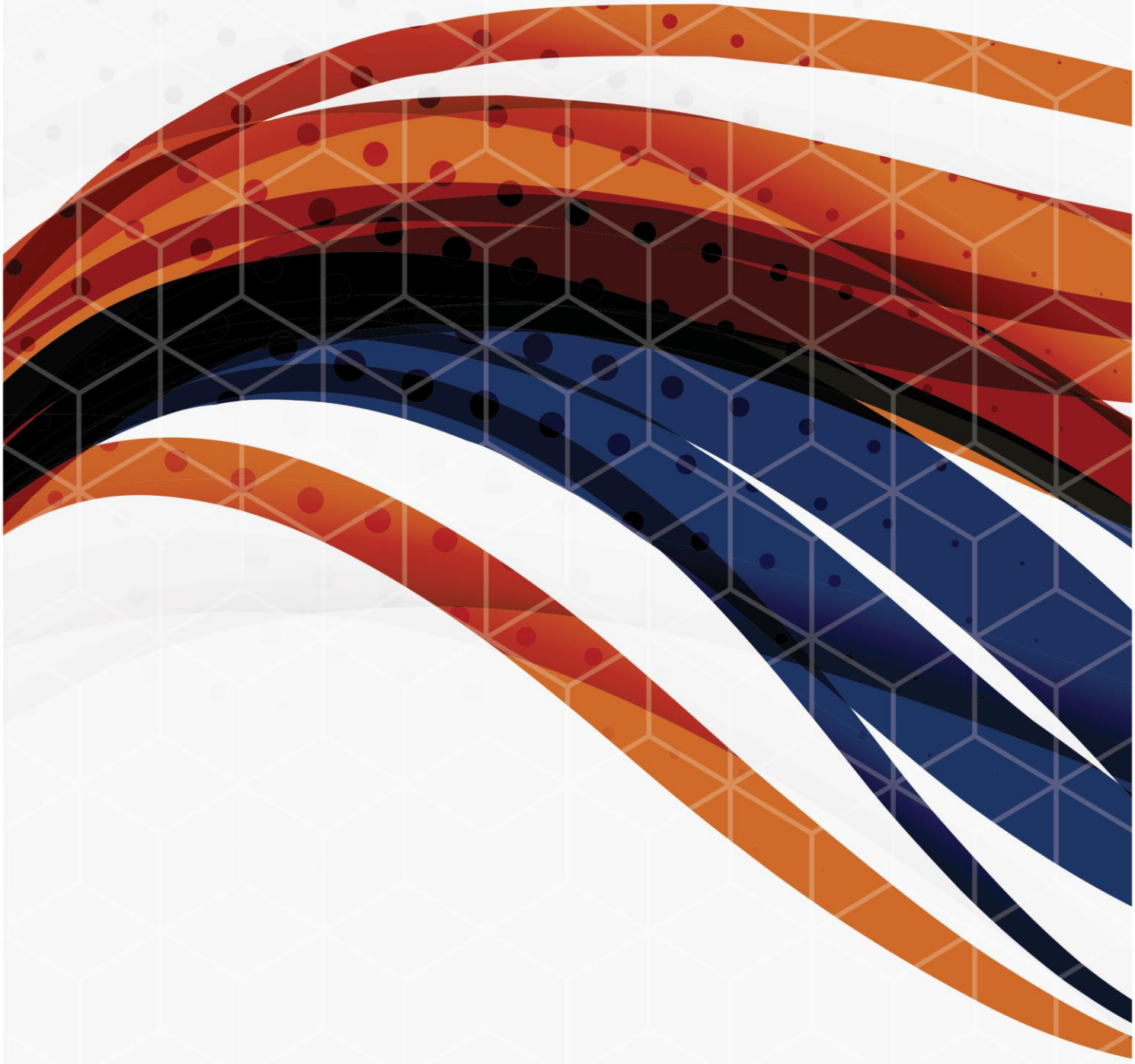
Government of **Western Australia**
Ministerial Review of the State Industrial Relations System

Ministerial Review of the
State Industrial Relations System
Interim Report



March 2018

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Proposed Recommendations and Requests for Additional Submissions

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.

The Review of the State Industrial Relations System proposes these recommendations, for discussions and submissions, and has these requests for additional submissions on specific issues in response to Term of Reference 1.

1. The *Industrial Relations Act 1979* be amended, in accordance with these proposed recommendations and be renamed the *Industrial Relations Act 2018* (WA) (2018 IR Act).[1]

2. The 2018 IR Act is to be reviewed after three years of operation.

3. The 2018 IR Act is to be in a plain English drafting style and gender neutral.

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.

[1] The year will be the year in which the amending Act is enacted.

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[2] 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,[3] ought to:

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

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

(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);[4] 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.

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.

[4] 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.

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.

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.

The Review of the State Industrial Relations System proposes these recommendations, for discussions and submissions, and has these requests for additional submissions on specific issues in response 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.[5]

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.

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[5] 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).

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.

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.

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.

The Review of the State Industrial Relations System proposes these recommendations, for discussions and submissions, in response to Term of Reference 3.

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.

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.

The Review of the State Industrial Relations System proposes these recommendations, for discussions and submissions, and has this request for additional submissions on these specific issues in response to Term of Reference 4.

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

    (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.

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.

The Review of the State Industrial Relations System proposes these recommendations, for discussions and submissions, and has these requests for additional submissions on specific issues in response to Term of Reference 5.

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.

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.

The Review of the State Industrial Relations System proposes these recommendations, for discussions and submissions, and has these requests for additional submissions on specific issues in response to Term of Reference 6.

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.[6]

(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.

[6] 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."

(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 this issue 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.

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.

The Review of the State Industrial Relations System proposes these recommendations, for discussions and submissions, in response to Term of Reference 7.

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 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.[7]

[7] This is consistent with *Magistrates Court Act 2004* (WA) s 16(4).

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.

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.

The Review of the State Industrial Relations System proposes these recommendations, for discussions and submissions, in response to Term of Reference 8.

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.

Schedule A to Proposed Recommendations

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

Glossary

Acronymn	Full Title
ABS	Australian Bureau of Statistics
ACCI	Australian Chamber of Commerce and Industry
ACTU	Australian Council of Trade Unions
AEU	Australian Education Union
Ai Group	Australian Industry Group
AIRC	Australian Industrial Relations Commission
AIRCFB	Australian Industrial Relations Commission Full Bench
ALRC	Australian Law Reform Commission
Amendola Report	Review of the Western Australian Industrial Relations System; Final Report by Mr Steven Amendola, October 2009
AMA	Australian Medical Association (WA Branch)
AMMA	Australian Mines and Metals Association
AMWSU	Amalgamated Metal Workers and Shipwrights Union
ANF IUWP	Australian Nursing Federation Industrial Union of Workers Perth
Arbitral Bench	Industrial Commission Arbitral Bench (Proposed Recommendation 6)
ATO	Australian Taxation Office
BPSS Regulations	*Public Sector Management (Breaches of Public Sector Standards) Regulations 2005* (WA)
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
CCI	Chamber of Commerce and Industry 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)
COAG	Council of Australian Governments
CoSBA	Combined Small Business Alliance of WA Inc.
CPSU/CSA	Community and Public Sector Union/Civil Service Association of WA
DLGSCI	Department of Local Government, Sport and Cultural Industries
DMIRS	Department of Mines, Industry Regulation and Safety

Acronymn	Full Title
EDR Act	*Employment Dispute Resolution Act 2008* (WA)
ELC	Employment Law Centre of Western Australia Inc.
EO Act	*Equal Opportunity Act 1984* (WA)
FCA	Federal Court of Australia
FCAFC	Federal Court of Australia Full Court
FDV	Family 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
FWA	Fair Work Australia
FW Act	*Fair Work Act 2009* (Cth)
FWO	Fair Work Ombudsman
FWC	Fair Work Commission
GPG	Gender Pay Gap
GR Act	*Government Railways Act 1904* (WA)
Green Bill	Labour Relations Legislation Amendment and Repeal Bill 2012
HIA	Housing Industry Association
HSUWA	Health Services Union of WA
HS Act	*Health Services Act 2016* (WA)
IA Act	*Industrial Arbitration Act 1979* (WA)
IAC	Western Australian Industrial Appeal Court
IC Act	*Independent Contractors Act 2006* (Cth)
IEU	Independent Education Union of Australia WA Branch
ILO	International Labour Organization
IR Act	*Industrial Relations Act 1979* (WA)
IR Amendment Act	Industrial Relations Amendment Act 2000 (WA)
IMC	Industrial Magistrates Court of Western Australia
Judicial Bench	Proposed Industrial Commission Judicial Bench (Proposed Recommendation 4)
Labourline	Labourline Industrial and Workplace Consulting
LG Act	*Local Government Act 1995* (WA)
LP Act	*Legal Profession Act 2008* (WA)
LSL Act	*Long Service Leave Act 1958* (WA)

Acronymn	Full Title
MAP	Ministerial Advisory Panel on Work Health and Safety Reform
Master Builders	Master Builders Association Western Australia
MCE Act	*Minimum Conditions of Employment Act 1993* (WA)
MCE Regulations	*Minimum Conditions of Employment Regulations 1993* (WA)
MGA	Master Grocers Australia (MGA Independent Retailers)
Migration Act	*Migration Act 1958* (Cth)
MSI Act	*Mines Safety and Inspection Act 1994* (WA)
Model WHS Act	*Model Work Health and Safety Act*
NES	National Employment Standards in the *Fair Work Act 2009* (Cth)
Non-SES organisation	Non-Senior Executive Service organisation under the *Public Sector Management Act 1994* (WA)
NSW IR Act	*Industrial Relations Act 1996* (NSW)
NSW IRC	New South Wales Industrial Relations Commission
OD Act	*Owner-Drivers (Contracts and Disputes) Act 2007* (WA)
OSH Tribunal	Occupational Safety and Health Tribunal
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
PSLR	Public 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)
PTA	Public Transport Authority
QLD IR Act	*Industrial Relations Act 2016* (Qld)
QLD IRC	Queensland Industrial Relations Commission
RFTIT	Road Freight Transport Industry Tribunal
RTBU	Australian Rail, Tram and Bus Union
SACS	Social and Community Services
SBDC	Small Business Development Corporation

Acronymn	Full Title
SDA	The Shop, Distributive and Allied Employees' Association of Western Australia
SES	State Employment Standards (Proposed Recommendation 47)
SES organisation	Senior Executive Service organisation under the *Public Sector Management Act 1994* (WA)
SSTUWA	The State School Teachers' Union of WA 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 Protocol	International Labour Organisation Protocol of 2014 to the *Forced Labour Convention 1930*
The Review	Ministerial Review of the State Industrial Relations System 2018 by Mr Mark Ritter SC assisted by Mr Stephen Price MLA
VET Act	*Vocational Education and Training Act 1996* (WA)
Vic LSL Act	*Long Service Leave Act 1992* (Vic)
Vic LSL Bill	*Long Service Leave Bill 2017* (Vic)
VSO	Vocational Support Officer
WACOSS	Western Australian Council of Social Service Inc.
WAIRC	Western Australian Industrial Relations Commission
WALGA	Western Australian Local Government Association
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
Work Choices	*Workplace Relations Amendment (Work Choices) Act 2005* (Cth)
WR Act	*Workplace Relations Act 1996* (Cth)
WWC Act	*Working with Children (Criminal Record Checking) Act 1984* (WA)

Chapter 1 The Creation, Purpose and Context of the Review into the State Industrial Relations System

1.1 Review of the State Industrial Relations System

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, 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 initial contract by which Mr Ritter was engaged was to expire on 15 February 2018, the Minister said publicly in an Estimates Committee hearing, referred to below, that he expected the Review would take about six months. Consistent with this, Mr Ritter's contract has been extended and the Final Report of the Review is expected to be provided to the Minister in May 2018.

