entry holder could conceivably misuse the powers given, and for there to be consequences if that occurs.

1108. As mentioned earlier, the CFMEU provided a confidential submission in response to the allegations made by Master Builders. The Review was subsequently authorised to publish that the CFMEU said:

(a) It was concerned about the allegations made by Master Builders.

(b) As s 49I(2) of the IR Act is an "investigative power", the ability for authorised representatives to improve the quality of those investigations through the use of electronic evidence is "integral".

(c) In relation to the Master Builder's reliance on *BPL Adelaide Pty Ltd v NWU*, the CFMEU submitted the case is distinguishable as it relates to right of entry under s 484 of the FW Act regarding an entry to hold discussions and not to investigate suspected contraventions of safety.

1109. Due to the confidentiality of the CFMEU submission the Review cannot say more of what it contained; and of course, the Review is not in any position to resolve factual

disputes between stakeholders about past actions. With respect to the photographs attached to Master Builders submission, however, Master Builders acknowledged it was only a presumption that they were taken by union officials using rights of entry. The same applies to the subject matter of the defamation proceedings referred to by Master Builders. As to the reference to *BPL Adelaide Pty Ltd v NWU*, the Review is of the opinion that the (non-confidential) submission made by the CFMEU only partially answers the point made by Master Builders. Although the issue arose in the context of a right of entry under s 484 of the FW Act to conduct discussions, there is a general point that arises from the decision about the intersection between the policies of an employer/site operator and right of entry entitlements. For example if there is an employer policy that no-one on site is entitled to have a mobile telephone, would that be subject to, or override the amendment to s 49I sought by the CFMEU, insofar as a right of entry holder wanted to use a telephone to photograph an employment record or piece of machinery? The Review thinks there should be an appropriate melding of the opposing points of view and concerns; with the priority being the health and safety of those on site. It may be that in some circumstances the taking of a mobile telephone onto a site or part of a site will be in breach of a site-owner's safety policy. If that is the situation then the policy should prevail, provided it is reasonable. Therefore a site-owner or operator should not be able to sidestep the suggested amendment to the IR Act by simply proclaiming a "safety policy" that banned all mobile phones. The Review considers it is possible, by legislation or regulation to appropriately cater for the resolution of the problem.

1110. Overall, and subject to what has been said above, the Review is of the opinion that a recommendation of the type contained in the proposed recommendation should be made. As set out in the Interim Report at [1395]: "An entitlement to obtain a photograph or make an audio, video or digital recording can be seen to be making the benefit of [the right to copy and record] more effective, particularly given enhancements in technology. The entitlement would provide a method of preserving evidence, to be used to provide proof of the "suspected breach", if required in enforcement proceedings." Any amendment to the IR Act could make it clear that it was not intended, by the amendment, to interfere with intellectual

property rights, which could still be enforced. The amendment could be made to ensure it did not conflict with the *Surveillance Devices Act 1998.* An example of how that might be done is contained in s 482(1A) of the FW Act. Issues of data security and identity theft, the Review accepts, are real concerns. But the Review considers that the fears can be overstated. For example, the existing s 49I(2) of the IR Act permits copies to be taken of entries in employment records. If a right of entry holder was minded to, these could be converted to electronic documents and circulated; and employment records could be used, if someone was so minded, to perpetuate "identity theft". The solution to the concerns, in the opinion of the Review is to have some safeguards against them, in the nature of penalties to potentially apply if there has been an abuse of the right of entry. As submitted by the CFMEU and other unions, the risk of losing authorisation under s 49J(5) of the IR Act is something of a deterrent to any misuse of materials. In the opinion of the Review however, that risk ought to be supplemented by a provision in the terms of s 504 of the FW Act. This creates a civil penalty provision for use or disclosure of information obtained via the use of a right of entry for a purpose not related to the investigation or rectifying the suspected contravention at issue. As set out above, the inclusion of such a penalty provision would not be any sign that people holding right of entry authorities are not to be trusted but it is a safeguard against misuse. It would be educative and reinforce the need for right of entry holders to only use the materials for the purposes intended. It would provide some protection for the concerns held by the employer groups cited above – so that if there was misuse of information obtained, there could be specific consequences. The jurisdiction to enforce any such provision would, like the other IR Act civil penalty provisions, be held with the IMC. As to the CFMEU's argument that the proposed recommendation is beyond s 504 of the FW Act, because it does not apply to s 494 of the FW Act, the Review does not accept that. Section 504 applies to things obtained upon the exercise of a right of entry under the FW Act in broadly similar circumstances to the obtaining of documents and the like under s 49I of the IR Act. There is, in the opinion of the Review, no extension of the possible penalties that might apply, if the proposed recommendation was adopted, from the circumstances contemplated by the application of s 504 of the FW Act.

8.3 Right of Entry and the *Construction Industry Portable Paid Long Service Leave Act 1985*

1111. In the Interim Report the Review referred to the submission by the CFMEU that there should be an amendment to s 49I(1) to include the *Construction Industry Portable Paid Long Service Leave Act 1985* (WA) (CIPPLSL Act) to allow union representatives to enter a workplace to investigate suspected breaches. The Review said it would canvass the opinion of the Board administering the CIPPLSL Act, before giving the issue additional consideration. The Review has, consequently corresponded with Mr John Youens, the Chief Executive Officer of the Board, called MyLeave. In a letter dated 27 April 2018 Mr Youens advised the Review that it was a "polarising issue" for the members of the MyLeave Board. Accordingly, no position of the Board was put to the Review. Mr Youens suggested the Review canvass the views of stakeholders before deciding whether the requested changes were necessary and/or appropriate. There have not been specific submissions made to the Review opposed to the argument that the CFMEU has made in support of the suggested amendment. The purpose of s 49I is to allow for entry and inspections and the copying of materials where there is a suspected breach of, amongst other things, the LSL Act. This right enhances the prospect that employees may be able to obtain this employment benefit. The Review considers the same would apply if the IR Act was amended to include the CIPPLSL Act as well as the LSL Act and the other Acts and instruments referred to in the subsection, and accordingly proposes to make a recommendation that s 49I be amended to include a suspected breach of the CIPPLSL Act.

8.4 Recommendations

1112. With respect to Term of Reference 7 the Review makes the following recommendations and observations:

68. In the Amended IR Act, industrial inspectors are to be empowered:

    (a) To issue infringement notices for breach of record-keeping and pay slip obligations.

    (b) Issue compliance notices, based on the model contained in s 716 of the FW Act, if it is in the public interest to do so.

(c) Issue enforceable undertakings, based on the model contained in s 715 of the FW Act, if it is in the public interest to do so.

69. The Private Sector Labour Relations Division (PSD) of DMIRS is to prepare a written public policy to guide the use of the new enforcement mechanisms.

70. In the Amended IR Act, the penalties that may be imposed by the IMC in enforcement proceedings be amended to be equivalent to the penalties set out in s 539 of the FW Act, and contain a provision that has the effect that when the penalties under s 539 of the FW Act are changed over time, the same changes in corresponding penalties apply in the Amended IR Act.

71. The Amended IR Act is to include provisions comparable to s 550 of the FW Act to enable those involved in any contravention of a relevant breach to be penalised and/or ordered to rectify any non-payment, or ordered to pay compensation or any other amount that the employer may have been ordered to pay.

72. The Amended IR Act is to include provisions to enable the IMC to impose penalties for a breach of the WAES or any applicable award, agreement, or other industrial instrument, including but not limited to breaches of long service leave obligations.

73. The Amended IR Act is to include a section comparable to s 557C of the FW Act to the effect that, if, in a contravention proceeding against an employer where an applicant makes an allegation in relation to a matter and the employer was required to make and keep a record, make available for inspection a record or give a pay slip, in relation to the matter, and the employer has failed to comply with the requirement, the employer has the burden of disproving the allegation.

74. The Amended IR Act is to include sections comparable to s 535(4) and s 536(3) of the FW Act prohibiting an employer from wilfully making, keeping

or maintaining a false or misleading employment record or wilfully providing a false or misleading pay slip.

75. The Amended IR Act is to include provisions comparable to s 112 and s 113 of the *Fair Trading Act 2010* (WA) to provide for the ability of industrial inspectors to share information acquired during an investigation within DMIRS or with other State Government or Commonwealth departments or agencies, or to obtain relevant information within DMIRS or from another State Government department or agency or any Commonwealth department or agency, to the extent permitted by any Commonwealth law.

76. In the Amended IR Act, s 98 of the IR Act is to be amended so that there is no restriction on the powers of industrial inspectors only being exercised at an "industrial location". Instead, industrial inspectors are to be able exercise their powers at either:

    (a) The premises where work is or was being performed; or

    (b) Business premises where the inspector reasonably believes there are relevant documents or records.

77. In the Amended IR Act the monetary penalties that may be imposed by the Full Bench under s 84A(5) of the IR Act be increased to $10,000 in the case of an employer, organisation or association and $2,000 in any other case.

78. Subject to recommendation [79] the Amended IR Act includes amendments to s 49I of the IR Act to include:

    (a) An entitlement under s 49I(2)(b) of the IR Act to make copies of entries in records and documents by way of a photograph, video record or other electronic means, that is relevant to the suspected breach.

    (b) An entitlement to photograph, or record by video, tape or other electronic means the work, material, machinery or appliance that is

inspected under s 49I(2)(c) of the IR Act, that is relevant to the suspected breach.

(c) A civil penalty provision to apply in circumstances comparable to s 504 of the FW Act, for any misuse of any documents or other materials obtained in exercise of the rights contained in s 49I(2) of the Amended IR Act.

(d) In s 49I(1) reference to a suspected breach of the *Construction Industry Portable Paid Long Service Leave Act 1985* (WA).

79. Recommendation [78] is to be subject to:

(a) Compliance with the *Surveillance Devices Act 1998* (WA).

(b) Compliance with reasonable site safety requirements applying at the premises.

(c) The protection of intellectual property rights including with respect to patents and copyrights.

80. The Minister give consideration to the actions that should be taken to assist employers to understand the changes to the enforcement and compliance laws.

Chapter 9 Local Government

9.1 The Term of Reference

1113. The eighth term of reference is as follows:

> The Ministerial Review of the State Industrial Relations System is to consider and make recommendations with respect to the following matters …
>
> 8. Consider whether local government employers and employees in Western Australia should be regulated by the State industrial relations system, and if so, how that outcome could be best achieved.

9.2 Interim Report and Proposed Recommendations

1114. An analysis of the issues relevant to the Term of Reference was contained in the Interim Report.

1115. The Interim Report should be read as an adjunct to this chapter of the Final Report. In the Interim Report the following was discussed and analysed:

(a) Background to the Term of Reference.[296]

(b) The Constitution of Western Australia, the *Local Government Act 1995* (WA) (LG Act) and other legislation.[297]

(c) The consequences of the Work Choices legislation.[298]

(d) Legal uncertainty and the jurisprudence about whether local governments are constitutional corporations.[299]

(e) The submissions to the Review.[300]

(f) Access to the WAIRC for local government employees.[301]

(g) Mobility between State and local government employment.[302]

---

296 Interim Report, [1417]-[1421].
297 [1422]-[1457].
298 [1458]-[1465].
299 [1466]-[1497].
300 [1498]-[1526].
301 [1527]-[1529].

(h) Options for moving local government employers and employees into the State jurisdiction.[303]

(i) Transferring employee entitlements between jurisdictions.[304]

1116. The Interim Report then analysed the issues and set out the following proposed recommendations for discussion and additional submissions:

69. Local government employers and employees be regulated by the State industrial relations system.

70. To facilitate recommendation 69, the State Government introduce legislation into the State Parliament consistent with s 14(2) of the FW Act that declares, by way of a separate declaration, that each of the bodies established for a local government purpose under the *Local Government Act 1995* (WA) is not to be a national system employer for the purposes of the FW Act (the declaration).

71. If the declaration is passed by the State Parliament, the State expeditiously attempt to obtain an endorsement under s 14(2)(c) and s 14(4) of the FW Act by the Commonwealth Minister for Small and Family Business, the Workplace and Deregulation, to make the declaration effective (the endorsement).

72. As a counterpart to recommendation 70, the State enact legislation that has the effect, upon the endorsement, of deeming local government Federal industrial awards, agreements or other industrial instruments to be State awards, agreements or other industrial instruments for the purposes of the 2018 IR Act.

73. If the endorsement is obtained, a taskforce be assembled and chaired by a representative of DMIRS and include a representative of the Department of Local Government, Sport and Cultural Industries, the WAIRC, the Western Australian Local Government Association, the Western Australian Municipal, Administrative, Clerical and Services Union of Employees, the Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth, the State Solicitor's Office and a nominee of the President of the Law Society of Western Australia, to oversee, monitor, assist, facilitate and progress the transition of local government employers and employees between the Federal and State industrial relations systems.

1117. One of the purposes in publishing the Interim Report was to put forward possible recommendations and receive additional submissions about them. As stated in the Interim Report, for the present Term of Reference the Review thought the process may be of particular significance.

---

302 [1530]-[1532].
303 [1533]-[1553].
304 [1554]-[1557].

9.3 The Conduct of the Review after the Interim Report

1118. Following the publication of the Interim Report the Review had meetings with the stakeholders principally affected by the recommendations, being UnionsWA and, importantly, their affiliate the WASU, and at a separate meeting WALGA, Hall & Wilcox as solicitors representing four large metropolitan local governments and a representative from the City of Nedlands. In the opinion of the Review, these meetings were productive in canvassing some of the issues arising out of the proposed recommendations of the Interim Report and to discuss the type of submissions that would be of assistance to the Review for the Final Report.

1119. Additional written submissions were later received from CCIWA, the City of Canning, WALGA, UnionsWA, WASU, ELC, the ECCWA and other unions who expressed support of the submissions of UnionsWA and the WASU. There was also a confidential submission by Hall & Wilcox, on behalf of the four large metropolitan local governments. That submission will be taken into account although the local government clients will not be identified.

1120. The position of WALGA and the four local governments is opposed to that of the unions who made submissions on the proposed recommendations. The unions are in favour of the proposed recommendations to facilitate local government employers and employees being subject to the State system, whereas WALGA and the local governments are opposed to them. CCIWA, whom the Review is instructed has some local government members, is also not supportive of the proposed recommendations. The City of Canning is opposed to the proposed recommendations as well, but the ECCWA and the ELC support them.

1121. The details of the submissions made in response to the proposed recommendations will be later analysed and set out.

9.4 The Basis of the Interim Report Proposed Recommendation

1122. As set out in the Interim Report, the primary reasoning of the Review in arriving at its interim position was:

(a) There is legal uncertainty about whether local government employers are national system employers, because there is no definitive decision on the issue.

(b) It is preferable to try and end the jurisdictional uncertainty by bringing all local government employers within the State system to the extent possible.

(c) The Review considered there was strength in the views expressed by Mr Bennett QC in his High Court submission in the Work Choices case, the reasons of Spender J in *Etheridge Shire Council*, the reasoning of the FWC in the Award Modernisation Case and the majority of the WAIRC Full Bench in the *Shire of Ravensthorpe* to the collective effect that local governments in Western Australia are not constitutional corporations.

(d) This strongly supported the proposition that the State should attempt to provide jurisdictional certainty, leading to a recommendation by the Review that local governments and their employees be regulated by the State industrial relations system.

(e) The Review placed weight on the submission of the WASU that there had been difficulties in dealing with the Federal system in registering enterprise agreements.

(f) The Review placed weight upon the WASU submission that the Federal *Local Government Industry Award 2010* does not contain terms and conditions that are particularly advantageous to Western Australian employees.

(g) Local government employees must continue to be within the State system for some purposes including occupational health and safety and the enforcement of contractual benefits.

(h) Local government is part of the Western Australian system of government. It is part of the Western Australian body politic. The Western Australian Constitution contains a duty for the State to provide for local government that has been carried into effect by the enactment of the LG Act. Local

governments have inherently governmental functions within their boundaries.

(i) Although the majority of local governments are currently operating within the Federal system that is "based upon a particularly shaky premise; that the local governments are constitutional corporations".

9.5 The Written Submissions about the Interim Report

1123. The submissions that were received in response to the Interim Report considered the arguments the Review said favoured its interim position and the substance of the proposed recommendations.

1124. The following is a summary of the submissions received by the Review. They are divided by reference to the proposed recommendation included in the Interim Report with respect to this Term of Reference. Proposed recommendation 69 is the lynchpin of the proposed recommendations under this Term of Reference. It attracted the most significant submissions. They will be discussed in turn firstly by considering the submissions against the proposed recommendation and then those in favour of it.

9.5.1 Submissions Opposing Proposed Recommendation 69

Local government employers and employees be regulated by the State industrial relations system.

1125. CCIWA was, as stated, not supportive of proposed recommendation 69. It did agree with the point made in the Interim Report that "uncertainty is not productive of a good system" and that the local government sector should be covered by a single system. However consistently with the CCIWA position on the State system generally, it submitted that: "If the State Government remains of a mind to retain the state industrial relations system, CCIWA again submits that this should be for the coverage of the public sector and that the private sector should be referred," to the Commonwealth. CCIWA referred to the WALGA submission to the Review that of the 148 local government employers in Western Australia, 131 currently operate under the national system while only 17 are covered under the State system

(equating to 11.5 per cent). CCIWA said considerable weight should be given to the issues outlined in the WALGA submission.

1126. CCIWA also referred to [1533] of the Interim Report, which outlined two methods on how other States have provided certainty of coverage for local government. CCIWA said it supported the first method outlined in the Interim Report of: "Referring powers to the Commonwealth so as to place all local government employers and employees into the Federal system…". CCIWA said this was in line with its "principal view for the referral of industrial relations powers to the Commonwealth. Implementation of this solution in WA would only impact 11.5 per cent of local government employers. This achieves consistency via the least complex and disruptive path."

1127. CCIWA also noted what it termed the significant disruption and substantial complexity that would result if the second method was implemented. CCIWA also noted the comments in the Interim Report at [1539] – [1553] that set out the limits of what the State Government could unilaterally do to implement the second method. CCIWA also supported a WALGA submission (outlined below) that substantial consultation be undertaken with the local government sector before any recommendation was adopted. CCIWA concluded that "…should [proposed] recommendation 69 be adopted and that "local government employees be regulated by the State industrial relations system" CCIWA would submit… this could form part of the reforming of the WAIRC (and the IR Act) to cover public sector employees with the referral of private sector employees to the Commonwealth." Whilst that is so, the Review does not have any authority to comment on the referral of legislative powers about private sector employees and employers to the Commonwealth.

1128. The submission from WALGA, in summary:

(a) Opposed proposed recommendation 69.

(b) Proposed a number of alternative recommendations, which included further consultation but which did not support the proposed recommendation.

(c) Argued the establishment of local government under the *Constitution Act 1889* (WA) does not equate to requiring regulation under the State industrial system and to do so "fails to recognise the role of the Commonwealth in legislating pursuant to the corporations power, the establishment of Local Government as bodies corporate under the *Local Government Act 1995* (WA) and the contemplation of trading activities being undertaken by Local Government pursuant to the LG Act."

(d) Disagreed with the Review's preliminary opinion that local governments are not constitutional corporations and argued that until there is High Court authority on this issue that to draw this conclusion based on current case law is "inappropriate and unfounded".

(e) Argued that unfair dismissal and denied contractual benefits applications before the WAIRC are not an appropriate measure of jurisdictional uncertainty and resulting cost to local governments. WALGA said: "We note a number of references in submissions to the Review citing the cost to the Local Government sector in mounting and defending jurisdictional objections. Based on the data provided by the Review, very few jurisdictional objections are proceeding to hearing and as such, there may be little actual cost to Local Government in maintaining the current duality of industrial relations systems."

(f) Argued the weight placed by the Review (and the State Government in determining the Terms of Reference for the Review) on jurisdictional certainty for local government is not supported by the evidence and is unlikely to warrant the level of change proposed by the Review. It was submitted: "…it is unclear whether there is any evidential or other persuasive basis indicating that the jurisdictional dilemma is significantly impacting the sector, either financially or in terms of perceived risk associated with mischaracterisation as constitutional corporations, or indeed, that implementation of the proposed recommendation would be in service of Local Government interests. Jurisdictional uncertainty has existed in the

Local Government industrial relations landscape for many years and, while occasionally inconvenient, has not, in the main, caused significant problems that would require drastic and fundamental change such as that proposed by the Interim Report."

(g) Submitted that: "In the absence of a clear cost associated with jurisdictional uncertainty, it is difficult to understand how the gravity and cost to Local Government in implementing proposed recommendation 69 will be weighed against the 'cost' of uncertainty by the Review in formulating its final recommendations."

(h) Queried the current "drive by the State Government to achieve a declaration of this kind, given a similar jurisdictional uncertainty applies to the not for profit sector in WA."

1129. The City of Canning said it was of the view that local government employers and employees should not be regulated by the State IR system. The City argued, "the referral of industrial relations powers by the State Government to the Commonwealth is by far the most sensible and logical approach to addressing the jurisdictional uncertainty for the City and indeed the broader Local Government sector. A decision by the State Government to refer industrial relations powers with respect to Local Government would achieve multiple benefits for the City and all of the stakeholders involved including the State Government…".

1130. The City of Canning submitted the FW Act has expressed a clear intention to "cover the field" to generally exclude State industrial laws. The City argued that given that intent, "transposing the City (as well as the majority of Local Governments) into the state IR system shows a disregard for the stated intent of the federal industrial relations legislation. The City is of the view that the interim [report] has not provided any cogent commentary that outlines a tangible or realistic benefit for the City (or any Local Government) to be transposed into the State IR System." Aspects of this submission will be later commented upon by the Review, particularly in relation to the context of the passing of s 14 of the FW Act, that deals, broadly with

the steps a State may take to ensure that local governments are within the State industrial relations system.

1131. The City of Canning also said it supported the submission and general recommendations made by WALGA.

1132. Hall & Wilcox made a substantial submission to the Review on behalf of its clients, four large metropolitan local governments. The submission has been of considerable assistance to the Review. For ease of reference the submission will be attributed to Hall & Wilcox or "the four local governments."

1133. The four local governments supported the submission made by WALGA in December 2017. The four local governments said: "The adoption of the proposed recommendations will have significant negative ramifications for each member of the [four local governments] (which in our view would be similar for most local governments in WA) and no benefit or advantage has been identified that will result from moving local governments in WA from the Federal System to the State System."