1.2 Purpose of the Interim Report and Overview

3. The purpose of the Interim Report is to inform the Government, stakeholders and the public of the progress that has been made by the Review and to seek further consultation and submissions upon the issues that emerge from a consideration of the Terms of Reference, the submissions received by the Review to date, and proposed or possible recommendations to be made by the Review.

4. For the benefit of readers the Review provides this overview of its opinions and proposed recommendations on significant issues covered by the Terms of Reference. The Terms of Reference are set out in full below. Generally though, the work of the Review has demonstrated why the decision to have the Review was, with respect, required to be made by the Minister. This is because of the

length of time since there was a fulsome review of the *Industrial Relations Act 1979* (WA) (IR Act) that has led to any legislative change. As set out in chapter 2 of the Interim Report, the IR Act was enacted for a different time and jurisdictional coverage of the State industrial relations system. That changed dramatically, and seemingly forever, when the Howard Government enacted the "Work Choices" legislation in 2005.[8] From that time, as set out in more detail later in this chapter, the industrial relations of trading or financial corporations, and the terms and conditions of employment of their employees has been largely governed by the national system. That has meant that most of the hitherto exercised jurisdiction of the Western Australian Industrial Relations Commission (WAIRC) disappeared; to be instead exercised under Commonwealth laws and in Federal institutions. Mostly the jurisdiction is now exercised by the Fair Work Commission (FWC) under the auspices of the *Fair Work Act 2009* (Cth) (FW Act).

5. This has raised an issue for the State as to whether it should follow what other States have done and refer to the Commonwealth its legislative powers over the industrial relations of private sector employees. No State Government in Western Australia, since the Work Choices legislation was held to be valid by the High Court, has made any moves to do so. The previous Barnett Liberal Government did not do so, and the Terms of Reference of the present Review contain a Ministerial statement that it is not in the contemplation of the McGowan Labor Government. Therefore, although the issue remains "live" in theory it is not something that the Review needs to at all grapple with.

6. The consequence of the reduced role of the State system in governing the industrial and employment relations of trading and financial corporations has not just been a diminution in the number and nature of industrial matters the WAIRC may have referred to it. Due, in part, to the demands of engaging with the national system of industrial relations, agreement making and "award modernisation", the resources and primary interests of most private sector unions and employer organisations have inevitably been directed Federally. That has meant the award making and updating system under the IR Act has largely fallen

[8] *Workplace Relations Amendment (Work Choices) Act 2005* (Cth)

into disuse in the private sector, with the consequence that the awards are becoming more and more outdated and do not cover and apply to all private sector employees in Western Australia not covered by a Federal award. So, quite surprisingly, given that one reason for having an award is to provide a "safety net" of conditions of employment, there are modern day pockets of employees in Western Australia not covered by either a State or Federal award. The enactment of the Work Choices legislation and the FW Act has also led to jurisdictional uncertainty for local governments across Australia.

7. All of this, and more, justify having the Review as stated. The Terms of Reference require the Review to look at contemporary issues for the State system and try to make recommendations to take things into the immediate future.

8. At this point the Review thinks there is a strong case to recommend an updating of the IR Act, to try to enhance the prospects that the people who use the system can more readily understand and apply it. As set out in the proposed recommendations that will follow, the Review in its preliminary opinion favours an updating and renaming of the IR Act to be called the *Industrial Relations Act 2018* (WA) (2018 IR Act).[9] This will allow for the correction of some of the more basic problems in understanding and following the legislation. The IR Act is currently replete with numerical complications in its sections, gender-specific personal pronouns[10] and could not be said to have a plain English drafting style.

9. More fundamentally the 2018 IR Act could bring within the one piece of legislation, the subject matter now covered by other legislation and a General Order of the WAIRC, the Termination, Change and Redundancy General Order. That will enhance, hopefully, the prospect that someone wanting to find out what the law is, which applies to them as an employer or employee in the State system, will be able to do so. The topics of minimum conditions of employment, currently within the *Minimum Conditions of Employment Act 1993* (WA) (MCE Act) and long service leave incompletely covered by the *Long Service Leave Act 1958* (WA)

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9 Or whatever year amending legislation was passed, so if passed in 2019 the suggested name will be the *Industrial Relations Act 2019.*

10 That is, it says 'he' in places where non gender specific pronouns should be used.

(LSL Act) can be moved into the 2018 IR Act. Additionally, as is currently proposed to be recommended in response to Term of Reference 5, there should be a set of State Employment Standards (SES) that covers these and additional topics, most of which, at a Federal level are included in the National Employment Standards (NES) included in the FW Act. The presence of SES will mean that there is a lesser need for reliance on State awards to provide minimum conditions of employment.

10. State awards are the focus of Term of Reference 6. As set out in the chapter on that Term of Reference, the State award system is in need of rejuvenation. Chapter 7 State Awards explores how that might be done. The preliminary suggestion of the Review is that, without any loss of current entitlements, over a period of three years, State awards ought to be reviewed and replaced by New Awards to be made by the WAIRC. The suggested New Awards are to be industry and occupational based. The Review has, based on the work of the Secretariat, produced a list of 28 State Awards that might be made by the WAIRC with suggested union and employer input. The first contemplated stage, that is proposed to be completed within 12 months, is to review and decide upon the priority of the making of the New Awards. In the preliminary opinion of the Review the 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. Other considerations, like the extent to which the existing award is out of step with contemporary industrial practices, are also likely to be important. The purpose and effect of the rejuvenation of the State award system and the making of New Awards ought not lead to any diminution of the conditions of employment of the employees who are covered by them. That, understandably, was a pre-requisite for the system that the Term of Reference has asked the Review to design.

11. Term of Reference 3 has 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 detail in chapter 4, the preliminary opinion of the Review is that there should be such a provision in the 2018 IR Act. There is an alarming gender pay gap in Western Australia and the Review considers the WAIRC ought to be armed with

the tools necessary to do what it can to enhance equal remuneration. The chapter discusses different models that might be adopted and, in general, at this preliminary point, the Review favours the model operating in Queensland, over the models under the FW Act, or operating in NSW.

12. Term of Reference 7 requires the Review to consider the mechanisms for enforcement of employment and industrial entitlements. As set out in chapter 8, the Review is of the opinion 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 to the FW Act and in contemporary times. The methods that may be used to enforce conditions, short of commencing court proceedings, are inadequate and should be broadened. There is, remarkably, no penalty for an employer that breaches the LSL Act. All of that needs to be attended to, in the preliminary opinion of the Review.

13. Another aspect of enforcement that the Review has looked at is "right of entry" 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 is of the preliminary opinion that it is time for there to be a "fit and proper person" test for a person to obtain and hold a right of entry certificate. The Review is also of the preliminary opinion that the benefits of having the right of entry needs to be modernised to allow for the recording of evidence by electronic means to support a possible breach of industrial laws. Otherwise the Review is conscious that there is also a State review of occupational safety and health laws being undertaken and that review can be expected to look at rights of entry more specifically within that context.

14. Term of Reference 8 has required the Review to look at the position of local government within the State industrial relations system. Chapter 9 of the Interim Report discusses the jurisdictional uncertainty that presently exists as to whether local governments in Western Australia are or are not within the national or State industrial relations systems. That uncertainty is not productive of a good system. The Review is of the preliminary opinion that local governments ought to be

covered by the State system. This view does not, at present, find favour with the Western Australian Local Government Association (WALGA). Chapter 9 suggests some ways in which the concerns of WALGA might be addressed and WALGA will have the opportunity to make further submissions on the topic. On this issue however the Review regards it as significant that the *Constitution Act 1889* (WA) provides "the Legislature shall maintain a system of local governing bodies".[11] Therefore, local government is part of the body politic of the State. The *Local Government Act 1995* (WA) (LG Act) sets out in some detail the role that local government is to play in the governing of the people of the State. In this context, the preliminary opinion of the Review is that it is preferable that they be covered by the State industrial system. That would mirror the situation in New South Wales, Queensland and South Australia. There is also, at present, uncertainty as to the status of enterprise bargaining agreements registered under the FW Act, as the local government employer may not, as a matter of constitutional law, be a "trading corporation" and therefore entitled to make an agreement under the FW Act. That is not something which is checked when agreements are registered with the FWC.

15. Term of Reference 4 asks the Review to look at the exclusions of employees from coverage under the IR Act and the MCE Act. Two of the impetuses for this are that the exclusions have been identified as being problematic to Australia signing an international covenant and the developing "gig economy". There is of course, also the fundamental principle of all employees being able to be entitled to the minimum employment standards of the State and to be able to participate in the State industrial relations system, if they are not covered by the Federal system. The preliminary opinion of the Review is that the exclusions should be removed. The reasons for and consequences and issues arising out of such a recommendation are discussed in Chapter 5 Definition of Employee.

16. Chapter 5 also discusses the gig economy. The preliminary conclusions are that, legislatively, there may be little the State Government can do to regulate the industrial relations of companies operating in the gig economy and the workers

[11] *Local Government Act 1995* (WA) s 52(1).

who are engaged by them. This is because of a combination of the effects of the FW Act and the *Independent Contractors Act 2006* (Cth) (IC Act). The chapter seeks additional submissions on the topic however and otherwise suggests a method for the monitoring of the situation, which is one of understandable concern for the State.

17. Chapter 3 of the Interim Report discusses Term of Reference 2 about the access of public sector employees to the WAIRC. As that chapter sets out, the present regime is, it seems to the Review, overly technical and complex, without concomitant good reason. The system separates different parts of the public sector into different pathways of rights, jurisdictions and remedies. In the preliminary opinion of the Review this is in need of change. The Review analyses how this might be done, albeit it seeks further submissions on some aspects of a proposed new system. Foremost in the new system under consideration by the Review is the abolition of the constituent authorities of the WAIRC, including the Public Service Arbitrator (PSA) and the Public Service Appeal Board (PSAB), which the Review considers unnecessary and out of step with a modern industrial relations system.

18. The Review is of the general preliminary opinion that public sector employees, public sector industrial organisations and employers should be covered by the ordinary jurisdiction of the WAIRC and as a consequence able to refer industrial matters to the WAIRC in the same way as their private sector counterparts. This general view is subject to the different considerations that might apply to the public sector that do not apply to the private sector; such as the nature of the public sector involving as it does the expenditure of public money, the types of employers and employees included in the public sector and the desire of the State Government to be able to reform it. It may also be that the work of the Review can only go part of the way required to reform the regulation of the employment of public sector employees. The Review will be assisted by additional submissions on all of these issues but it is of the preliminary opinion that a review of the *Public Sector Management Act 1994* (WA) (PSM Act) might be the next logical step.

19. That leaves Term of Reference 1 about the structure of the WAIRC. The future structure of the WAIRC is to some extent dependent upon the outcome of the consideration of the other terms of reference as outlined above. It also has to be taken note of that the WAIRC now, generally, has coverage over small business and the public sector. The Review is of the preliminary opinion that within that rubric the WAIRC ought to be continued as a body that is available to resolve industrial disputes and make orders and awards that affect general terms and conditions of employment.

20. As explained in chapter 2, the Review finds the denial of contractual benefits jurisdiction of the WAIRC to be problematic in principle for a body that is not required to be made up of people who have legal qualifications and experience. The chapter addresses how that concern might be addressed and seeks additional submissions on the topic.

21. The chapter also discusses the position of the President of the WAIRC, which has been a part of the WAIRC since legislated for in 1979. The Review is critical of a succession of State Governments not dealing with the position of the President, since the Hon PJ Sharkey retired in 2005 as the last person to substantively occupy the role. Since then Acting Presidents have been appointed and reappointed for in excess of 12 years. Due to the downturn in jurisdiction for the WAIRC, there is now insufficient work to occupy a full time President. Efficiency demands a change. At the same time however, the preliminary opinion of the Review is that the importance of the work done by a President position needs to be respected and not undermined by legislative amendment. Specifically, one of the purposes in having a President was to ensure that there was a high standard of judicial decision making by the Full Bench of the WAIRC; in particular, in hearing appeals from single Commissioners. That was to be achieved by the President having the status and conditions of a puisne justice of the Supreme Court. Therefore, although the preliminary opinion of the Review is that the position of the President should be abolished, appeals should in the future be determined by an Industrial Commission Judicial Bench, headed on an ad hoc basis by a Supreme Court justice as allocated by the Chief Justice, from time to time.