1134. The submission provided considerable background on each of the four local governments, including that they have operated in the Federal system on a long term basis, conduct considerable trading activities and currently operate under Federal instruments. Due to the confidentiality of the submission, all of the details provided about the four local governments cannot be included in the Final Report. It can be said however, that with respect to each of the local governments:

(a) They employ between 650 and 1300 employees.

(b) They have an annual revenue of between $140-$235 million.

(c) They engage in business activities that include operating swimming pools, gymnasiums, leisure facilities, creches, rental of properties and equipment, financial investments, libraries[305] and visitor and community services.

[305] The submission did not explain how a local government providing municipal library facilities was a trading activity but the Review does not necessarily rule out the prospect that it might involve trading.

(d) They derive between 6 per cent to 13 per cent of their income from what the four local governments regard as trading activities.

1135. Hall & Wilcox submitted the four local governments all had historic participation in the Federal system. The submission said that each of the four local governments had certified industrial agreements under the *Workplace Relations Act 1996* (Cth) (WR Act). It was submitted that under s 170LH of Division 2 of Part VIB of the WR Act, the AIRC could only certify agreements for employers that were constitutional corporations. Hall & Wilcox provided the decision records or transcripts of the AIRC in certifying these agreements. Included in each is a finding that the local government was found to be a constitutional corporation. The decisions do not however include any reasoning supporting the finding. The decisions are probably not binding on any other industrial tribunal or court; and certainly not the High Court. The four agreements were certified between June 2002 and May 2005. Three of the agreements were made under s 170LJ of the WR Act. These agreements were made with an organisation of employees. The fourth was an agreement with employees under s 170CK of the WR Act. The three s 170LJ WR Act agreements were made with three different organisations, being the Australian Municipal, Administrative, Clerical and Services Union (West Australian Branch) (that is, the WASU), the Transport Workers' Union of Australia and the Western Australia Shire Councils, Municipal Road Boards, Health Boards, Parks, Cemeteries and Racecourse, Public Authorities, Water Boards Union. Therefore, the Review accepts that each of the four local governments has a firm historical basis, in three instances as endorsed by a union, for now conducting themselves as if they are constitutional corporations. That is because there is a decision of the AIRC that finds each of them to be so, and in three instances, the registered organisations (unions) who made the agreements must have concurred with the AIRC making this finding.

1136. Hall & Wilcox submitted the terms and conditions of employment of the employees of the four local governments were constituted by:

(a) The *Local Government Industry Award 2010* (Federal).

(b) Enterprise agreements made under the FW Act.[306]

(c) Common law contracts underpinned by the NES contained within the FW Act.

1137. The four local governments referred to the issue of jurisdictional uncertainty as follows:

> Since the introduction of the Work Choices legislation, there has been some uncertainty (not just in relation to local government) about the jurisdictions of the various State industrial relations systems and the Federal System.
>
> This uncertainty has been alleviated in all States (other than WA) by the referral by those States of some of their industrial relations powers to the Commonwealth in return for acceptance by the Commonwealth that certain employers will not be covered by the Federal System. (footnote omitted)

1138. The Hall & Wilcox submission referred to the *Fair Work Amendment (State Referrals and Other Measures) Bill 2009* which amended the FW Act to make provision for a declaration to be made under s 14(2) of the FW Act. This sub-section was referred to in the Interim Report at [1537]-[1538]. As there stated, it provides a mechanism to declare, under a State or Territory law, that a body established, amongst other things, for a local government purpose is not a national system employer. Hall & Wilcox referred to the Second Reading Speech of the Hon Julia Gillard, when Minister for Employment and Workplace Relations on 21 October 2009 which set out the reasons for the introduction of s 14 of the FW Act. The Second Reading Speech says the section was introduced as part of a package involving the transfer of the legislative powers of the States with respect to industrial relations, to the Commonwealth. At the time of the second reading speech, South Australia and Tasmania had agreed to transfer their legislative powers to the Commonwealth and New South Wales had been involved in negotiations about the same, and been involved in the development of the legislation. Victoria had already transferred its powers, during the Howard Federal Government. In this context, as referred to in the submission by Hall & Wilcox, the Second Reading Speech of Minister Gillard talked about the benefits of progress towards a "true national" industrial relations system that the then Federal Government believed the enactment of the Bill would

306 Hall & Wilcox submitted there were between the four local governments currently 13 enterprise agreements either in term or recently expired.

assist in attaining. The Hall & Wilcox submission noted, again, that Western Australia was now the only State that had not, to date, referred its powers to legislate with respect to private sector employers and employees to the Commonwealth. The Review will comment further on the introduction of this legislation below.

1139. The Hall & Wilcox submission then referred to the December 2017 WALGA submission to the Review, which said that of the 148 local government employers in Western Australia, 131 operate under the Federal system. The 17 remaining local governments were said to employ approximately 870 of a total of 22,700 local government employees in Western Australia, or less than 4 per cent. As stated by Hall & Wilcox, this means that 88.5 per cent of local governments are within the Federal system and, in addition, over 96 per cent of employees have their terms and conditions of employment determined by the Federal award, enterprise bargaining agreements made under the FW Act, or common law contracts underpinned by the NES.

1140. The submission also pointed to the historic participation of Western Australian local government within the Federal system, including a Federal award regulating the terms and conditions of employment for local government employees in Western Australia since the *Municipal Employees (Western Australia) Award 1982*.

1141. The Hall & Wilcox submission then turned to the jurisdictional uncertainties that had arisen since the Work Choices legislation, and in particular whether local governments were constitutional corporations and therefore covered by the FW Act.

1142. The four local governments said:

> The Interim Report summarises the two main opinions about the status of local governments as constitutional corporation as being:
>
> (a) it is unlikely that local governments are constitutional corporations due to the nature of local government as a constitutionally required tier of government even though it may undertake trade (based upon the decisions in *Etheridge*[307] and *Shire of Ravensthorpe*);[308] or

[307] *Australian Workers' Union of Employees, Queensland v Etheridge Shire Council* [2008] FCA 1268; (2008) 171 FCR 102.

[308] *Shire of Ravensthorpe v John Patrick Galea* (2009) WAIRC 01149; (2009) 89 WAIG 2283.

(b) a local authority could be a constitutional corporation depending on the nature and extent of its trading (or financial) activities based on the decision in the *ALS case*,[309] focusing upon the activities of the particular local government and whether or not its financial or trading [activities] are substantial and not just peripheral.

1143. The Hall & Wilcox submission commented upon the analysis by the Review of these decisions and submitted that the approach of Spender J in *Etheridge* as to the "federal balance" was contrary to the High Court's approach to that issue in the Work Choices decision.[310] The Review will comment upon that point later.

1144. The Hall & Wilcox submission referred to the acceptance of the "test set out in the *ALS decision*" by the Full Federal Court in *Bankstown Handicapped Children's Centre Association Inc v Hillman*.[311] The submission then said, "Adopting the activities test as set out in the *Bankstown* and *ALS* cases, our clients submit that each of them would be regarded as trading corporations and therefore constitutional corporations." In making this submission Hall & Wilcox relied upon:

(a) The number of trading activities engaged in.

(b) The local governments engaged in a wider range of trading activities than in the City of Albany, which was found not to be a trading corporation in *Madigan v City of Albany*.[312]

(c) The percentage of total revenue and value of the revenue derived by trading activities was greater than the local governments found not to be trading corporations in the *Shire of Yalgoo*[313] and *City of Burnside*.[314]

(d) The Federal Court decision in *E v Australian Red Cross Society*[315] in which the total value of the income derived from trading was determined as being relevant to the characterisation of the Australian Red Cross as a trading corporation.

309 *Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No. 2)* (2008) 37 WAR 450.
310 *NSW v Commonwealth* (2006) 229 CLR 1; as referred to in the article "Trading or Financial Corporations under section 51(xx) of the Constitution: A Multifactorial Approach", Christopher Tran, 2011 (37) 3 Monash University Law Review, 12.
311 (2010) 182 FLR 483.
312 [2013] WAIRC 00367.
313 [2016] FWC 2190.
314 [2017] FWC 5974.
315 *E v Australian Red Cross Society* (1991) 27 FCR 310.

1145. On the issue of the perceived uncertainty about jurisdiction, Hall & Wilcox submitted:

(a) Although the four local governments, if challenged would argue they are constitutional corporations, it acknowledged that the legal tests to be applied in determining whether local governments are constitutional corporations will remain uncertain until considered by the High Court.

(b) The four local governments have operated under the Federal system and self characterise as national system employers under the FW Act. The four local governments contend that, given their long history of operating in the Federal system there is not uncertainty about whether they should be in the State system or the Federal system; or if there is uncertainty it does not manifest in any tangible way that causes a disadvantage to them or their employees.

(c) Unfair dismissal "data" referred to in the Interim Report is not necessarily a useful measure as to the nature and extent of any jurisdictional uncertainty.

1146. Hall & Wilcox also made submissions about the likely impact of the proposed recommendations being carried into effect. The submission said:

> Although the Interim Report's recommendations are largely concerned with removing uncertainty within the sector, our clients consider that the consequences of that uncertainty are insufficient to outweigh the numerous and potentially significant difficulties that local government employers will experience both during the period of any transition to the State System and generally. Further, it is submitted that the consequences of any uncertainty are currently based on perception rather than reality.

1147. It was also submitted that under the FW Act, local government employees have a number of rights and/or protections that are not available under the IR Act. These were "protection against adverse action", "protection in transfer of business situations", participation in bargaining or appointing their own bargaining agent, access to the FWC to help resolve disputes and "stop bullying" orders under the FW Act. There were also submissions about members of the four local governments negotiating enterprise agreements "directly with employee representatives [that] had no trade union involvement." The submission contended: "Bargaining under the

current State collective bargaining arrangements would therefore significantly curtail our clients' ability to negotiate terms and conditions on a collective basis."

1148. The submission from Hall & Wilcox also pointed to other changes consequent upon any move towards the State system.

1149. This included the prospect of increased employment costs that could result from a move to the State system.

1150. Hall & Wilcox submitted:

> Although the Interim Report proposes that all local government Federal industrial agreements will be deemed to be State awards, the bargaining parameter for our clients will essentially be re-set at the end of the transitional period when any new industrial agreements will be based upon the State Employment System … and modernised State industrial awards. This is likely to have significant consequences for our clients (who currently pay above the minimum Federal Award entitlements) given the recommendation in the Interim Report that the current terms and conditions of employees are not to be reduced as a result of the modernisation of the State System. This could mean that when it comes to terms and conditions, local government employees will expect the best from both systems. This means that although bargaining over many years has led to enterprise agreements containing terms and conditions that absorb and exceed the minimum terms and conditions in the Federal award, our clients will be required to further enhance existing [terms] and conditions to include any more beneficial provisions included in the modified State Award. In bargaining employees will not accept a reduction in current terms and conditions to offset any more beneficial terms they receive under the State Award. If the modernised State industrial award reflects the most beneficial terms of the current State and Federal awards it will increase the employment costs for local governments.