22. The Review is also currently inclined to recommend the abolition of the Industrial Appeal Court (IAC), to be replaced by a system that would allow appeals, on questions of law, to be heard and determined by the Court of Appeal, after leave to appeal is granted on a question of law. This would involve an enhancement of the particularly narrow present possible grounds of appeal to the IAC.

23. Other jurisdiction that is currently exercised by the President can, as is set out in Chapter 2, generally be undertaken by the Chief Commissioner or other Commissioners as designated by the Chief Commissioner.

24. An anachronism of the structure of the WAIRC is the 'Commission in Court Session' (CCS). That is, as chapter 2 explains, a bench constituted by three Commissioners that ordinarily decides significant industrial matters, like the State Wage Case. It is however inaptly named as there is nothing particularly court-like about the nature of the jurisdiction it exercises and how it performs its functions. The preliminary opinion of the Review is that there should still be a Full Bench of Commissioners to determine important industrial matters but that should be restyled the Industrial Commission Arbitral Bench, to better fit with what it does.

25. Chapter 2 also discusses some of the processes engaged in by the WAIRC and whether they can be enhanced, such as the way in which industrial matters are referred to the WAIRC under s 32 and s 44 of the IR Act. The chapter also discusses how the WAIRC operates and considers whether there ought to be an entitlement to legal representation before the WAIRC, whether the WAIRC should be able in some extreme cases to order legal costs against a party, the regulation of industrial agents, and other matters of a procedural nature, within the Term of Reference, that have been raised with the Review.

1.3 Terms of Reference and Announcement of Review

26. The Review and the 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.

27. In a media statement published on 22 September 2017,[12] the Minister 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 needs of its constituents – predominantly small business employers 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.

1.4 No Comprehensive Update of State Industrial Relations System Since 2002

28. In the media statement the Minister said: the "State [industrial] system has not been comprehensively reviewed and updated since 2002 …". This comment requires some elucidation. On 30 June 2009 the then State Government, through the Minister for Commerce, the Hon. Troy Buswell MLA, appointed

[12] The Hon. Bill Johnston MLA, Minister for Mines and Petroleum; Commerce and Industrial Relations; Electoral Affairs; Asian Engagement, 'Review of the State industrial relations system' (Media Statement, 22 September 2017).

Mr Steven Amendola to conduct a review of the Western Australian Industrial Relations System. Mr Amendola prepared and submitted his "Final Report" to the Government on 30 October 2009 (Amendola Report).[13] There was a considerable degree of inaction following the receipt of the Amendola Report. The Amendola Report was not published by the Government until 6 December 2010. At that time, then Minister for Commerce, the Hon. Bill Marmion MLA, announced by media statement that stakeholders would be consulted about "taking the recommendations forward" and the Government "plans to introduce legislation to Parliament in 2011".[14] This did not, however, eventuate. No legislation was introduced and on 6 July 2011 then Premier the Hon. Colin Barnett MLA said the Government was not intending to act on any of the recommendations of the Amendola Report.[15]

29. In 2012, the State Government tabled in Parliament a draft Bill for public comment. This was the Labour Relations Legislation Amendment and Repeal Bill 2012, commonly called "the Green Bill".[16] The tabling of the Green Bill was for the purpose of allowing stakeholders and other interested parties to make submissions to the Government about the contents of the Bill. The Green Bill contained some of the recommendations of the Amendola Report. There was, however, no further published report based upon an analysis of the comments about the Green Bill, nor any subsequent legislative action prior to the election of the present State Government in March 2017. Thus, whilst the State system was "reviewed" in 2009, as stated by the Minister, it was not "updated" in the seven years that passed, after receipt of the Amendola Report, up to the election of the present Government. A "review and update" of the State industrial relations system is, for reasons that will emerge, now well overdue.

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13 Steven Amendola, *Review of Western Australian Industrial Relations System*, Final Report, 30 October 2009.

14 The Hon. Bill Marmion MLA, Minister for Commerce, 'Amendola Review released' (Media Statement, 6 December 2010).

15 'Barnett dismisses IR Review', *The West Australian*, 7 July 2011; 'Unions claim victory as Barnett scraps radical reform plan', *The Australian*, 7 July 2011; 'Barnett bins IR recommendations', *The Australian Financial Review*, 7 July 2011.

16 The Labour Relations Legislation Amendment and Repeal Bill 2012 was tabled in Parliament on 14 November 2012.

1.5 Comments by the Minister to the Estimates Committee

30. 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.[17]

(b) It was expected the Review would consider the "gig economy, which is a major concern for everybody in the industrial relations system". The Minister referred to "Uber drivers" and said:

> I point out, and it is unusual, that the courts in California, where Uber started, have determined that Uber drivers in California are employees of Uber. The question of the definition of "employee" is an essential issue in modern society.[18]

31. 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.* The Review has taken note of these comments by the Minister, and they will be addressed in later chapters of the Interim Report.

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17 Western Australia, *Parliamentary Debates*, Legislative Assembly Estimates Committee A, Thursday 21 September 2017, E440-2 (Bill Johnston, Minister for Commerce and Industrial Relations).

18 Ibid.

32. The people who are conducting the Review were not engaged to draft the Terms of Reference. The Terms of Reference represent what the Government, through the Minister, thought needed to be reviewed about the State system.

1.6 Review Bound by Terms of Reference

33. It must be steadily borne in mind that the Review is governed by the Terms of Reference. The purpose of the Review is not to review the State system generally, reconsider the Amendola report, the Green Bill and/or any comments about the Green Bill. The need to comment upon these things only arises incidentally to the extent required by the Terms of Reference.

34. The Review did not draft the Terms of Reference. The Review has therefore had to consider the meaning and construction of the Terms of Reference, and hence the scope of the Review. In doing so, the Review has taken into account what the Minister said about the purpose of the Review.

35. Some of the submissions made to the Review contained opinions, ideas and suggestions that the Review thinks are outside the Terms of Reference. The topics covered by these submissions are set out in **Attachment 1A** to this chapter. The fact that these opinions, ideas and suggestions are on topics outside the Terms of Reference does not, of course, necessarily mean that they are not worthy of consideration by the State Government. It just means that this Review cannot consider and report on the topics, unless there is some amendment of, or addition to, the Terms of Reference.

1.7 Historical Context for the Review – The Change in the Commonwealth – State Paradigm on Industrial Relations Laws and Systems

36. The fact that there has not been any comprehensive review and updating of the State industrial relations system since 2002 is particularly significant given the seismic changes to the Australian industrial relations landscape effected in 2005 and thereafter.

37. In 2005 the Commonwealth Government enacted the *Workplace Relations Amendment (Work Choices) Act 2005* (Work Choices). Work Choices came into

effect on 27 March 2006 and from that date fundamentally altered the law of employment in Australia.[19] Work Choices tried to forge a single national workplace relations system for Australia. As set out on page 1 of the Explanatory Memorandum to the Workplace Relations (Work Choices) Bill 2005, Work Choices attempted to: *"*simplify the complexity inherent in the existence of six workplace relations jurisdictions in Australia by creating a national workplace relations system based on the corporations power[20] that would apply to a majority of Australia's employers and employees".

38. This was a significant change for the Commonwealth, in that the industrial arbitration power in s 51(xxxv) of the Constitution was not the major source of power underpinning comprehensive industrial relations legislation. In addition to the corporations power, there were other sources of power available to the Commonwealth to enhance the attempt to federalise industrial relations. Victoria, in 1996, had referred almost all of the State's industrial legislative powers to the Commonwealth under s 51(xxxvii) of the Constitution.[21] The Commonwealth also had legislative power to make laws about all employers and employees in the Territories[22] and employees engaged by Commonwealth agencies. Accordingly, after Work Choices the Federal industrial system covered employers and their employees if the employer was the Commonwealth, or an agency of the Commonwealth, a "constitutional corporation",[23] or operated in Victoria or one of the Territories. It was therefore estimated that 75-85 per cent of the Australian workforce was then "within the scope of the Federal system".[24]

39. The States challenged the Work Choices legislation, but the High Court, in *New South Wales v Commonwealth,*[25] by a 5-2 majority,[26] rejected the challenge. The majority decided the Commonwealth Parliament could, under the

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19 This brief historical review is, in part, based upon what is set out in Carolyn Sappideen et al, *Macken's Law of Employment* (Law Book Co of Australasia, 7th ed, 2011) [120] and Andrew Stewart et al, *Creighton & Stewart's Labour Law* (The Federation Press, 6th ed, 2016) [3.27], [3.59]-[3.60], [3.68], [3.72].

20 *Commonwealth Constitution* s 51(xx).

21 *Commonwealth Powers (Industrial Relations) Act 1996* (Vic).

22 *Commonwealth Constitution* s 122.

23 This is a composite phrase applying to corporations covered by s 51(xx) of the Constitution as being: 'Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'.

24 Creighton & Stewart, above n 19, [3.59], [6.10].

25 (2006) 229 CLR 1.

26 Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ wrote a joint judgment; Kirby J and Callinan J dissented.

corporations power, legislate about the industrial rights and obligations of corporations and their employees and the means by which they can conduct their industrial relations.[27]

40. However, whilst the use of the corporations power expanded the capacity of the Commonwealth to legislate about workplace relations, its use also contained an obvious and inherent limitation – employers who were not constitutional corporations, including sole traders and unincorporated partnerships, were not covered by the national system unless other States, like Victoria, referred legislative powers to the Commonwealth. Thus Work Choices and the corporations power did not and could not be used as the sole basis for a comprehensive national industrial relations system.

41. Following a change in the Commonwealth Government, the enactment of the FW Act and related legislation[28] attempted to build upon and expand the Federal workplace relations system established by Work Choices. The FW Act was also primarily based upon the Commonwealth corporations power, and, like Work Choices, expressed a clear intention to "cover the field" to generally exclude State industrial laws.[29] Thus, as set out in Creighton & Stewart[30] generally, the rights and obligations created by the FW Act applied to "national system employers" and their employees. Pursuant to s 14 of the FW Act, those employers included trading, financial and foreign corporations, Commonwealth agencies and other employers that operate in a Territory. The term "national system employer" was separately extended by ss 30D and 30N of the FW Act to include any other type of employer in a "referring State", subject to any limitations imposed by that State.

42. In 2009, New South Wales, Queensland, South Australia and Tasmania followed what Victoria had done in 1996 and referred legislative powers to the

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27 At [178], following the acceptance by the majority of the reasoning of Gaudron J in *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Electrical Union* (2000) 203 CLR 364, 375 [83].

28 The most significant was the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).

29 FW Act s 26.

30 Above n 19, [3.72], albeit there seems to be a typographical error in the paragraph, in citing s 30M and not s 30N as extending the meaning of the term "national system employer", in a "referring State".

Commonwealth.[31] In 2009 the FW Act was amended to take into account these referrals of power.[32]

43. As summarised in Creighton & Stewart[33] the Commonwealth, following these referrals now has the following legislative coverage:

(a) Victoria, Australian Capital Territory and Northern Territory – all employers, including State/Territory government agencies.

(b) New South Wales, Queensland and South Australia – all employers, other than State and local government employers.

(c) Tasmania – all employers, other than State government agencies.

(d) Western Australia – trading, financial and foreign corporations, and Commonwealth agencies.

44. As with Work Choices, however, the FW Act does not exclude all State industrial relations laws from applying, and the States are not precluded from making laws on some topics. In particular, the matters set out in s 27 of the FW Act remain under the purview of the States. Relevantly to the Review these matters include occupational health and safety, child labour, long service leave, regulation of employer and employee associations, and claims for enforcement of contracts of employment.

45. It is however, reasonably safe to assume there will be no return to the industrial relations landscape that existed before Work Choices.

46. This is because:

(a) Five States have referred their private employment and industrial relations legislative powers to the Commonwealth.

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31 *Industrial Relations (Commonwealth Powers) Act 2009* (NSW); *Fair Work (Commonwealth Powers) Act 2009* (Vic); *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld); *Fair Work (Commonwealth Powers) Act 2009* (SA); *Industrial Relations (Commonwealth Powers) Act 2009* (Tas).

32 *Fair Work Amendment (State Referrals and Other Measures) Act 2009* (Cth).

33 Above n 19, [3.72].

(b) The use of the corporations power to support industrial relations laws has been upheld by the High Court.

(c) The enhanced Federal system of employment law and industrial relations has survived changes of the Commonwealth Government. Neither major political party has expressed any inclination towards decentralisation.

47. The changes to the number and type of employers and employees that are now able to be covered by the State industrial relations system is another reason why a review and update of the system is required.

48. Since the enactment of Work Choices there has been discussion about the future of the Western Australian industrial relations system. A threshold question was whether to refer industrial relations legislative powers to the Commonwealth. However, the Barnett State Government did not make any moves to refer powers in its eight years in office; and, it is apparent from the Terms of Reference and the comments of the Minister that the present State Government has also made a decision not to refer its industrial relations legislative powers to the Commonwealth. Significant stakeholder bodies, like the Chamber of Commerce and Industry WA (CCI) have submitted to the Review that WA should refer its legislative powers. The previous State government, in power for eight years, made no moves to do so. Debate on the issue is outside the Terms of Reference for the Review. As the Minister's statements have indicated, the State Government has decided instead to proceed with a State industrial relations system that it wants to be contemporary, fair and accessible, having regard to the people, bodies and institutions covered by the State system.

1.8 Methodology Engaged in by the Review

49. The following is the methodology engaged in by the Review to consult and obtain information and submissions to date:

(a) Following the public announcement, the Minister wrote to stakeholders to advise them of the Review and the opportunity to make submissions.

(b) On 30 September 2017 the Review published an advertisement in *The West Australian* and *The Australian*. The advertisement set out the Terms of Reference, where additional information could be obtained online, and said written submissions could be emailed to the Secretariat at irreviewsecretariat@dmirs.wa.gov.au. The advertisement said submissions were requested by 24 November 2017.

(c) In addition, the Review sent 215 letters to employer associations, industrial agents, law firms, not for profit organisations, public sector departments, unions and other people whom it thought might be interested in the Review and/or, in the opinion of the Review, could contribute to the process of obtaining information or receiving opinions relevant to the Terms of Reference. In each of the letters, submissions were requested by 24 November 2017.[34]

(d) The Review has corresponded and had meetings with Chief Commissioner Scott, Senior Commissioner Kenner and Registrar Bastian of the WAIRC to obtain statistics, information and opinions about the way in which the State industrial relations system is operating and the Terms of Reference.[35]

(e) The Secretariat also asked a number of stakeholders whether they would like to meet with the Review to discuss the Terms of Reference prior to finalising written submissions. Numerous stakeholders took up this opportunity and 13 meetings were held between 13 November 2017 and 20 December 2017. The Review has found these stakeholder meetings to be very useful in facilitating a direct exchange of ideas about the Terms of Reference, the relevant issues and possible submissions and recommendations.

(f) The Review has received 65 sets of written submissions from bodies, institutions and individuals. Attachment 1B contains a list of those who provided written submissions, with the exception of any organisation or

[34] One of the letters was to Mr Amendola. He did not reply.
[35] The Review notes the WAIRC has been very helpful.

person who wished to make a private submission.[36] Many of the submissions were provided, with the agreement of the Review, after 24 November 2017, so as to maximise the scope for people or bodies to contribute to the Review. It is noted that the WAIRC has not made a public written submission, as such, but its views have been conveyed to the Review in the meetings and correspondence referred to above. The Chief Commissioner's Annual Reports also contain information relevant to understanding the position of the WAIRC on issues related to the Terms of Reference.

(g) In addition to the stakeholder meetings, there have been informal private meetings and correspondence with people who have knowledge of, or past or present involvement with, the State industrial relations system.

(h) The submissions have been carefully considered and analysed by the Secretariat and the Review for the purpose of preparing the Interim Report. An analysis of the public submissions is included in the individual chapters of the Interim Report that deal with each Term of Reference.

50. The Review has been greatly assisted by work done by the Secretariat. In particular, the Secretariat has prepared, at the request of the Review, background papers on each of the Terms of Reference and other information. Much of the background information contained in the Interim Report is drawn from the background papers provided by the Secretariat.

1.9 Invitation for Submissions/Comments or Meetings about Interim Report

51. The Review now invites interested stakeholders, organisations or individuals to provide submissions about the Interim Report. Information on making a submission is available on the Review website at www.dmirs.wa.gov.au/labour-relations or by contacting the Secretariat via irreviewsecretariat@dmirs.wa.gov.au

[36] A list of all who have made written submissions has been maintained by the Secretariat, for record keeping purposes.

52. It is then intended that the Review will consider and analyse the submissions and other information provided in response to the Interim Report before preparing the Final Report for the Minister.

1.10 Who is Covered by the State Industrial Relations System

53. As the Minister said in announcing the Review, it is important to understand who is covered by the State industrial relations system. The following information is primarily taken from an information guide prepared by the Secretariat, and is available on the DMIRS website.

54. In broad terms, the State industrial relations system in Western Australia covers the following employers and their employees – the State Government and other public sector bodies, sole traders, unincorporated partnerships, unincorporated trusts and incorporated associations that are not foreign, trading or financial corporations; including possibly some not for profit organisations. It is questionable whether or not local government bodies and their employees are covered by the State industrial relations system. The complexities of the issue will be discussed in the chapter on Term of Reference 8.

55. The numbers of employees who are covered by the State system is not readily ascertainable. As set out earlier, in announcing the Review, the Minister said the State system potentially covers between 21.7 per cent to 36.2 per cent of the employees in the State. That estimate is based upon an analysis done by DMIRS.[37] Based upon Australian Bureau of Statistics (ABS) *Employee, Earnings and Hours* survey data from 2010, the Secretariat advises that the figure is between 21.7 per cent to 36.2 per cent of employees in the State.

56. Two methods, both with limitations, can be used to estimate the figures. They are:

(a) Identifications based on reported employee pay setting methods.

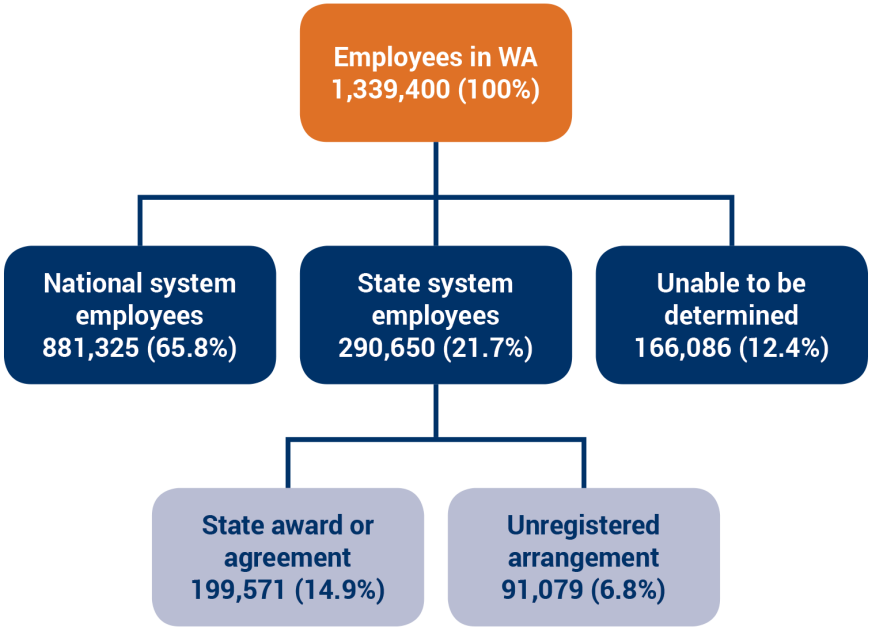
(b) The collection of employer information by type of legal organisation.

[37] ABS (2011) *Employee Earnings and Hours, Australia, May 2010*, catalogue no. 6306.0, unpublished data request. More recent data is not available

1.10(a)Pay Setting Methods

57. As can be seen in Figure 1A below, it is estimated that 21.7 per cent of employees are covered by the State system according to pay setting methods; although it should be noted that 12.4 per cent were unable to be determined. The large proportion of undetermined coverage means that this method is not deemed reliable enough to adequately estimate employee system coverage in Western Australia. The estimated number of employees is based on ABS *Labour Force* survey estimates.

Figure 1A Number and Proportion of Employees by Pay Setting Methods, Western Australia[38]

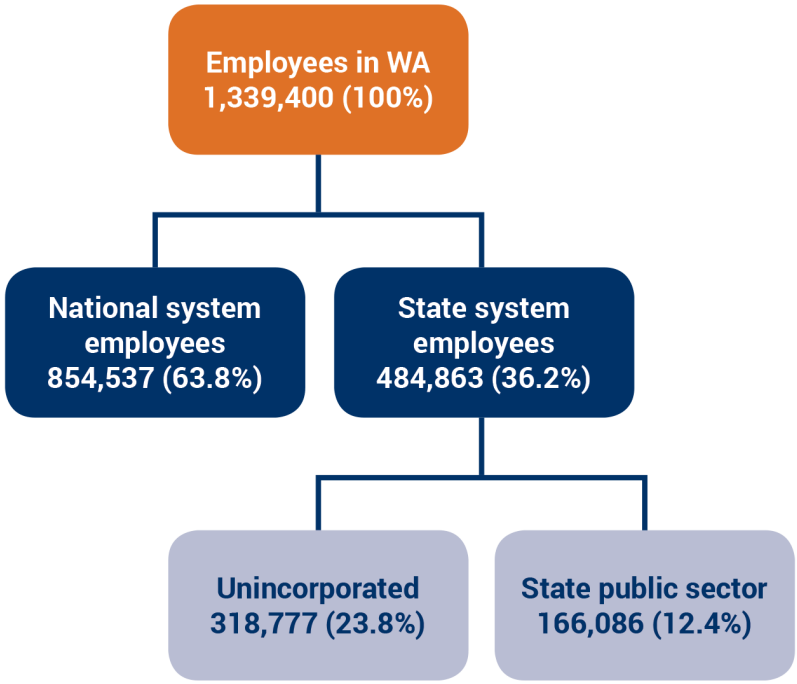


[38] Above, n 37; and ABS (2018) *Labour Force Australia*, December 2017, catalogue no 6202.0, Table 8 (trend data series)

1.10(b)Type of Legal Organisation

58. As per Figure 1B below, the proportion of State system employees by type of legal organisation or entity is estimated to be 36.2 per cent (484,863 employees). It should be noted that the small proportion of local government authorities that are considered to be operating in the State system has not been included in this estimate. The estimated number of employees included below is based on ABS *Labour Force* survey estimates.[39]

Figure 1B Number and Proportion of Employees by Type of Legal Organisation (Entity), Western Australia[40]



1.10(c) Employers

59. Newly obtained unpublished administrative data from the Australian Taxation Office (ATO) has been analysed by the Secretariat for the Review to estimate the proportion and number of employing businesses (excluding public sector and local government authorities) that are potentially covered by the State system.[41] The

39 ABS (2018) *Labour Force, Australia, December 2017*, catalogue no. 6202.0, Table 8 (trend data series).

40 Ibid and above n 37

41 ATO (2017) Unpublished administrative data available upon request, 2014-15. Trust and partnership business data from the ABR was accessed 5 January 2018. The data is for active ABN businesses only but does not identify whether they employ or not.

ATO manages administrative data for all businesses that are registered for pay as you go (PAYG) withholding and for GST registration receipts with the ATO.

60. Based on this data, it is estimated that a maximum of 35.4 per cent of private sector employers in Western Australia are covered by the State industrial relations system (27,511 employing businesses). This analysis is based on business entity types which can be used to identify unincorporated businesses. The analysis made the following assumptions:

(a) All sole traders (individuals) are considered unincorporated.