1151. The Hall & Wilcox submission also pointed to other costs including employing staff with the relevant knowledge and experience to manage the transition to, and involvement with the State system; the amendment or renegotiation of employment contracts underpinned by the NES; and the review of operational policies and procedures underpinned by the FW Act, to ensure consistency with the IR Act. Hall & Wilcox also submitted there was a prospect of loss of jobs and services from potentially higher employment costs.

1152. This argument was however, albeit perhaps not surprisingly, devoid of specific details, statistics or projections.

1153. The four local governments put forward as alternatives to the proposed recommendation being the maintaining of the status quo, the referral by the State Government of its industrial relations legislative powers to the Federal Government or that there be a "modernisation" of the State industrial relations system before there was any attempt to move local governments into the State industrial relations system.

1154. The Hall & Wilcox submission also pointed to a period of uncertainty if there was an attempt made to transition their clients to the State industrial relations system. As set out in the submission, this was because of:

(a) It not being known whether necessary legislation containing a declaration under s 14(2) of the FW Act would be passed by the Western Australian Parliament.

(b) It not being known whether the relevant Commonwealth Minister would endorse any declaration made by the Western Australian Parliament, as required under s 14(2) of the FW Act.

(c) It not being known what the State transitional arrangements will be that will apply to the local governments.

(d) It not being known until "after the State awards have been modernised what minimum terms and conditions will apply to local government employees".

1155. The submission also said the four local governments have enterprise agreements that are due to expire over the next 18 months and having uncertainty around a transition to the State system would adversely affect the bargaining process.

1156. In conclusion, the Hall & Wilcox submission noted that based on the jurisdictional objections set out in the Interim Report that "some local government employees seem confused about whether they should make an unfair dismissal claim in the WAIRC under the IR Act or the FWC under the FW Act" (footnote omitted). It was submitted however, that this confusion extended to other employees employed by incorporated associations as well as some employees employed by companies. It

was submitted that to move their clients to the State system was a disproportionate response to the perceived problem and would cause significant and unwarranted disruption. Overall it was submitted that whilst "…the adoption of the recommendations might avoid some future legal stoush it will do nothing to assist our clients in managing employee relations or better serving their communities. Indeed, it is likely to result in the opposite occurring. From their perspective a forced move to the State system will cause each of them considerable pain for no gain".

1157. The submissions opposing the proposed recommendation will be later analysed in this chapter.

9.5.2 Submissions Supporting Proposed Recommendation 69

1158. The ECCWA supported the proposed recommendation although it did not elaborate on its position.

1159. So too, did the ELC. It argued "…the dual system of employment laws that exists in Western Australia can be very difficult for local government employers and employees to navigate…". It said: "In ELC's view, there is therefore merit in treating all local government employers and employees as State system employees, because it will improve certainty and reduce confusion. Additionally, there is some logic in local government employers and employees being in the State system rather than the national system because local government entities are created through State, rather than federal, legislation."

1160. As mentioned earlier, the WASU and the other unions that made submissions upon the Interim Report strongly supported proposed recommendation 69. The WASU said: "Local government was not intended to be governed by the Commonwealth Government and should ultimately be regulated by State Governments." The WASU also submitted that "as per the *Constitution Act 1889* (WA) local Councils and Shires are part of the arm of government constituted by "elected local government bodies" which are controlled by the provisions of the WA *Local Government Act*…" (footnote omitted). The submission was expressly supported by the AMWU, United Voice and the WAPOU.

1161. UnionsWA said it "joins with our affiliate, the ASU [WASU], in supporting all Local Government employers and employees being regulated by the WA Industrial Relations system."

9.5.3 Proposed Recommendations 70 and 71

> 70. To facilitate recommendation 69, the State Government introduce legislation into the State Parliament consistent with s 14(2) of the FW Act that declares, by way of a separate declaration, that each of the bodies established for a local government purpose under the *Local Government Act 1995* (WA) is not to be a national system employer for the purposes of the FW Act (the declaration).
>
> 71. If the declaration is passed by the State Parliament, the State expeditiously attempt to obtain an endorsement under s 14(2)(c) and s 14(4) of the FW Act by the Commonwealth Minister for Small and Family Business, the Workplace and Deregulation, to make the declaration effective (the endorsement).

1162. Some submissions were also made specifically in response to proposed recommendations 70 and 71, about the State Government introducing legislation into the State Parliament consistent with s 14(2) of the FW Act to declare, by way of a separate declaration, that each of the bodies established for a local government purpose under the LG Act is not to be a national system employer for the purposes of the FW Act.

1163. WALGA opposed proposed recommendations 70 and 71, but said that the method outlined in recommendations 70 and 71 to facilitate the implementation of proposed recommendation 69 is preferred to any attempt to remove the corporate status of local governments.

1164. UnionsWA supported recommendations 70 and 71, arguing that "Local Government was not intended to be governed by the Commonwealth Government, as per section 52 of WA's *Constitution Act 1889.*"

9.5.4 Proposed Recommendation 72

> As a counterpart to recommendation 70, the State enact legislation that has the effect, upon the endorsement, of deeming local government Federal industrial awards, agreements or other industrial instruments to be State awards, agreements or other industrial instruments for the purposes of the 2018 IR Act.

1165. Proposed recommendation 72 was a counterpart to recommendation 70, to the effect that the State enact legislation that has the effect, upon the endorsement, of

deeming local government Federal industrial awards, agreements or other industrial instruments to be State awards, agreements or other industrial instruments for the purposes of the Amended IR Act.

1166. Consistently with its overall position, WALGA did not support proposed recommendation 72. It said, however, that in the event proposed recommendation 69 was implemented "…WALGA would support the deeming of Federal enterprise agreements to be State agreements as the counterpart to recommendation 70, however, opposes the blanket deeming of the Federal Local Government Industry Award 2010 to be a State award and further opposes the deeming of instruments taking effect upon endorsement…".

1167. WALGA helpfully provided a submission of the steps it thought should occur prior to local government moving into and being regulated by the State system, if that was to occur, as follows:

(a) The introduction of the State employment standards, as referred to in Chapter 6 of the Interim Report and agreements being amended to incorporate the SES in place of the NES.

(b) "Award modernisation".

(c) A revision of the enterprise bargaining requirements in the IR Act to accommodate agreements in which the parties are the employer and employees, with the option of the union being a party.

1168. WALGA then said: "Having introduced the SES, modernised the State awards and considered the bargaining requirements under the State system, it would then follow that the transition of Local Government to the State system and associated deeming of industrial instruments would be streamlined, reducing the cost and operational impact on Local Governments." The Review notes at this point that a consideration of the enterprise bargaining provisions of the IR Act is not included in the Terms of Reference, so the Review does not comment in any way on that aspect of the WALGA submission.

1169. UnionsWA also did not support the proposed recommendation, but for different reasons. It submitted, local government should have two separate and distinct State awards covering the industry, rather than any "deemed" inferior national modern award. The UnionsWA submission said it accepted the practical need for agreements and other industrial instruments from the Federal system to be deemed as State instruments as part of a transition process from the Federal to the State system. However, it did not support the deeming of Federal industrial awards to be State awards. UnionsWA submitted the national *Local Government Industry Award 2010* in the Fair Work system is inferior to the current Local Government State Awards, namely the *Local Government Officers' (Western Australia) Interim Award 2011*; and the *Municipal Employees (Western Australia) Interim Award 2011*.

1170. It said "…UnionsWA supports the ASU's [WASU's] proposal for a Local Government transition process similar to that of Queensland. That involved recognising current registered industrial instruments, such as Enterprise Agreements, within the state system. As each agreement expired, they would be replaced with state agreements. Those councils without Industrial agreements currently should simply transition into the WA system."

1171. The WASU said: "Negotiating Enterprise Bargaining Agreements in Local Government under the Fair Work Act can be problematic and causes endless hostility in the workplace … Local government in Western Australia is a very good example of how the Fair Work system does not work."

1172. The WASU submitted: local government should have two separate and distinct awards covering the industry. The reasons for two local government industry awards in Western Australia include:

(a) Historically local government in Western Australia, as in most States, has had at least two awards covering their employees.

(b) The modern *Local Government Industry Award 2010* is a "far inferior Award" to the current local government State awards and it is also a combined award that the WASU submits is not fit for purpose.

1173. The submission developed: "Historically, Local Government in Western Australia has had two awards covering the broad spectrum of roles. *Local Government Officers' (Western Australia) Interim Award 2011* and *Municipal Employees (Western Australia) Interim Award 2011* were originally Federal Awards from 1999 until they were replaced by the modern *Local Government Industry Award 2010*, after a transitional period that ended in March 2011. Both State awards have continued to be used by Local Government Councils and Shires operating in the State IR system for the last 7 years. During that time no disputes have arisen from these Awards and this has ensured relative industrial harmony in councils under the state system."

1174. The WASU therefore proposed that there should be two Western Australian local government awards as follows:

(a) *Local Government Salaried Officers Award 2018* - proposed to cover all local government officers including (generally inside) office workers and salaried officers.

(b) *Municipal Employees Award 2018* - proposed to cover wage based employees generally working outdoors and with trade qualifications.

1175. The WASU proposed a "…process, similar to the Local Government transition process that applied in Queensland, recognising current registered industrial instruments, such as Enterprise Agreements, in the State system and as each agreement expires replacing them with State agreements. All councils without Industrial agreements would simply transition into the WAIRC…".

1176. The WASU said it was "…opposed to any transitioning (or deeming) of federal modern awards into the State IR system." The WASU submitted the following State awards should also be maintained:

(a) *Aboriginal Communities and Organisations Western Australian Interim Award 2011*.

(b) *Crisis Assistance Supported Housing Industry Western Australian Interim Award 2011.*

(c) *Social and Community Services (Western Australian) Interim Award 2011*.

(d) Various State private sector "Clerks awards".

1177. The WASU said that with the WAIRC it "…should be able to vary the scope of the above awards to ensure all employees of State System employers are ultimately award covered."

1178. The ELC said it did not have any particular views on the exact mechanisms by which all local government employers and employees could be regulated by the proposed State industrial relations system and therefore did not make any comments on proposed recommendations 70 to 73.

9.5.5 Proposed Recommendation 73

If the endorsement is obtained, a taskforce be assembled and chaired by a representative of DMIRS and include a representative of the Department of Local Government, Sport and Cultural Industries, the WAIRC, the Western Australian Local Government Association, the Western Australian Municipal, Administrative, Clerical and Services Union of Employees, the Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth, the State Solicitor's Office and a nominee of the President of the Law Society of Western Australia, to oversee, monitor, assist, facilitate and progress the transition of local government employers and employees between the Federal and State industrial relations systems.

1179. Proposed recommendation 73 was about a taskforce. WALGA said it would support the establishment of a taskforce as proposed by recommendation 73 with a variation to the taskforce composition. WALGA said an additional two positions should be given to WALGA nominated local government representatives, and that consideration be given to appointing a representative from CCIWA.

1180. UnionsWA did not support the proposed recommendation. It submitted:

> UnionsWA does not support the creation of a Local Government taskforce of various Departmental and representative organisations. Such a taskforce will only prolong the period of transition out of [the] Federal System.
>
> …
>
> UnionsWA agrees with the ASU [WASU] that such a Taskforce would be expensive [to] both the Government and the union. If the taskforce was to proceed then the ASU [WASU] would require additional funding from the State Government to engage in the Taskforce process.