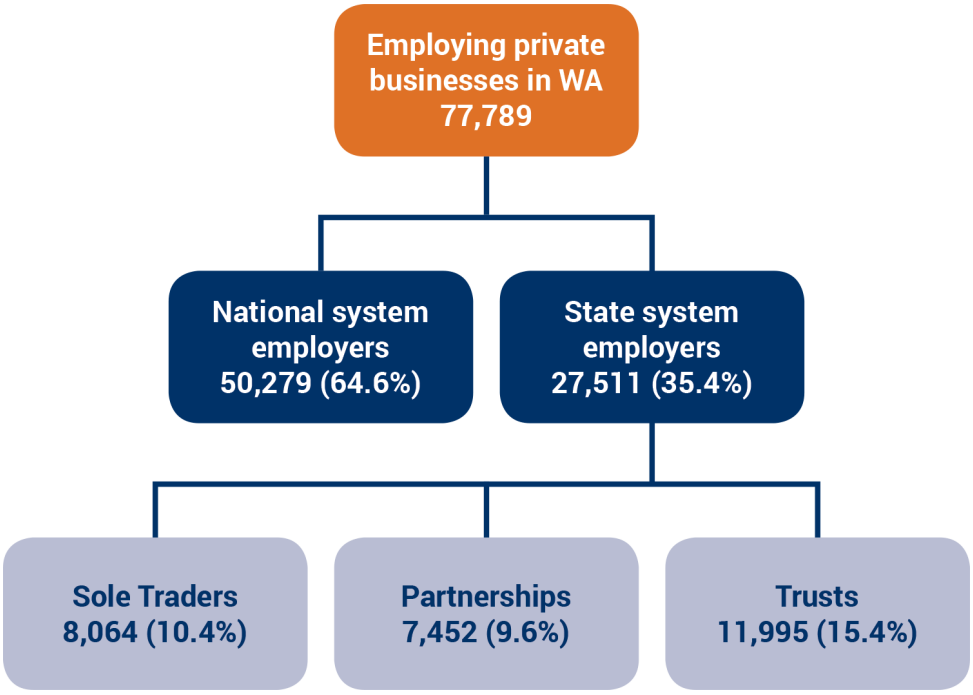
(b) The majority of employing and non-employing partnership businesses (86.8 per cent) consist of partnerships between individuals, rather than between incorporated businesses, and are therefore more likely to be unincorporated. The data was revised to exclude potential incorporated businesses from the partnership data.

(c) Trust business structures are highly complex and can include fixed, hybrid or public trusts of varying types. Unfortunately the ATO data cannot distinguish between which trust entities would be considered covered by the State system as trustees were not identifiable. Data available from the Australian Business Register on all trusts (those that employ and those that do not employ) indicates that 54.4 per cent of all trust businesses have an individual as a trustee. Based on this information, this analysis has inferred that 54.4 per cent of employing trust businesses are unincorporated.

61. Figure 1C below illustrates by entity type the proportion and number of employers covered by the State industrial relations system.[42]

[42] ATO (2017) Unpublished administrative date 2014-15.

Figure 1C Proportion and Number of Private Sector Employers Western Australia[43]



1.11 Decline in Trade Union Membership

62. The jurisdiction of the WAIRC is generally structured around the involvement of employer and employee organisations. Employee organisations are, in the main, trade unions. Relevant to an understanding of the way in which the State industrial relations system is presently used and might be used in the future, is that there has for some time been a marked decline in trade union membership.

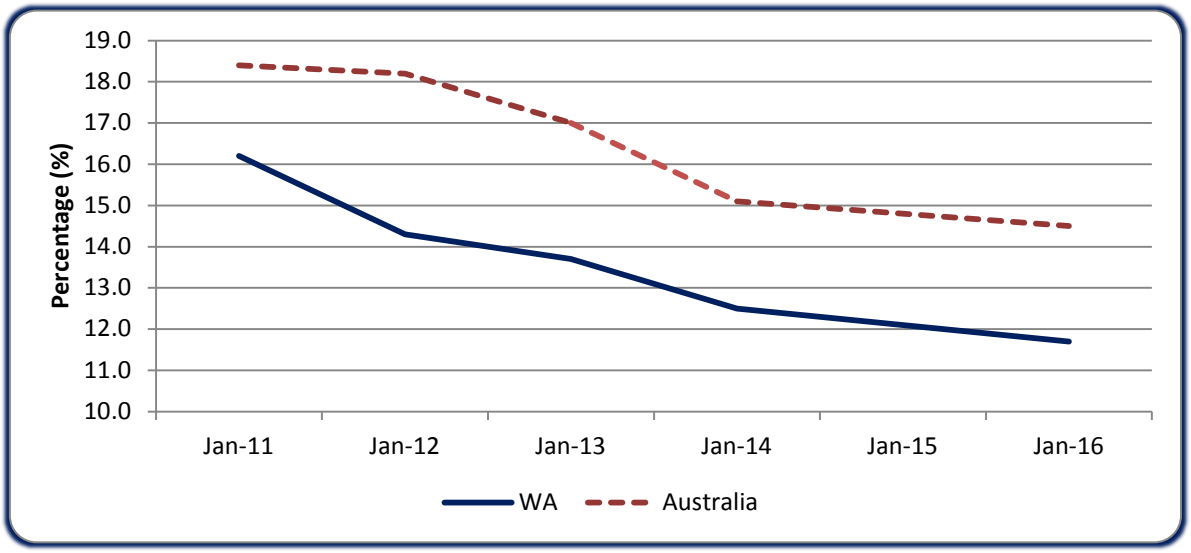
63. As of August 2016, the ABS estimated that 11.7 per cent or 139,300 employees in WA are trade union members.[44]

64. Trade union membership in WA and Australia has gradually declined over the last decade. Figure 1D shows the decline in trade union membership in WA compared to Australia since 2011.

43 Ibid.

44 ABS (2017) *Characteristics of Employment*, Australia, August 2016, catalogue no. 6333.0, data cube 16.

Figure 1D: Proportion of Trade Union Membership Western Australia and Australia [45]



65. In both WA and the whole of Australia, females were more likely to have trade union membership (12.8 per cent and 14.7 per cent respectively) than males (8.7 per cent and 12 per cent respectively).[46]

66. In WA, two-thirds of trade union members have had their membership for more than five years (67.3 per cent).[47]

67. State specific data for trade union membership by sector and industry is not published by the ABS.

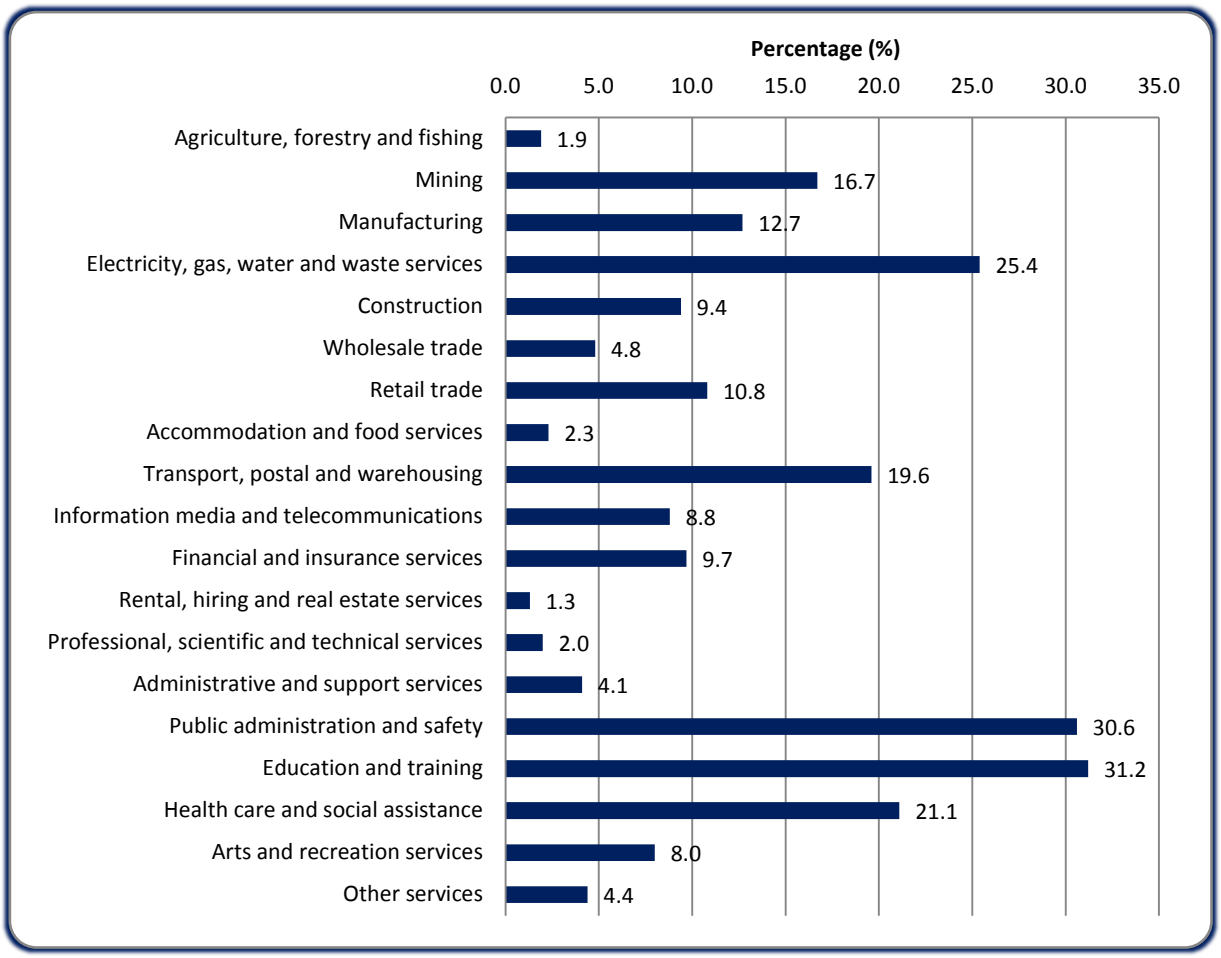
68. Nationally, trade union membership was highest in the public sector with 38.4 per cent of public sector employees being a member of a trade union, and 9.3 per cent of private sector employees being a member of a trade union.[48]

69. Figure 1E below represents the proportion of trade union membership by industry in Australia. The highest proportion of trade union membership is in the education and training industry (31.2 per cent), the public administration and

45 Ibid.
46 Above n 44, data cube 17.
47 Ibid.
48 Above n 44, data cube 18.

safety industry (30.6 per cent) and the electricity, gas, water and waste services industry (25.4 per cent)[49].

Figure 1E: Proportion of Trade Union Membership by Industry, Australia, August 2016[50]



70. For males, trade union membership was highest in the public administration and safety industry (33.2 per cent), the electricity, gas, water and waste services industry (29.1 per cent) and education and training industry (27.7 per cent).[51]

71. For females, trade union membership was highest in the education and training industry (32.7 per cent), the public administration and safety industry (27.5 per cent) and the health care and social assistance industry (22.5 per cent).[52]

49 Above n 44, datacube 18.
50 Ibid.
51 Ibid.
52 Ibid.

72. Trade union membership was highest for professionals (34.8 per cent) which includes teachers and nurses, followed by community and personal services workers (13.3 per cent) and technicians and trades workers (12.5 per cent). [53]

73. Trade union members in Australia were more likely to have a Bachelor Degree (24.3 per cent) or have completed a Certificate III or IV trade certificate (22.0 per cent).

74. Figure 1F below shows the proportion of trade union members in Australia by weekly earnings. Half of trade union members (50.2 per cent) earned between $41,600 ($800 per week) and $83,200 per annum ($1,600 per week), a further 32 per cent earned less than $41,600 per annum and 29.2 per cent earned more than $83,200 per annum.[54]

75. The median weekly earnings for trade union members were $1,211 ($62,972 per annum). The median weekly earnings for non-union members were $1,000 per week ($52,000 per annum).[55]

76. The issue of the decline in union membership of private sector unions is relevant to the operation of the State industrial relations system. As explained in chapter 2 of the Interim Report, the system was built upon the premise of strong union membership and involvement. The right to refer matters to the WAIRC or its constituent authorities from the "employee side" was, and still is, apart from some isolated exceptions, reposed in unions on behalf of employees, rather than the employees themselves.

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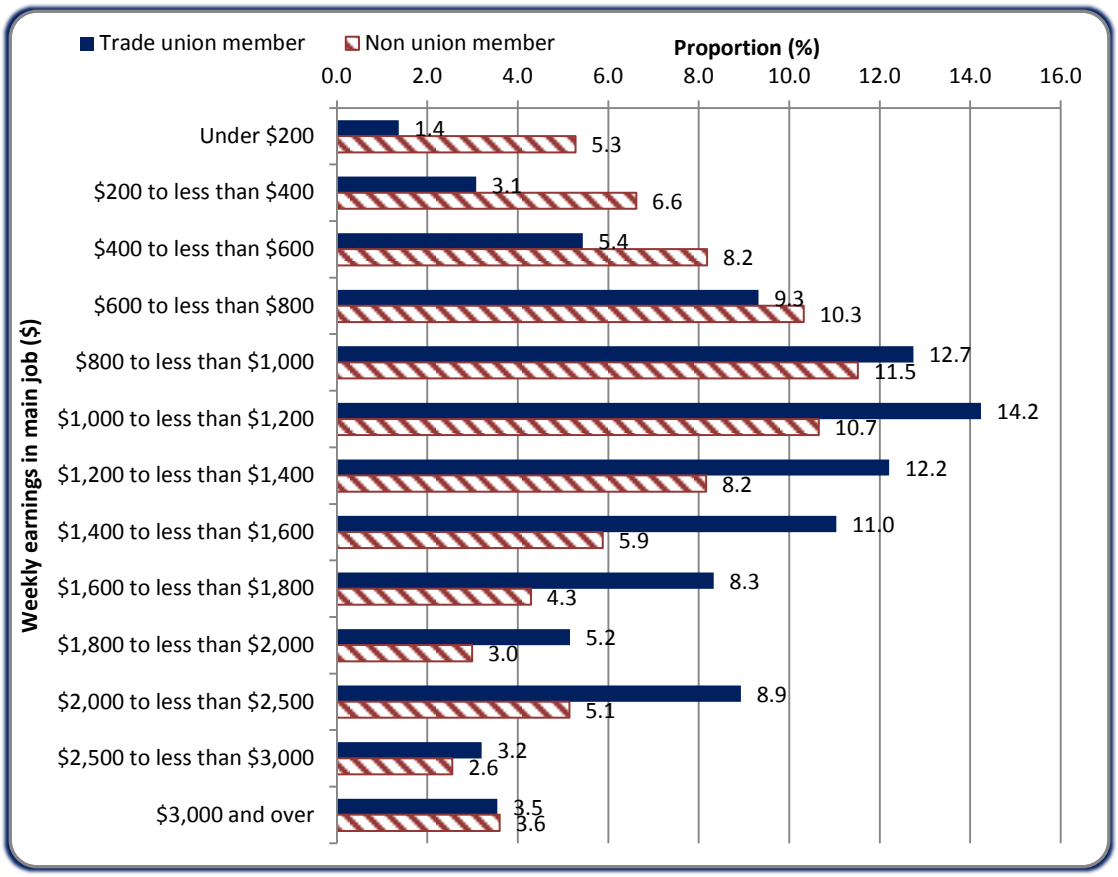
53 Above n 44, datacube 18

54 Above n 44, data cube 19.

55 Ibid.

Figure 1F: Proportion of Trade Union Membership by Weekly Earnings, Australia, August 2016[56]



1.12 The State Industrial Relations Systems and Laws in the Other States of Australia

77. As part of the general background to a consideration of the Terms of Reference, the Review has also looked at legislative change in other Australian State jurisdictions.

78. The Secretariat has provided an overview of legislative changes that have been made to the labour relations systems operating in other Australian States since 2010.

79. As set out earlier, all of the other States have referred their industrial relations powers to the Commonwealth in respect of private sector employees. Further, all employees in Victoria, the Australian Capital Territory and the Northern Territory

56 Above n 44, datacube 19.

are subject to the Federal industrial relations system, including public sector and local government employees. The State industrial relations systems in New South Wales, Queensland, South Australia and Tasmania therefore only generally apply to public sector and (in some cases) local government employees.[57]

80. All States and Territories continue to administer long service leave systems, which apply to most private sector employees as a national long service leave standard has yet to be developed.[58]

81. Significant legislative changes that have been made by other States since 2010 are outlined below.[59]

1.12(a)New South Wales

Industrial Relations Amendment (Public Sector Appeals) Act 2010 (NSW)

82. The objects of this legislation were to:[60]

(a) Amend the New South Wales *Industrial Relations Act 1996* (NSW IR Act) to provide for the NSW Industrial Relations Commission (NSW IRC) to review decisions concerning the promotion and discipline of public sector employees, instead of the Government and Related Employees Appeal Tribunal.

(b) Repeal the *Government and Related Employees Appeal Tribunal Act 1980*.

(c) Amend the *Transport Appeal Boards Act 1980* and the NSW IR Act to provide for the President of the NSW IRC to review decisions concerning the promotion and discipline of officers and employees of the State Transit Authority, Sydney Ferries, the Roads and Traffic Authority and RailCorp, instead of Transport Appeal Boards.

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57 Local government employees within Victoria, the Northern Territory and Tasmania are subject to the Federal industrial relations jurisdiction, while local government employees in New South Wales, Queensland and South Australia are subject to their respective State jurisdictions.

58 Employees subject to the Federal industrial relations jurisdiction are covered by the relevant long service leave legislation in their State or Territory, unless there are long service leave entitlements in a federal pre-modern award that would have covered an employer and their employees before 1 January 2010; or in some circumstances when a Federal registered agreement applies.

59 The States are considered in order of descending population numbers.

60 Explanatory Note, Industrial Relations Amendment (Public Sector Appeals) Bill 2010 (NSW).

Industrial Relations Amendment (Industrial Representation) Act 2012 (NSW)

83. The object of this legislation was to amend the NSW IR Act with respect to overlapping representation of employees, contract drivers or carriers, and related demarcation disputes.[61]

84. The NSW IR Act was amended to enable industrial representation of the same classes or groups of employees or contractors by one or more industrial organisations or associations of contractors, subject to safeguards relating to demarcation disputes. The amendments brought NSW legislation into line with corresponding provisions in the Commonwealth *Fair Work (Registered Organisations) Act 2009*.

Industrial Relations Amendment (Industrial Court) Act 2016 (NSW)

85. This legislation substantially amended the NSW IR Act and other legislation to abolish the NSW Industrial Court and transfer its functions; reconstitute the NSW IRC; and repeal and amend certain other legislation.[62] In summary, the legislation:

(a) Abolished the NSW Industrial Court (also referred to as the Industrial Relations Commission in Court Session).

(b) Appointed the current President of the NSW IRC (in his capacity as the only remaining judicial member) as a Judge of the Supreme Court.

(c) Reconstituted the NSW IRC so that it consists of a Chief Commissioner and Commissioners.

(d) Transferred the functions of the NSW Industrial Court principally to the Supreme Court and, in some cases, to the District Court and the NSW IRC.

61 Explanatory Note, Industrial Relations Amendment (Industrial Representation) Bill 2012 (NSW).

62 Explanatory Note, Industrial Relations Amendment (Industrial Court) Bill 2016 (NSW).

1.12(b)Victoria

Long Service Leave Bill 2017 (Vic)

86. The Long Service Leave Bill 2017 (Vic) (Vic LSL Bill) is a Bill to repeal the current *Long Service Leave Act 1992* (Vic LSL Act) and replace it with a new Act that is more contemporary. The Vic LSL Bill is currently before the Victorian Parliament.

87. In 2016, a review of the Vic LSL Act was carried out by the Department of Economic Development, Jobs, Transport and Resources. Members of the public, unions, employers and peak bodies were encouraged to participate and contributed to the review, and a discussion paper was released to facilitate public consultation on key issues.[63]

88. The review highlighted some shortcomings with the current Vic LSL Act. Based on submissions from stakeholders and feedback from members of the public, a number of reforms are included in the Vic LSL Bill.

89. While a variety of changes to long service leave provisions are proposed, the rate that leave accrues will not change. Currently, leave accrues at one-sixtieth of the period of continuous employment (equivalent to 13 weeks of leave for every 15 years of service).

90. The main changes to long service leave provisions proposed in the Vic LSL Bill are as follows:[64]

    (a) Leave may be taken in a more flexible manner - with the approval of their employer, employees will be able to take long service leave in minimum periods of one day.

    (b) Employees will be able to apply to take long service leave after seven years' service on a pro rata basis (currently employees must serve 10 years before they can access a period of leave). This brings the qualification for taking of leave into line with the payment of leave when employment

63 Government of Victoria, *Long Service Leave Discussion Paper*, 2016.

64 Explanatory Memorandum, Long Service Leave Bill 2017 (Vic).

ends. However, it does not increase employee entitlements or employer costs as the entitlement has already crystallised at seven years.

(c) The definition of an "asset" in a transfer of business has been expanded to include intangible assets. This models the transfer of business arrangements in s 311 of the FW Act.

(d) Two existing civil penalty provisions are to be converted into criminal offences. Penalties will also be increased, to be comparable with current Victorian standards.

(e) Authorised departmental officers will be able to require the production of records when investigating alleged breaches.

(f) A new method of calculating leave has been introduced where an employee's hours of work are not fixed; or if they are fixed, they have been changed in the two years immediately before the employee commences long service leave. The average of the hours worked will be calculated as the greater of:

(i) the average over the last 12 months;

(ii) the average over the last five years; or

(iii) the average over the entire period of continuous employment.

(g) An employee whose hours of work are about to change will have the right to request a statement from their employer outlining the old and new working arrangements. This statement can then be used as evidence in any court proceedings about long service leave.

(h) Changes will be made to the way that parental leave is treated for long service leave purposes. Under the proposed changes:

(i) any period of paid parental leave will count as service (and will not break continuity of employment);

(ii) any period of unpaid parental leave up to 12 months will count as service (and will not break continuity of employment);

(iii) any period of unpaid parental leave beyond 12 months will not count as service (unless agreed otherwise between the employer and employee) but will not break the continuity of employment; and

(iv) casual and seasonal employees will be able to take up to 24 months' unpaid parental leave without breaking their continuity of employment.[65]

1.12(c) Queensland

Industrial Relations Act 2016 (Qld)

91. Queensland's industrial relations system applies to approximately 14 per cent of the State's 2.5 million workers (State and local government employees).[66]

92. During 2015, the Queensland Government approved an independent review (Qld review) of the State's industrial relations laws and tribunals to provide recommendations for reform. This was the first major review of the State's industrial relations system since 1998.

93. The Queensland review was conducted by an Industrial Relations Legislative Reform Reference Group, which was chaired by Mr Jim McGowan AM. The final report was published in March 2016.[67]

94. Following the review, the Queensland Government comprehensively overhauled its industrial relations framework, and established the *Industrial Relations Act 2016* (Qld IR Act).[68]

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65 The FW Act allows eligible casual employees to take up to 24 months' unpaid parental leave.

66 Government of Queensland, 'A Review of the industrial relations framework in Queensland' (Industrial Relations Legislative Reform Reference Group, 2015) 23.

67 Queensland, *Parliamentary Debates*, Legislative Assembly, Industrial Relations Bill 2016, 1 September 2016, 3327-3329 (Grace Grace, Minister for Employment and Industrial Relations).