1181. As stated in the UnionsWA submission, the WASU did not support this recommendation. The WASU said it would only prolong the period of transition of Federal system employers and enterprise agreements to the State system. It would also "come at considerable cost" to both the Government and the union. It argued: "Given the budgetary constraints brought on by the previous Government's spending spree, we think that this extravagant talk fest would be a waste of taxpayers' money." If the taskforce was to proceed then the WASU wanted funding from the State Government to engage in the process. Overall, it said the WASU "does not see the value of a task force once the legislation has been drafted and the legislation should be written based on this report."

9.6 Analysis of Issues

9.6.1 A Restatement of the Issues

1182. The Term of Reference contains a question about whether local government employers and employees in Western Australia "should" be regulated by the State industrial relations system. In the context, to some extent this is a wrapped up question. There is the legal aspect of – is the law such that local governments should be regulated by the State industrial relations system. And there is also a value-laden aspect. This aspect too, has nuances. The nuances include political perspectives, a sense of what is right for the State as a body politic and participant in the Australian federation, issues of utility and pragmatism, including the concept of whether it is "better" for these employers or employees to be in the Federal or State industrial relations system. That question itself is of course, value-laden. It depends on perspectives and political paradigms. That is reflected in the submissions the Review has received from WALGA, the City of Canning and the four local governments as against the WASU and UnionsWA. The latter see that the State system is better for their employee members. The former see the Federal system in that light. The Review suspects that says more about the present content of the laws than any particular views about federalism; but that is not necessarily a criticism; but it is maybe more a political reality. UnionsWA and the WASU point understandably to the inferior terms and conditions that they assert are comprised in the present Federal award as opposed to the interim State awards that could apply to local

governments; and the difficulties of bargaining with local government employers under the FW Act. In contrast WALGA and the four local governments point to the benefits of being able to directly bargain with a workforce without, in all instances at least, bargaining with a union. Then there are the issues of utility that featured in the submission on behalf of the four local governments; that can be colloquially expressed in the question, "why would you bother"? The question is punctuated with assertions of disruption, uncertainty and more seriously the spectre of job losses or loss of services. The answer to that question is probably, because the legal engagement of local government by the FW Act is uncertain, as are the enterprise bargaining agreements that presently cover employment conditions, local government is part of the body politic of the State and so "should" be subject to the industrial relations system of the State. One only has to list these opposing viewpoints to see that they are spiced with political perspectives and considerations. This is why, as will be later outlined, the Review is of the opinion that, given the present state of the law, the answer to the question posed in the Term of Reference is ultimately a political one for the Government to assess and decide upon.

9.6.2 The Legal and Constitutional Issue

1183. As set out in detail in the Interim Report, the question of whether local government employers and employees should be regulated by the State system is significantly wrapped up in the question of whether they can, or must be. That is because of the terms of the *Commonwealth Constitution* and the contents of the FW Act. Due to the contents of s 51(xx), and s 109 of the *Commonwealth Constitution* and the content and operation of the FW Act that "covers the field" of regulation of the employment of "constitutional corporation" employers and employees, if a local government within Western Australia is "a constitutional corporation", then the Western Australian Government does not have any legislative power to effectively or operatively regulate the employment of local government employers and employees.

1184. Therefore, the threshold constitutional question is of fundamental importance to the whole issue.

1185. As to that, as set out earlier, the Interim Report set out relevant jurisprudence upon the issue.

1186. The submissions in response to the Interim Report and in particular that from WALGA and Hall & Wilcox questioned the outcome of the analysis in the Interim Report. They asserted that many, if not most, of at least the larger local governments in Western Australia would, on a proper application of the relevant legal principles, be found by a court or industrial commission to be constitutional corporations. As set out earlier, the Hall & Wilcox submission about the four local governments was somewhat supported in this contention by the findings of the AIRC in each case of the local governments that they were constitutional corporations. Additionally, as stated, in three of those instances this was via the certification of an agreement under the WR Act which was made with a union. That is, both parties must have agreed the local government was a constitutional corporation. As also stated earlier, these findings are not binding, and in particular are not binding on the Federal Court or the High Court.

1187. Given however the nature and extent of the submissions provided by Hall & Wilcox and WALGA, the Review has given further consideration to the threshold issue of whether local governments in Western Australia are or can be constitutional corporations. This is a question to which, at present, there is no straightforward answer. Usually, as will be later reiterated, courts and industrial commissions apply an "activities test", to assess whether a corporation trades sufficiently to be described as a trading corporation. It is as yet not clear if, and if so to what extent that test might be moulded to take into account that a local government is principally a corporation with legislative and executive government roles and responsibilities. The latter issue has wrapped up within it some aspects of "federalism" that the Review will later examine.

1188. On the legal question, academics and commentators have certainly countenanced the proposition that local governments may be constitutional corporations. In

Creighton & Stewart's Labour Law,[316] the authors, in discussing the scope of the Federal system, say the following:

> 6.21 There has been similar uncertainty over the status of local councils. These are corporations that typically engage in a wide range of functions and activities, some of which undoubtedly involve generating income through trading – for example, charging fees for entry to swimming pools or for services such as rubbish collection. In *AWU (Queensland) v Shire of Etheridge Council* Spender J appeared to suggest that local councils should never be regarded as trading corporations, on the basis that their 'fundamental functions' are governmental. But the reasoning adopted to reach this conclusion, as in the *Aboriginal Legal Service* case, strays perilously close to the approach rejected in cases such as *WA Football League.* As Gageler J emphasised in *CEPU v Queensland Rail*, the prevailing authorities must be taken to preclude "an inquiry into a corporation's 'true character', to be evaluated by reference to that corporation's characteristic activity".
>
> 6.22 That said, it is plainly possible that the High Court may revert to a more purposive approach that would potentially exclude local councils, universities and a large number of other not for profit organisations from being regarded as trading corporations. The possibility of reconsidering the activities test was explicitly left open in the *Work Choices cases*. In *Queensland Rail* the majority judges were likewise content to conclude that the Authority was a trading corporation because (a) it had been established with the specific statutory purpose of operating as a "commercial enterprise", and (b) it engaged in a trading activity by supplying labour to a related entity. Whether either or both of these considerations were "necessary or sufficient" to that conclusion was deliberately left unresolved.[317]

1189. These paragraphs contain references to the federalism argument of Spender J in *Etheridge Shire Council,* the application of the "activities test" to local government and the reasoning of the High Court in *Queensland Rail,* all of which will be considered in greater detail below.

1190. Professor Greg Craven in *Industrial Relations, the Constitution and Federalism: Facing the Avalanche*[318] said the following after the enactment of the Work Choices legislation, the possible use of the Commonwealth's corporations power and local governments:

> Even more remote applications may be imagined, and presumably will occur readily to the Commonwealth. One possibly might involve the extensive regulation of State local

316 *Creighton & Stewart's Labour Law,* 6th ed, A Stewart, A Forsyth, M Irving, R Johnstone and S McCrystal, The Federation Press, 2016.

317 Footnotes omitted; however, the citations for *Etheridge Shire Council*, and the *Aboriginal Legal Service* cases have been earlier set out. The reference to WA Football League is a reference to *R v Federal Court of Australia; ex parte WA National Football League* (1979) 143 CLR 190. The reference to *CEPU v Queensland Rail* is to *CEPU v Queensland Rail* (2015) 256 CLR 171, with the paragraphs cited being [70] and [43]. The reference to the Work Choices case is to *New South Wales v Commonwealth* (2006) 229 CLR 1 at [55], [58].

318 [2006] UNSWLawJI 11; (2006) 29 (1) University of New South Wales Law Journal 203.

> governments, all of which (like universities) take a corporate form under State legislation, and all of which could be viewed as trading corporations by reference to such activities as the running of municipal pools, child care centres and so forth. It may well be that section 51(xx), appropriately interpreted in the WorkChoices case, would permit the regulation of a wide range of the activities of local government, extending well beyond those activities that are loosely connected with trade. If this were so, the Commonwealth would be provided with a potent weapon with which to influence social and policy outcomes within areas otherwise falling within the exclusive competence of the States.

1191. Linked to these observations is what the majority later said in the *Work Choices* decision at [178], about the amplification of the scope of the corporations power in s 51(xx) of the *Commonwealth Constitution*. Justice Spender, in Etheridge Shire Council also relied upon this, in the context of his Honour's argument that there would be an upsetting of the federal balance if the corporations power extended to making laws with respect to local governments. The majority in the *Work Choices* decision accepted what was said by Gaudron J in *Re Pacific Coal Pty Ltd; ex parte Construction, Forestry, Mining and Energy Union:*[319]

> I have no doubt that the power conferred by s 51(xx) of the Constitution extends to the regulation of the activities, functions, relationships and the business of a corporation … the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business.

1192. The federal balance aspect of the reasoning of Spender J was referred to in the submission by Hall & Wilcox, that cited an article by Mr Christopher Tran.[320] That article considered s 51(xx) of the *Commonwealth Constitution* and local governments in particular. The article made the point that a difficulty in the reasoning of Spender J in *Etheridge Shire Council*, together with the acceptance of his Honour's reasoning on appeal was "…that they appear to assume a concept of 'federal balance' without working through in detail how characterising Etheridge Shire Council as a trading corporation would affect the State in a constitutionally impermissible manner. Such

319 (2000) 203 CLR 346 at 375 (83).

320 Tran, C (2011) 'Trading or Financial Corporations under section 51(xx) of the Constitution: A Multifactorial Approach', *Monash University Law Review* (Vol 37, no. 3)

an imprecise approach is contrary to the majority judgment's criticism of 'federal balance' arguments in Work Choices".[321]

1193. In the appeal against the decision of *Etheridge Shire Council* which was about the costs order, the joint reasons of Marshall and Ryan JJ endorsed the conclusion of Spender J on the trading corporation issue. The judgment included these passages:

> [6] That question, his Honour correctly perceived, was to be answered by reference to the "activities test" erected by the authorities, principally including *R v Judges of the Federal Court of Australia; Ex parte Western Australian National Football League (Incorporated) Adamson's Case* (1979) 143 CLR 190 and its predecessor, *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533 and, as well, the more recent pronouncement by the High Court in *NSW v Commonwealth (The Work Choices Case)* (2006) 229 CLR 1. At [85], then, his Honour said;
>
> > I therefore proceed to enquire whether the Etheridge Shire Council is a trading corporation or a financial corporation, by considering whether, on the evidence, "the predominant and characteristic activity of the Etheridge Shire Council is in trading, whether in goods or services", or whether "the predominant and characteristic activity of the Etheridge Shire Council is in finance".
>
> [7] His Honour's analysis of the evidence before him showed that those questions, however formulated, could only be answered in the negative. First, by ss 24 and 25 of the Local Government Act 1993 (Qld), the Council was empowered to make local laws which then, by force of s 896 of that Act, had the force of state laws upon commencement. The Council therefore "has extensive legislative and executive functions of a governmental kind in relation to the relevant local government area", which itself was a contra-indication that trade or commerce was the predominant or characteristic activity of the Council. Secondly, although accepting, in reliance on *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 per Dixon J, at 381, that "trade" was a term to be broadly defined, his Honour held that the trading activities of the Council — like the provision of hostel accommodation, office space rental, and the sale of halls and of water — were not truly directed to profit-making, as the activities of trading or financial corporations invariably are: see *Adamson's Case*, supra, per Mason J, at 235. Those activities, his Honour considered, were more properly to be seen as extensions of the governmental powers or functions of the Council; it was no coincidence that almost all of those activities were conducted at a loss.

1194. In his article Mr Tran made the point that local governments engage in a wide variety of activities some of which have a trading character and which suggests their characterisation as a trading corporation. However, Mr Tran also referred to evidence that at Federation, municipal corporations were intended to be excluded

---

[321] The footnotes in this passage are omitted, however Mr Tran cited the appeal with respect to costs in *Etheridge City Council* reported at [2009] 178 FCR 252 at [7] and said also that "a judge adopting this line of reasoning should explain how characterising a corporation as a trading corporation impairs the constitutional integrity of the states in the manner discussed in *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 *(Melbourne Corporation)* and *Austin v Commonwealth* (2003) 215 CLR 185."

from the scope of s 51(xx) of the *Commonwealth Constitution*. This was also referred to in the reasons of Spender J in *Etheridge Shire Council*. Mr Tran cited the official report of the National Australasian Convention debates in 1897 where Sir Edmund Barton[322] indicated that a purpose of including the word "trading" in what became s 51(xx) of the *Commonwealth Constitution* was so that "municipal corporations" were excluded from the scope of the section. Mr Tran also referred to text writers in 1850, 1874 and 1902[323] who "treated municipal corporations separately from trading corporations". Mr Tran proposed in his article that there be a multifactorial test in determining whether a local government was a trading corporation.

1195. Mr Tran referred to it being an ambivalent factor that municipal corporations have a role in State government, "except to the extent that this observation informs the argument that municipal corporations were intended by the framers to be excluded from s 51(xx). It is not clear that merely characterising a municipal corporation as a trading or financial corporation will thereby prevent the states from functioning in the *Melbourne Corporation* sense, and so federalism has no direct role in the analysis".[324]

1196. The *Melbourne Corporation* principle was part of what underpinned the observations of Spender J in *Etheridge Shire Council* about the Commonwealth/State balance. On this issue, Mr Tran said:

> It might be possible, as Spender J did in *Etheridge Shire Council*, to reason that characterising an entity as a trading or financial corporation impairs the capacity of a particular state to function, and thus to conclude that the corporation should not be so characterised. However, this would be a peculiar use of the *Melbourne Corporation* principle. That principle has been applied to invalidate a law otherwise within power under s 51, rather than affecting the interpretation of a legislative head of power itself. Such a use of the principle would instead resemble the reserved powers doctrine discarded in *Amalgamated Society of Engineers v Adelaide Steamship Company Ltd*. Moreover, it is not unusual for an entity to have to comply with interlocking Commonwealth and state legislation and to keep itself up to date as to what legislation applies to it. Therefore, the *Melbourne Corporation* principle should not ordinarily affect the characterisation of a corporation. The proper use of that principle is after a corporation is found to be a constitutional corporation, to determine whether Commonwealth legislation in its application to that corporation is valid. One would

322 At [793]-[794].

323 Tran, C (2011) 'Trading or Financial Corporations under section 51(xx) of the Constitution: A Multifactorial Approach', *Monash University Law Review* (Vol 37, no. 3) 33-35.

324 *City of Melbourne v Commonwealth* (1947) 74 CLR 31.

> suppose that it is the application of a statute to a corporation that will affect a state's autonomy and not a corporation's mere status as a trading or financial corporation alone.[325]

1197. The *Melbourne Corporation* principle, was described by the majority in the most recent High Court consideration of it in *Fortescue Metals Group Limited v Commonwealth*[326] as follows:

> … the *Melbourne Corporation* principle requires consideration of whether impugned legislation is directed at States, imposing some special disability or burden on the exercise of powers and fulfilment of functions of the States which curtails their capacity to function as governments.

1198. Considered in that way, it is difficult to see that the *Melbourne Corporation* principle could be offended by just characterising local governments as constitutional corporations. It may in a particular case however, focus attention upon whether specific legislation of the Commonwealth that might be directed to local governments could offend the implied limitation upon Commonwealth power within the *Commonwealth Constitution*. For example, legislation that sought to abolish local governments, or set their rates or prescribe how they should conduct their elections or the make up of their governing bodies or the basis upon which they should exercise their legislative or executive powers might run into serious *Melbourne Corporation* principle arguments.

1199. Another aspect of the federal balance issue is its lack of an entrenched position for local government within the *Commonwealth Constitution*. This was referred to in some depth in the report by Professor Anne Twomey, entitled *Local Government Funding and Constitutional Recognition*[327] which looked specifically at the constitutional basis for the Federal funding of local government in Australia.

1200. As stated at p 6 of Professor Twomey's report:

> The Commonwealth Constitution establishes Australia's federal system. It is a classic dualist federal system, in which powers and functions are allocated to two levels of

---

325 Footnotes omitted, however Mr Tran observed in a footnote that by analogy it would be absurd to find that the *Melbourne Corporation* principle could operate to conclude that a particular building was not a lighthouse under s 51(vii) to avoid the application of Commonwealth laws to the building. Mr Tran also provided the citation of the Engineers case being (1920) 28 CLR 129.

326 (2013) 300 ALR 26 at [130].

327 Constitutional Reform Unit, Report No. 3, January 2013.

government, with local governments being 'mere creatures of states, existing at their will and having no independent relations with the federal government'.[328]

1201. As stated on p 7 in Professor Twomey's report:

> Local government therefore has no status or powers of its own. It does not exist as a spontaneous or independent creation of the people. Its existence and powers are derived from State legislation. Local government is a subordinate body of the State, exercising its powers by delegation from the State and under the State's supervision and authority.

1202. As noted in the Interim Report at [1423], in Western Australia s 52 of the *Constitution Act 1889* (WA) provides a positive duty on the State Government to maintain a system of local governing bodies.

1203. Professor Twomey referred to s 52 and s 53 of the *Constitution Act*. The latter provides:

> Section 52 does not affect the operation of any law —
>
> (a) prescribing circumstances in which the offices of members of a local governing body shall become and remain vacant; or
>
> (b) providing for the administration of any area of the State —
>
> (i) to which the system maintained under that section does not for the time being extend; or
>
> (ii) when the offices of all the members of the local governing body for that area are vacant;
>
> or
>
> (c) limiting or otherwise affecting the operation of a law relating to local government; or
>
> (d) conferring any power relating to local government on a person other than a duly constituted local governing body.

1204. Professor Twomey said that s 53 "… undercuts s 52 … [but] … this presumably covers the dismissal of councillors and the continuation of any vacancy in their offices while administrators are in place".

1205. Professor Twomey also noted that although local government is not explicitly recognised under the *Commonwealth Constitution*, it has been held to fall within the meaning of the term "State", in the *Commonwealth Constitution* in some decisions and for some purposes. Therefore, according to Professor Twomey, local

328 Citing N Steytler, 'Comparative Conclusions' in N Steytler (ed) *Local Government and Metropolitan Regions in Federal Systems*, McGill-Queens University Press, Montreal, 2009, 393.

government is subject to the same obligations as the States under the *Commonwealth Constitution* and receives the same implied protections as the States. In support of these propositions, Professor Twomey cited *Municipal Council of Sydney v The Commonwealth*[329] and *Melbourne Corporation v Commonwealth*.[330] Professor Twomey said in *Municipal Council of Sydney*, it was decided a local government could not impose rates upon Commonwealth property because of the application of s 114 of the *Commonwealth Constitution* that prohibits a State from taxing Commonwealth property. Professor Twomey said, relevantly, the *Melbourne Corporation* principle was established in a case about the Commonwealth affecting the capacity of a local government to enter into banking transactions.

1206. Professor Twomey examined the possible use of the corporations power to constitutionally support the Federal Government's "Road to Recovery Program" and in that context countenanced the prospect that local governments may be constitutional corporations. Although doubtful of the use of the corporations power for this purpose, Professor Twomey said:

> Further, even amongst those local government bodies that have a corporate status, not all would be regarded as 'trading' or financial corporations. In relation to each local government body, it would depend upon whether the 'trading activities form a sufficiently significant proportion of its overall activities so as to merit its description as a trading corporation'. This may well differ between council and council, and in relation to the same council over a period of time. For example, in *Australian Workers Union, Queensland v Etheridge Shire Council*, Spender J of the Federal Court held that the Etheridge Shire Council was not a constitutional corporation because trading was not its predominant and characteristic activity and did not form a sufficiently significant proportion of its overall activities.[331]

1207. On that legal question, the Review has also had cause to reconsider the IAC decision in *City of Mandurah v Hull*.[332] That was a decision in which there was a question of whether the jurisdiction of the WAIRC under the IR Act, over an alleged unfair dismissal, had been ousted because the employment of the employee was covered by a Federal award. Justice Anderson, with whom Kennedy J agreed said[333] that the proceedings before the WAIRC at first instance "appeared" to have been conducted

329 (1904) 1 CLR 208.
330 (1947) 74 CLR 31.
331 Footnotes omitted however, the quotation in the passage is from *WA National Football League* per Mason J at 233.
332 (2000) 100 IR 406, [2000] WASCA 216.
333 [32].

on the basis that the City of Mandurah was a financial corporation or a trading corporation and therefore a "constitutional corporation" within the meaning of 170CB of the WR Act. Anderson J then said:[334]

> [33] The question whether the City of Mandurah is a "financial corporation" or a "trading corporation" might not be an easy question to answer. It is, of course, a question of fact. In *Burrows v Shire of Esperance* (1998) 86 IR 75, the municipality was held to be a trading corporation. In *Mid Density Development Ltd v Rockdale Municipal Council* (1992) 39 FCR 579 and *Jazabas Pty Ltd v City of Botany Bay Council* [2000] NSWSC 58, the municipalities were held not to be trading corporations. The question does not seem to have been explored before the Commission. I must say, I do not think it is self-evident that a municipality such as the City of Mandurah is either a financial corporation or a trading corporation although, depending upon its activities, it may be.

1208. The submission from Hall & Wilcox asserted that the four local governments were trading corporations. Although some relevant information was provided, the Review is not in any position or really entitled to perform any rudimentary adjudication about the issue. It is noted however that the Hall & Wilcox submission does rely upon an assessment of the activities engaged in by the four local governments and the revenue raised from the activities, somewhat divorced from the status of the four local governments as government bodies who legislate and perform an executive governmental role in Western Australia. That issue will be later referred to by reference to *Wentworth Shire Council v Bemax Resources Ltd,*[335] a decision of Rein J of the Equity Division of the NSW Supreme Court.

1209. As set out earlier the Hall & Wilcox submission relied upon the decision in *Bankstown Handicapped Children's Centre Association*. As described in *Creighton & Stewart* at 6.20, the decision may be contrasted to that of the *ALS* decision, even though the "court applied essentially the same principles as its West Australian counterpart". *Creighton & Stewart* say that despite this, it seems "impossible to reconcile the approaches taken in the two decisions". As is there noted by the authors, the Bankstown Handicapped Children's Centre provided welfare, support and child care services pursuant to contracts with two government departments. It was decided that although the Association's activities could be characterised as the provision of

334 [33].
335 [2013] NSWSC 1047, (2013) 278 FLR 264.

public welfare services this did not detract from the essentially commercial nature of its relationship with the government. On that basis it was decided the Association was substantially engaged in trade, quite apart from the minority of its income that it derived from fees received directly from clients.