68 Industrial Relations Bill 2016 (Qld).

95. Much of the Qld IR Act was drafted to reflect similar regulation to the FW Act and *Fair Work (Registered Organisations) Act 2009* (Cth).[69] In particular, the Qld IR Act:

(a) Amended the objects of the legislation to include having a fair and balanced industrial system, the primacy of collective bargaining and recognising obligations of mutual trust and confidence.

(b) Amended enterprise bargaining arrangements to put greater emphasis on responsible representation and good faith bargaining, with arbitration being triggered as a last resort.

(c) Revised the regulation of registered industrial organisations and associated entities, to make them similar to those in the *Fair Work (Registered Organisations) Act*.

(d) Provided the Industrial Registrar, as an independent statutory officer, with the authority to investigate suspected breaches of an industrial organisation's obligations.

(e) Established a general protections jurisdiction to protect workers against adverse action during employment or dismissal; and workplace bullying remedies similar to those available to private sector workers under the FW Act.

(f) Further aligned Queensland's minimum employment standards with the NES, including parental, carer's and compassionate leave entitlements, the requirement for employers to give an information statement to employees upon commencement, and a right for employees to request flexible work arrangements.

(g) Provided paid leave for victims of domestic and family violence.

69 Explanatory Notes, Industrial Relations Bill 2016 (Qld).

(h) Provided the Queensland Industrial Relations Commission (Qld IRC) with exclusive jurisdiction to deal with all workplace related anti-discrimination matters, including those taken under the *Anti-Discrimination Act 1991* (Qld).

(i) Removed provisions that allowed legal representation in the Qld IRC without the consent of all parties.

(j) Removed prohibitions on content that can be included in a modern award or certified agreement.

(k) Removed notice requirements for an authorised industrial officer to enter a workplace.

(l) Reinstated employment conditions for government workers that were removed under the previous government, including job security, contracting out protections, union encouragement, organisational change, policy incorporation, and personal employee information.

(m) Re-established the independence of the Qld IRC when determining wage cases by removing the requirement that it must consider the employer's "financial position and fiscal strategy".

1.12(d)South Australia

South Australian Employment Tribunal Act 2014 (SA)

96. This legislation established the South Australian Employment Tribunal. The South Australian Employment Tribunal initially had jurisdiction to review certain decisions arising from the Return to Work Scheme in South Australia, which commenced in 2015.[70] As discussed later in this section, the South Australian Employment Tribunal's functions have since been expanded significantly.

97. The South Australian Employment Tribunal was given similar functions, powers and a similar operating approach to the South Australian Civil and Administrative

[70] Explanatory Notes, South Australian Employment Tribunal Bill 2014 (SA).

Tribunal. It was designed to provide an efficient and cost-effective process for all parties involved, act with as little formality and technicality as possible, and be flexible in the way in which it conducts its business.

98. The South Australian Employment Tribunal is headed by a President who, until recently, held concurrent office as a judge of the Industrial Relations Court of South Australia.

Fair Work (Miscellaneous) Amendment Act 2015 (SA)

99. This legislation amended the *Fair Work Act 1994* (SA). It also made consequential amendments to abolish the statutory office of the Employee Ombudsman, and changed the requirements for the constitution of the Full Commission of the Industrial Relations Commission of South Australia.[71]

Statutes Amendment (South Australian Employment Tribunal) Act 2016 (SA)

100. This legislation conferred a range of further jurisdictions on the South Australian Employment Tribunal, substantially enlarging its responsibilities.[72]

101. On 1 July 2017, the South Australian Employment Tribunal's jurisdiction was expanded to:

(a) Continue to resolve Return to Work disputes.

(b) Resolve South Australian employment and industrial disputes.

(c) Regulate South Australia's awards, agreements and the registers of Work Health and Safety entry permits, registered industrial agents and industrial organisations.

(d) Hear South Australian work, health and safety related prosecutions.

(e) Resolve South Australian equal opportunity and dust disease matters.

71 Explanatory Notes, Fair Work (Miscellaneous) Amendment Bill 2015 (SA).

72 Explanatory Notes, Statutes Amendment (South Australian Employment Tribunal) Bill 2016 (SA).

102. The South Australian Employment Tribunal now hears matters previously heard in the:

(a) Industrial Relations Court and Industrial Relations Commission (which have now been abolished).

(b) District Court - in regards to the *Dust Diseases Act 2005* (SA).

(c) Criminal jurisdiction of the Magistrates Court, in respect of "industrial offences".

(d) Magistrates, District and Supreme Courts in regards to common law employment contract disputes, and damages under the *Return to Work Act 2014* (SA).

(e) Teachers Appeal Board and Classification Review Panels.

(f) Equal Opportunity Tribunal.

(g) Police Review Tribunal (termination and transfer matters only).

(h) Public Sector Grievance Review Commission.

1.12(e)Tasmania

State Service Amendment Act 2012 (Tas)

103. This was an amendment Act that was largely concerned with the oversight and governance of the Tasmanian public sector. However, it also dealt with the structure of the Tasmanian Industrial Commission.[73]

104. The legislation streamlined the Tasmanian Industrial Commission by ensuring that it has, as a minimum, a President and Deputy President. Additional Commissioners are able to be appointed to meet varying workloads or to undertake specific tasks. Commissioners can be selected based on their

[73] Explanatory Notes, State Service Amendment Bill 2012 (Tas).

knowledge and experience in public sector administration, and may also be appointed if they hold similar roles in other jurisdictions.

105. The legislation also made changes to review processes, so that any reviews the Tasmania Industrial Commission undertakes under the *State Service Act 2000* (Tas) cannot be referred to the Full Bench of that Commission (so as to avoid the Tasmanian Industrial Commission having to review its own decisions).

Long Service Leave Amendment Act 2011

106. The legislation amended Tasmania's *Long Service Leave Act 1976* to reduce the qualifying periods for access to long service leave in the private sector.[74] The new long service leave entitlements are:

(a) 8⅔ weeks' long service leave after the first 10 years of continuous employment; and

(b) 4⅓ weeks' long service leave after each additional 5 years of continuous employment.

107. The legislation did not change the rate at which long service leave is accrued, which remains the equivalent to 13 weeks' long service leave after 15 years of continuous employment (0.8667 weeks per year). This brought Tasmania's long service leave standard into line with that applying in most other States and Territories, including Western Australia.

74 Explanatory Notes, State Service Amendment Bill 2012 (Tas).

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 *Construction Industry Portable Paid Long Service Leave Act 1985*
- Post-employment restraints
- Sham contracting
- Labour Relations Legislation Amendment and Repeal Bill 2012 (on issues that are not covered by the Terms of Reference)
- Amendola recommendations (on issues that are not covered by the Terms of Reference)
- Online filing (elodgement) and case management system in the Industrial Magistrates Court

Attachment 1B – Public Submissions to the Review

- Agnes McKay Law Practice
- Professor Alison Preston, UWA Business School, The University of Western Australia
- Australian Council of Trade Unions
- Australian Lottery and Newsagents Association
- Australian Medical Association (WA)
- Australian Mines and Metals Association
- Australian Nursing Federation Industrial Union of Workers Perth
- Chamber of Commerce and Industry WA
- Combined Small Business Alliance of WA Inc
- Community and Public Sector Union SPSF Group, WA Branch/ Civil Service Association of WA Inc
- Community Employers WA
- Community Legal Centres Association (WA) Inc
- Construction, Forestry, Mining and Energy Union, Construction and General Division, WA Divisional Branch
- Mr Cory Fogliani
- Department of Communities
- Department of Health
- Department of Justice
- Department of Local Government, Sport and Cultural Industries
- Employment Law Centre of Western Australia Inc
- Equal Opportunity Commission
- Eureka Lawyers
- Health Services Union of WA
- Hon. Alison Xamon MLC (Greens WA)
- Housing Industry Association
- Independent Education Union of Australia WA Branch
- Labourline Industrial & Workplace Relations Consulting
- Liberal Democrats Western Australia
- Master Builders Association Western Australia
- Master Grocers Australia (MGA Independent Retailers)
- National Union of Workers
- Mr Nicholas Ellery
- Mr Peter Katsambanis MLA

- Public Sector Commission
- Mr Ray Andretich
- Restaurant & Catering Australia
- Shire of Wiluna
- Slater & Gordon
- Small Business Development Corporation
- The Law Society of Western Australia
- The Salvation Army Australia
- The Shop, Distributive and Allied Employees' Association of Western Australia
- The State School Teachers' Union of W.A. (Inc.)
- UnionsWA
- United Firefighters Union of Australia West Australian Branch
- United Voice
- Western Australian Council of Social Service
- Western Australian Local Government Association
- Western Australian Municipal, Administrative, Clerical and Services Union of Employees
- Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers Perth
- WA Police Union
- WA Prison Officers' Union

Note: In addition to the above there was a further 14 confidential submissions sent to the Review.

Chapter 2 Structure of the Western Australian Industrial Relations Commission

2.1 The Term of Reference

108. 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.

109. 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. The phrase "streamlined and efficient" is sometimes used as a synonym or code for a cost cutting or savings measure. In the present context however the Review does not think the phrase should be understood in this way. This is because creating a structure that would cost less might, 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 the Minister has in contemplation. As set out in Chapter 1, this is a contemporary, fair and accessible system.

110. Efficiency, therefore, is a relative term. Its meaning takes shape from its context and what is trying to be achieved.

111. A review of the structure of the WAIRC must take into account what the WAIRC does. In the context of the present Review, it also brings into account the other Terms of Reference. This is because the Recommendations of the Review on those Terms of Reference will have an impact on what the WAIRC will or might be doing in the immediate future.

112. As the chapters of the Interim Report on the other Terms of Reference illustrate, the Review is considering proposed recommendations that would, over time,

mean the WAIRC would have an expanded jurisdiction including employees who have hitherto been excluded from the jurisdiction of the WAIRC. It could have an expanded jurisdiction, potentially, to deal with industrial matters involving the public sector. The Review may also recommend the WAIRC have jurisdiction to update the proposed State Employment Standards and rejuvenate the State private sector award system. The WAIRC may also have, in the future, an expanded jurisdiction over local government and their employees.

113. Accordingly, the Review cannot sensibly assess the structure of the WAIRC without taking these aspects into consideration, as well as looking at what the WAIRC does now.

2.2 Issues Relevant to Term of Reference 1

114. In the opinion of the Review the following inter-related issues are relevant to the first Term of Reference:

(a) What is the WAIRC? What is the purpose of the WAIRC and what are its objects?

(b) How is the WAIRC presently structured? What are the different roles engaged in by its constituents?

(c) What is the jurisdiction of the WAIRC?

(d) What are the powers of the WAIRC and when and in what circumstances can it exercise those powers?

(e) Given the coverage of the FW Act what work does the WAIRC now do? Who uses the WAIRC and for what purpose?

115. In this chapter of the Interim Report the Review has looked at and kept these questions in mind in trying to decide upon the structural changes that might take place to the WAIRC to enhance its efficiency and structure, in the context of establishing and maintaining a State industrial relations system that is contemporary, accessible and fair.

2.3 What is the WAIRC?

2.3(a) The WAIRC

116. The WAIRC was established, albeit under a different name, by the *Industrial Arbitration Act 1979* (WA) (IA Act).[75] The IA Act, enacted by a Liberal Government, repealed the *Industrial Arbitration Act 1912* (WA).[76] It was the outcome of a "major overhaul" of the 1912-1977 legislation[77] after Senior Industrial Commissioner Mr Eric Kelly had conducted an independent review. The IA Act commenced in 1980.

117. The change of name from the Western Australian Industrial Commission to the WAIRC was part of a suite of amendments to the legislation brought about after a change to a State Labor Government in 1983. These changes[78] became operative in late November 1984 and March 1985.

118. Section 8(1) of the current IR Act provides for the continuation of the Commission established under the *Industrial Arbitration Act 1912,* "subject to this Act under the name the Western Australian Industrial Relations Commission".