1210. Another decision of some relevance in considering the breadth of the corporations power is *United Firefighters' Union of Australia v Country Fire Authority*.[336] The Country Fire Authority was held to be a constitutional corporation although it was not predominantly concerned with trading or profit and was in effect an emergency services provider that generated revenue from the supply of various safety related goods and services, as well as property rentals.[337] The Full Federal Court concluded:

> [135] We do not accept that the primary judge applied the wrong test, as contended for by the CFA. An important question is whether the corporation's trading activities form a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation: see *Adamson* at 233; per Mason J. The same approach was taken in *State Superannuation Board* at 305; per Mason, Murphy and Deane JJ where their Honours referred to the nature and the extent or volume of a corporation's activities needed to justify its description as a [trading] corporation …
>
> [136] Answering that question does not simply involve the application of a formula or equation nor the substitution of percentages or other measures of monetary value as between the activities found to be trading activities and the activities not so found. The purpose for which a corporation is formed is not the sole or principal criterion of its character as a trading corporation and the Court looks beyond the "predominant and characteristic activity of the corporation". We refer again to the nature and the extent or volume of a corporation's activities needed to justify its description as a trading corporation. The relationship between the activities relied upon and the overall activities of the corporation, and the extent of those activities in comparison with the extent of the corporation's activities overall are relevant. In our opinion, this was the approach taken by the primary judge.
>
> [137] If a corporation, carrying on independent trading activities on a significant scale, is properly categorised as a trading corporation that will be so even if other more extensive non-trading activities properly warrant it being also categorised as a corporation of some other type: see *State Superannuation Board* at 304. In our view, this proposition answers in large part the submissions put as to the public purpose of the CFA. As we have said, the issue is one of characterisation and is a matter of fact and degree.

336 (2015) 228 FCR 497.

337 See *Creighton & Stewart* at 6.18.

1211. It is also relevant to reconsider the decision of *Queensland Rail*, referred to in the Interim Report at [1547]-[1550][338] and referred to earlier as part of the *Creighton & Stewart* analysis of local governments in this context. As indicated in the Interim Report, the plurality in *Queensland Rail* did not find it necessary to decide whether a local government, if part of the body politic of a State could be a trading corporation or not. However, there were observations made by Gageler J that may tend to support the submission made by Hall & Wilcox. At [69] his Honour referred to two ways in which the constitutional description of trading was capable of applying to a corporation. This was by reference to its trading purpose or by reference to its trading activity. At [70] his Honour rejected an argument put to the Court that attempted to introduce as a substitute to an investigation about trading, an inquiry into a corporation's true character to be evaluated by reference to the corporation's characteristic activity. His Honour said the "…constitutional description of trading is capable of being applied to a corporation either by reference to its substantial trading purpose (irrespective of activity) or by reference to its substantial trading activity (irrespective of purpose)…".

1212. The vexed question remains how that will be applied to a local government that does have legislative and executive governmental powers and principally operates as a tier of the State government, as local governments do under the LG Act.

1213. The decision of *Wentworth Shire Council*, cited above, gives some further indication of how the trading activities of a local government might be construed within the context of being a local government. At issue was whether the Wentworth Shire Council was a trading corporation for the purposes of the *Trade Practices Act 1974* (Cth). Justice Rein said:

> [94] The test to determine whether a corporation is a trading or financial corporation is laid down in The Queen v Judges of the Federal Court of Australia: Ex parte WA National Football League [1979] HCA 6; (1979) 143 CLR 190 ("Adamson's case") and State Superannuation Board v Trade Practices Commission [1982] HCA 72; (1982) 150 CLR 282. In the latter case, the plurality said at pp 304–305:
>
> > Secondly, the judgments of the majority in *Adamson* make it clear that, in having regard to the activities of a corporation for the purpose of ascertaining

338 *Communications, Electrical, Electronic, Energy, Information, Postal Plumbing and Allied Services Union v Queensland Rail* (2015) 256 CLR 171; [2015] HCA 11.

> its trading character, the court looks beyond its "predominant and characteristic activity" (cf at 213 per Gibbs J). Barwick CJ (at 208) spoke of making a judgment "after an overview" of all the corporation's current activities, the conclusion being open that it is a trading corporation once it is found that "trading is a substantial and not a merely peripheral activity". Mason J said that it "is very much a question of fact and degree" (at 234), having earlier stated that the expression is essentially: … a description or label given to a corporation when its trading activities form a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation**…**
>
> (Emphasis added)

[95] The issue (as Davies J summarised it in *Mid Density Development Pty Ltd v Rockdale Municipal Council*) is:

> [W]hether Rockdale's trading activities or financial activities formed a sufficiently significant proportion of its overall activities as to justify its description as a trading or financial corporation. The adjectives "significant" and "substantial" were considered in the context of characterization in *Deputy Commissioner of Taxation (Cth) v Stewart* [1984] HCA 11; (1984) 154 CLR 385 at 390, 397 and 399–400. The activities must be of a sufficiently significant or substantial scale as to confer the character of "trading" or "financial" upon the corporation. The relationship between the activities relied upon and the overall activities of the corporation, and the extent of those activities in comparison to the extent of the corporation's activities overall are relevant.
>
> (Emphasis added)

[96] The view of the majority in *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533 ("*St George County Council*") that the test of whether a corporation in a trading corporation is answered by examination of the purpose for which the corporation was established was effectively rejected when the views of Barwick CJ, in dissent, in *St George County Council* were preferred by the plurality in *Adamson's case* and see also *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 at p 304. The test favoured by Barwick CJ in *St George County Council* and by the plurality in *Adamson's case* requires examination of the activities of the corporation at the time of the conduct in question: see the discussion by Spender J in *Australian Worker's Union of Employees, Queensland v Etheridge Shire Council* (2008) 171 FCR 102 pp 118–119 and *Commonwealth v Tasmania ("Tasmanian Dam Case")* (1983) 158 CLR 1, 155 per Mason J. The Solicitor-General noted in his written submissions that the Attorney-General, as a matter of formality, "reserves the right to challenge the principles established in these cases".

[97] There was agreement that the test applied by Davies J in *Mid Density Development Pty Ltd v Rockdale Municipal Council* derived from Mason J's judgment in *Adamson's case* (set out in [95] above) is the test that I have to apply.

[98] There are cases in which organisations that might not, from their nature, appear to be trading corporations such as the RSPCA, the Red Cross and the University of Western Australia, have been held to be trading corporations for the purpose of the TPA but they were all held to be such based on the extent of their substantial engagement in profit making activity: *Orion Pet Products v Royal Society for Prevention of Cruelty to Animals (Vic) Inc* (2002) 120 FCR 860; *E v Australian Red Cross Society* (1991) 27 FCR 310; *Quickenden v O'Connor* (2001) 109 FCR 243.

[99] Mr Galasso drew my attention to a number of pages of the Council's Annual Report for 2004–2005 (Ex A4, pp 1403–1462) and Annual Financial Statements 2004/2005 (Ex A4, pp 1463–1544).

[100] The pages to which he drew attention contain references to water supply (Ex A4, p 1411), an aerodrome (Ex A4, p 1412) and two medical practices which practices show a significant profit (Ex A4, p 1417). These areas of activity seem to me to be connected with the promotion of community needs and not to be of a commercial or trading character. In relation to the water supply, Mr Galasso referred to s 610A of the LGA which he submitted makes water supply a business activity. I do not accept that contention. Section 610A only makes the carrying out of a water supply (or sewerage service) a business activity if it is not a service provided on an annual basis for which the Council's authorised or required to make an annual charge under s 501. Section 501 permits the Council to make an annual charge for water and no attempt was made to establish that the water supply with which the annual report is dealing is one for which a charge could not be made under s 501.

[101] Mr Robertson resisted the contention that the Council was a trading corporation. Mr Sexton contended that there was insufficient evidence to make a finding in relation to the trading activities of the Council (T290.37–44).

[102] Reference was made by Mr Galasso to the Council's operating surplus of $2.463M (Ex A4, p 1419). The fact that Council has an operating surplus does not make the local council a trading corporation any more than a state government surplus (if one could be achieved) makes that state government a trading corporation. Reference is made in the Annual Report to private works and an income of $98,485 (Ex A4, p 1425). This could be relevant, at least if coupled with other more significant amounts, but, with the exception of investment revenue of $215K and an expense of $207K for business undertakings (Ex A4, p 1534) which only yielded revenue of $181K, such other amounts have not been identified. With revenue of $11.9M (excluding capital amounts) and expenditure of $11.6M and rates and annual charges of $3.9M and user charges and fees of $3.2M the Council does not appear to be engaged in any significant enterprise for profit and it is not, in my view, a trading corporation. Reference was made in the Annual Report and accounts, to which Mr Galasso drew attention, phrases such as "cash on hand; short term deposit and bills" and the fact that these "describe things ordinarily commensurate with trading corporation" (T284). The use of financial terms in Council accounts which are also utilised in trading corporations do not really provide any assistance to the joint venturers' argument. Use of performance criteria such as "interest rate risk criteria" or "debt service ratio" and the division of the Council into "business units" are all indications that Councils are concerned about ensuring a responsible approach to cost and efficiency as is the Council's decision to adopt the Local Government Code of Accounting Practice and Financial Reporting (Ex A4, p 1519) but they do not support the conclusion that the Council is a trading corporation.

[103] In *Mid Density Development Pty Ltd v Rockdale Municipal Council* Davies J said of Rockdale Council that "most of its revenue is derived from rates, garbage levies and the rent from properties which it owns … The carrying out of a function of Government in the interests of the community is not a trading activity" at p 36 (see also *Marrickville Metro Shopping Centre Pty Ltd v Marrickville Council* (2010) 174 LGERA 67 at [99]). I think it would be unusual for any Council to have sufficient trading activities for it to be described as a trading corporation given the nature of

> local Councils and their largely statutorily driven activities but accepting that it is possible, the evidence here falls far short of it.

1214. The final sentence of the paragraph just quoted is significant. It reiterates that the application of the orthodox activities test may produce a result that a local government is not a trading corporation. Recourse to notions of the Federal/State balance are not necessarily required to produce this result; albeit Rein J emphasised that "the nature of local councils and their largely statutorily driven activities" would make it unusual for a council to be described as a trading corporation. However, the *Wentworth Shire Council* analysis also supports the contention that a determination about the status of a local government may only be able to be made on a case by case basis. This, of course, adds to uncertainties. As in other areas of the law, of course, uncertainties are not unknown in the industrial relations/employment law arena. For example, whether someone is an employee or an independent contractor is, ultimately, a case by case assessment.

1215. A review of the legal issues confirms, in the opinion of the Review, that there is grave doubt about whether local governments in Western Australia will be held to be trading corporations. As set out in the Interim Report, the preponderance of judicial determinations on the issue suggest they are not. However, unless and until there is a decision of the High Court on the issue there will be legal uncertainty.

1216. There are legal methods by which the legal uncertainties could be dealt with. It would be open for the issue to be raised in either the Full Federal Court or even perhaps the High Court as a test case. A case could seek a declaration as to whether or not a particular local government is a trading corporation; because that underpins the statutory basis upon which an existing or future enterprise agreement made under the FW Act is valid, and is therefore likely to be a justiciable, or judicially determinable, issue.[339] Given such a case would have a "constitutional issue" the State could intervene under s 78B of the *Judiciary Act 1903* (Cth). Whilst this may be a legally pure way to proceed to try and resolve uncertainties, it would be costly and there are risks inherent in doing so, for any unions and local government involved.

[339] See for example, *Allseas Construction SA v Minister for Immigration and* Citizenship [2012] FCA 529, (2012) 203 FCR 200.

The possibility of such a case being commenced was raised in stakeholder meetings but the Review did not detect any enthusiasm for doing so.

1217. In the Hall & Wilcox submission there was reference to the introduction of the Fair Work Amendment (State Referrals and Other Measures) Bill 2009. The submission from the City of Canning also alluded to the "covering of the field" by the Commonwealth legislation.

1218. In the revised Explanatory Memorandum to the Bill it was said of s 14(2) that in recognition of the rights of States to manage their own workforces in the manner they choose, the Government had specifically allowed States to exclude public sector and local government employees from the scope of any commitment to transfer legislative powers with respect to industrial relations to the Commonwealth. The Explanatory Memorandum noted that local government was an area where there was ambiguity regarding status as constitutional corporations. In Minister Gillard's Second Reading Speech on 21 October 2009, it was said that the Bill recognised that States referring powers to the Commonwealth could choose the extent to which matters relating to State public sector or local government employment were included or excluded from references. The Minister said: "Declarations would be able to be made by the State in relation to certain kinds of entities that are integral to state public administration or local government activities and which are therefore regarded as appropriately regulated in state systems". That is consistent with the approach that the present State Government may take to the issue.

1219. Other points made in the Hall & Wilcox submission reflected upon the value judgment aspect of the use of the word "should" in the Term of Reference, and some are deserving of comment. The submission referred to the rights held by employees under the FW Act including access to the FWC and "stop bullying" orders. One could debate whether an employee has more or less protections under the IR Act than the FW Act. Included in the protections that one might have under the IR Act is an entitlement via an organisation to refer any industrial matter to the WAIRC under s 44 of the IR Act. There is no counterpart in the FW Act. Additionally, if a recommendation to be made by the Review is adopted by the State Government and

passed into legislation, "stop bullying" orders will become a feature of the jurisdiction to be exercised by the WAIRC.

1220. The Hall & Wilcox submission also referred to collective bargaining with employees. It should be noted however that if agreements are to be made in the future under the IR Act, there would still be collective bargaining to produce an agreement. It would be the case however that the collective bargaining would be conducted by a registered organisation on behalf of the employees. That is consistent with the IR Act which includes as an object "to promote collective bargaining and to establish the primacy of collective agreements over individual agreements".

1221. As set out earlier, the question contained in this Term of Reference was whether local government employers and employees in Western Australia should be regulated by the State industrial relations system. That is, to some extent at least, a value-laden question. In the opinion of the Review there is no bright line certainty that local governments are not, either generally or in specific cases, excluded from the coverage of the FW Act because they are not constitutional corporations; although that might well be decided by the High Court. Unless or until that occurs there will be uncertainty.

1222. Apart from that, there are questions as to whether it is worthwhile attempting to bring local governments within the State system. The submission from Hall & Wilcox points to the potential difficulties in trying to achieve this. It could be a long term process and one that will, during its course, engender more rather than produce less uncertainty, although a successful outcome of the process would be certainty. There is also the question of value or benefits of the likely changes for the majority of local governments and local government employees within Western Australia if this were to occur.

1223. That is the WALGA, CCIWA and Hall & Wilcox submissions raise questions of whether it is pragmatically worthwhile to bring local government within the State system given the current operation of most Western Australian local governments within the Federal system.

1224. As against the WALGA and the four local governments' submissions, the unions desire a return to the State system because, primarily, they consider the State system to be preferable, particularly where working conditions for their members under the Federal *Local Government Industry Award 2010* are inferior to the two interim awards that remain within the State system.

1225. Ultimately, in the opinion of the Review the answer to the question posed in the Term of Reference, given the present state of legal uncertainty, depends upon political considerations that must be decided by the State Government.

1226. If the Government is of the opinion that local government employers and employees should be regulated by the State industrial relations system that outcome is, in the opinion of the Review, best achieved by trying to follow the process set out in s 14 of the FW Act, as outlined in the Interim Report. Further transitional arrangements are best arranged, in the opinion of the Review, in accordance with the submission made by UnionsWA as set out earlier.

1227. That will be reflected in the recommendations to be made to the Minister.

1228. In its recommendations, the Review will, in addition to what is said in the previous two paragraphs, respond to the question in this Term of Reference as follows:

(a) If local government employers are national system employers for the purposes of the FW Act then they are presently covered by the Federal industrial relations system.

(b) In turn this depends upon whether local governments are trading corporations under s 51(xx) of the *Commonwealth Constitution*.

(c) That issue, either for a local government in Western Australia generally, or for a specific local government has not as yet been determined by the High Court, and unless and until that occurs there can be no legal certainty on the issue. A test case could probably be run on the issue in the Federal Court or possibly the High Court.

(d) To date the preponderance of judicial and industrial commission authority favours local governments in Western Australia not being characterised as trading corporations. If, however, the High Court were to focus upon the extent of trading activities of local governments to determine whether a local government is a trading corporation, then it is possible at least larger local governments in Western Australia could be characterised as trading corporations. There is a body of judicial and academic support in support of this view.

(e) Although local governments can be described as being part of the body politic of Western Australia, that in itself may not be sufficient to avoid characterisation as a trading corporation, although it is likely to be at least a relevant factor.

(f) WALGA and large local governments consider that at least the larger local governments are trading corporations, and some past certified agreements have been made in the Federal system with unions based on the corporations power where the AIRC made a finding the local governments were constitutional corporations.

(g) By far the majority of local government employers and employees in Western Australia currently operate within the Federal industrial relations system and have done so for some time. The employment is governed by a combination of the Federal *Local Government Industry Award 2010*, enterprise bargaining agreements made under the FW Act and common law contracts underpinned by the NES.

(h) The validity of existing enterprise agreements depends upon the local government being a trading corporation. If the local government were not so, the enterprise agreement would be invalid. That could be tested in the Federal Court but has not occurred to date.

(i) WALGA and large local governments favour remaining in the Federal system and point to disruptions if they were moved to the State system.

(j) Unions support the move into the State system because, in part, of the Federal *Local Government Industry Award 2010* being inferior to interim State awards, a desire to use the State agreement making system and a preference for the State system generally.

(k) The most legally certain process to move local governments to the State system is to use the process outlined in s 14(2) of the FW Act; to pass legislation that declares each local government not to be a national system employer. To be legally effective under s 14 of the FW Act however, the responsible Commonwealth Minister must endorse the declaration.

(l) The process described in (k) is inherently political, may take some time and is not guaranteed to be successful.

(m) Whilst as part of the State body politic, it could be argued, that local governments should be part of the State industrial relations system, there may be pragmatic reasons why the Government may not wish, now, to attempt to proceed with the process that would, if successful create legal certainty and enshrine local government within the State system.

(n) Whether, in all these circumstances the Government wishes to attempt, at this time, to proceed to move local governments to the State system is ultimately a political question, having regard to all of the above.

9.7 Recommendations

1229. With respect to Term of Reference 8 the Review makes the following recommendations and observations:

81. In answer to the question contained in the Term of Reference, the Review reports:

(a) If local government employers in Western Australia are national system employers for the purposes of the FW Act, then they are presently covered by the Federal industrial relations system.

(b) In turn this depends upon whether local governments are trading corporations under s 51(xx) of the *Constitution*.

(c) That issue, either for local government in Western Australia generally, or for a specific local government has not as yet been determined by the High Court, and unless and until that occurs there can be no legal certainty on the issue. A test case could probably be run on the issue in the Federal Court or possibly the High Court.

(d) To date the preponderance of judicial and industrial commission authority favours local governments in Western Australia not being characterised as trading corporations. If, however, the High Court were to focus upon the extent of trading activities of local governments to determine whether a local government is a trading corporation, then it is possible at least larger local governments in Western Australia could be characterised as trading corporations. There is a body of judicial and academic in support of this view.

(e) Although local governments can be described as being part of the body politic of Western Australia, that in itself may not be sufficient to avoid characterisation as a trading corporation, although it is likely to be at least a relevant factor.

(f) The Western Australian Local Government Association (WALGA) and large local governments consider that at least the larger local governments are trading corporations, and some past certified agreements have been made in the Federal system with unions based on the corporations power where the Australian Industrial Relations Commission made a finding the local governments were constitutional corporations.

(g) By far the majority of local government employers and employees in Western Australia currently operate within the Federal industrial relations system and have done so for some time. The employment is

governed by a combination of the Federal *Local Government Industry Award 2010*, enterprise agreements made under the FW Act and common law contracts underpinned by the NES.

(h) The validity of existing enterprise agreements depends upon the local government being a trading corporation. If the local government were not so, the enterprise agreement would be invalid. That could be tested in the Federal Court but has not occurred to date.

(i) WALGA and large local governments favour remaining in the Federal system and point to disruptions if they were moved to the State system.

(j) Unions support the move into the State system because, in part, of the Federal *Local Government Industry Award 2010* being inferior to interim State awards, a desire to use the State agreement making system and a preference for the State system generally.

(k) The most legally certain process to move local governments to the State system is to use the process outlined in s 14(2) of the FW Act; to pass legislation that declares each local government not to be a national system employer. To be legally effective under s 14 of the FW Act however, the responsible Commonwealth Minister must endorse the declaration.

(l) The process described in (k) is inherently political, may take some time and is not guaranteed to be successful.

(m) Whilst as part of the State body politic, it could be argued, that local governments should be part of the State industrial relations system, there may be pragmatic reasons why the Government may not wish, now, to attempt to proceed with the process that would, if successful create legal certainty and enshrine local government within the State system.

(n) Whether, in all these circumstances the Government wishes to attempt, at this time, to proceed to move local governments to the State system is ultimately a political question, having regard to all of the above.

82. If the Government decides to take steps to ensure that local governments are part of the State industrial relations system then it is preferable to do so by the State Government introducing legislation into the State Parliament consistent with s 14(2) of the FW Act that declares, by way of a separate declaration, that each of the bodies established for a local government purpose under the *Local Government Act 1995* (WA) is not to be a national system employer for the purposes of the FW Act (the declaration).

83. If the declaration is passed by the State Parliament, the State should then expeditiously attempt to obtain an endorsement under s 14(2)(c) and s 14(4) of the FW Act by the Commonwealth Minister for Small and Family Business, the Workplace and Deregulation, to make the declaration effective (the endorsement).

84. As a counterpart to recommendation [80], the State enact legislation that has the effect, upon the endorsement, of deeming enterprise agreements to be an industrial instrument subject to the Amended IR Act.

85. If the endorsement is obtained, a taskforce be assembled and chaired by a representative of DMIRS and include representatives from the Department of Local Government, Sport and Cultural Industries, WALGA, the Western Australian Municipal, Administrative, Clerical and Services Union of Employees, the Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth, to oversee, monitor, assist, facilitate and progress the transition of local government employers and employees between the Federal and State industrial relations systems.