119. As set out later, the IR Act does not, in express terms, set out the objects, function or purpose of the WAIRC.

120. Section 12(1) of the IR Act provides that the WAIRC is a "court of record and shall have an official seal". A court of record is said to be distinguishable from a court of law. It is clear that the WAIRC does not always exercise judicial power, at least as that expression is known in Commonwealth constitutional law.[79]

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75 It was given its current name by s 6 of the *Acts Amendment and Repeal (Industrial Relations Act) (No. 2)* 1984.

76 IR Act s 4.

77 Marcelle V Brown, *Western Australian Industrial Relations Law*, (University of Western Australia Press, Second Edition 1991) [124]. Ms Brown's work contains a history of industrial relations legislation in WA to 1990 in Chapter 1; and see too the Amendola Report, above n 13 [17]-[61].

78 *Industrial Arbitration Amendment Act (No. 2) 1984*; *Acts Amendment and Repeal (Industrial Relations) Act (No. 2) 1984.*

79 *New South Wales v Kable* (2013) 252 CLR 118, Gageler J, [49]; *Palmer v Ayres; Ferguson v Ayres* (2017) 259 CLR 478, Kiefel, Keane, Nettle and Gordon JJ [20]-[24].

2.3(b) The Genesis of the WAIRC

121. The stated reason for the enactment of the IA Act serves as a reminder of the way in which the jurisdiction of the WAIRC has changed. When introducing the Bill to Parliament, the Hon. R J O'Connor MLA, Minister for Labour and Industry, said the Government was particularly concerned about the high level of industrial disputes in the Pilbara iron ore industry, and "believed the existing legislation had been incapable of dealing with the industrial issues of the time".[80] An industrial dispute of this type would now however take place within the Federal industrial relations system, given the employers in the Pilbara iron ore industry are all constitutional corporations. Thus the WAIRC and the IR Act were built in another time, well before the changes to the industrial relations landscape that commenced in 2005 with the Work Choices legislation, against a different backdrop and for a now superseded purpose. This background is relevant to a consideration of the issues related to Chapter 7 of the Interim Report about Term of Reference 6, to do with the current situation about State awards under the State system.

2.3(c) The IR Act and an Objectiveless WAIRC

122. As stated, the IR Act provides for the continuation in existence of the WAIRC but does not in terms set out its objects, functions or purpose. This was noted in the Amendola Report.[81] On this point, the Amendola Report contrasted the IR Act with the *State Administrative Tribunal Act 2004* (WA); which in s 9 sets out the main objectives of the State Administrative Tribunal (SAT).

123. The objects, functions and purpose of the WAIRC are to be gleaned or inferred from an assessment of the jurisdiction and powers it exercises under the IR Act and other legislation.

124. Part II of the IR Act is headed "The Western Australian Industrial Relations Commission", and is comprised by 14 non-sequentially numbered Divisions. As the headings of the Divisions provide a snapshot of the constitution, role, function and purpose of the WAIRC, they are reproduced below in Table 2A:

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80 Brown, above n 77 [124]; Western Australian Parliamentary Debates (1979) 226, 3615.

81 Above n 13, at 72 [106].

Table 2A – Divisions in the IR Act

Division	Heading
Division 1	Constitution of the Commission
Division 2	General jurisdiction and powers of the Commission
Division 2A	Awards
Division 2B	Industrial agreements
Division 2C	Holding of compulsory conferences
Division 2D	Miscellaneous provisions relating to awards, orders and agreements
Division 2E	Appeals to the Full Bench
Division 2F	Keeping of and access to employment records
Division 2G	Right of entry and inspection by authorised representatives
Division 3	General Orders
Division 3A	MCE Act functions
Division 3B	Collective agreements and good faith bargaining
Division 4	Industrial organisations and associations
Division 5	Duties of officers of organisations

125. Section 23(1) of the IR Act is central to an understanding of the way the IR Act works and the role of the WAIRC. It provides:

> **23 Jurisdiction of Commission**
>
> (1) Subject to this Act, the Commission has cognizance of and authority to enquire into and deal with any industrial matter.

126. Therefore, the WAIRC, subject to the balance of the IR Act, has jurisdiction to enquire into and deal with industrial matters. These are broad powers, made broader, over time, by an expanding definition of what an "industrial matter" is, as defined in s 7 of the IR Act.[82]

127. Consistently with the jurisdiction to "deal with any industrial matter", the WAIRC, and industrial bodies broadly like it, have often been colloquially called the "industrial umpire". This is because they have the capacity to take hold of and try to resolve an industrial dispute, sometimes of their own volition, but mostly upon the application of an industrial organisation of employees (union), employer, employer organisation or, in some instances, the Government.

[82] The definition is later reproduced.

128. The broadly stated jurisdiction is consistent with the type of Commission the Government intended to create under the IA Act. However, as indicated, the ordinary jurisdiction of the WAIRC is now subject to considerable legal and practical restrictions. Presently they are imposed by the FW Act, although the FW Act largely continued the carve out of the jurisdiction of the WAIRC which commenced with the Work Choices legislation.

129. Section 26(1) of the FW Act provides that it is "intended to apply to the exclusion of all State or Territory industrial laws so far as they would otherwise apply in relation to a national system employee or a national system employer". A "national system employee" and "national system employer" are defined in s 13 and s 14 of the FW Act, respectively. Although these definitions have some intricacies, it is adequate for present purposes to say that national system employers include trading and financial corporations, as being "constitutional corporations" to which s 51(xx) of the *Constitution* applies. Section 26(2)(a) of the FW Act provides that a "*State or Territory industrial law* is", amongst other legislation specified "a general State industrial law". In turn, s 26(3)(c) of the FW Act provides that "the *Industrial Relations Act 1979* of Western Australia" is "a general State industrial law". The outcome of this is that the jurisdiction of the WAIRC does not generally include the "industrial matters" of trading and financial corporations.

130. Steytler P,[83] explained the reason for this, in Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No 2),[84] with respect to the broadly similar provisions in the Work Choices legislation. His Honour said:[85]

> The parties agree that, because the Commonwealth Act applies to industrial matters as between constitutional corporations and their employees to the exclusion of the State Act (so far as the State Act would otherwise apply in relation to an employee or employer), the effect of s 109 of the Constitution is that, so far as the State Act purports to give to the Commission jurisdiction to deal with industrial matters concerning relations between a constitutional corporation and its employees, or one of them, it is invalid.

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83 Pullin J agreed with the reasons of his Honour.

84 (2008) 178 IR 168, [14].

85 The reference by his Honour to the "State Act" is to the IR Act.

131. Therefore, for the private sector, the jurisdiction of the WAIRC is generally confined to sole traders, unincorporated partnerships, unincorporated trusts, unincorporated associations, non-trading corporations, incorporated associations that are not trading or financial corporations,[86] the public sector and, possibly, local government.[87]

132. The word "generally" was used in the previous paragraph as the FW Act expressly preserves some State laws from the application of s 26 of the FW Act.[88] Laws that are not excluded by s 26 include a law that deals with "non-excluded matters" or "rights and remedies" incidental to them. Relevant to the jurisdiction of the WAIRC is that the non-excluded matters include occupational health and safety, long service leave,[89] the regulation of employer and employee associations and "claims for enforcement of contracts of employment …".[90]

133. Consistent with these provisions, the WAIRC has roles and functions not only as provided for under the IR Act, but also other legislation.

134. In dealing with all of the jurisdiction it has, the WAIRC is in some respects chameleon like, changing its character depending upon what it is doing, and under which legislation, at any particular time.

135. The Amendola Report saw this as a weakness of the structure of the WAIRC, but in the opinion of the Review that is not necessarily so. It depends on the intended objective, purpose and function of the WAIRC.

2.3(d) The Objects of the Industrial Relations Act

136. The objects of the IR Act are set out in s 6 of the IR Act. They are lengthy but do not mention the WAIRC. The lengthiness of the objects are, the Review surmises, probably a product of State governments of different persuasions trying over time to paint their particular political colour upon the industrial relations system of the

86 These are generally incorporated under the *Associations Incorporation Act 2015* (WA) s 10.
87 See Chapter 9.
88 FW Act s 27.
89 Subject to an exception set out under Pt 2-2, div 9 of the FW Act; see FW Act s 27(2)(g).
90 FW Act s 27(2)(o).

State. As stated in Creighton & Stewart, in Australia, "labour regulation represents one of the few areas of substantial policy difference between the major political parties".[91] As the authors go on to state, this was particularly evident in the 2007 Federal election, when the consequences of the Work Choices legislation and "community concerns" about it were "successfully exploited" and led to a landslide Australian Labor Party victory.

137. The nature and extent of that electoral victory could well have had an impact on the Barnett Liberal Government, elected in Western Australia for the first time in September 2008. That is because, as outlined in Chapter 1, the Barnett Government was very inactive about amending the IR Act, even after obtaining the Amendola Report, and tabling the Green Bill into State Parliament.

138. Section 6 of the IR Act provides:

> The principal objects of this Act are —
>
> (a) to promote goodwill in industry and in enterprises within industry; and
>
> (aa) to provide for rights and obligations in relation to good faith bargaining; and
>
> (ab) to promote the principles of freedom of association and the right to organise; and
>
> (ac) to promote equal remuneration for men and women for work of equal value; and
>
> (ad) to promote collective bargaining and to establish the primacy of collective agreements over individual agreements; and
>
> (ae) to ensure all agreements registered under this Act provide for fair terms and conditions of employment; and
>
> (af) to facilitate 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; and
>
> (ag) to encourage employers, employees and organisations to reach agreements appropriate to the needs of enterprises within industry and the employees in those enterprises; and
>
> (b) to encourage, and provide means for, conciliation with a view to amicable agreement, thereby preventing and settling industrial disputes; and
>
> (c) to provide means for preventing and settling industrial disputes not resolved by amicable agreement, including threatened, impending and probable industrial disputes, with the maximum of expedition and the minimum of legal form and technicality; and

[91] Creighton & Stewart's Labour Law, Sixth Edition, Federation Press, 2016, 3[1.01].

(ca) to provide a system of fair wages and conditions of employment; and

(d) to provide for the observance and enforcement of agreements and awards made for the prevention or settlement of industrial disputes; and

(e) to encourage the formation of representative organisations of employers and employees and their registration under this Act and to discourage, so far as practicable, overlapping of eligibility for membership of such organisations; and

(f) to encourage the democratic control of organisations so registered and the full participation by members of such an organisation in the affairs of the organisation; and

(g) to encourage persons, organisations and authorities involved in, or performing functions with respect to, the conduct of industrial relations under the laws of the State to communicate, consult and co-operate with persons, organisations and authorities involved in, or performing functions with respect to, the conduct or regulation of industrial relations under the laws of the Commonwealth.

139. The lack of a stated purpose for, or role of, the WAIRC is stark. Some of the "objects" appear as thinly disguised political statements about labour regulation. Those objects, though, can have an oblique impact upon the way the WAIRC conducts itself, and makes decisions, as underlying relevant considerations. Other objects, less in number, provide a better albeit still indirect indication of the role the WAIRC has to play in the industrial relations system the IR Act provides for. For example, object 6(b) refers to the conciliation of industrial disputes and in other sections of the IR Act the role of the WAIRC in trying to achieve this is described.

140. The same may be said about object 6(c) relating to the IR Act providing a means for settling industrial disputes not resolved by agreement; with the rider that this is to be done "with the maximum of expedition and the minimum of legal form and technicality". Object 6(d) refers to "awards made for the prevention or settlement of industrial disputes". The IR Act then later sets out how the WAIRC is to be involved in the making of awards to serve this purpose. Object 6(e) links to one of the powers to be exercised by the WAIRC in relation to registered organisations; the IR Act object is to "discourage…overlapping of eligibility for membership of such organisations".

2.3(e) The Objectives of the Industrial Relations Act and what the WAIRC does

141. It is apparent though that the objects of the IR Act do not purport to nor do they fully represent, now, what the WAIRC does, and how. This is in part due to the limited role the industrial relations laws of the State have, in regulating the industrial relations of trading corporations, their employees and their representative unions, within the industries of the State.

142. Additionally, and as an example, under s 29(1)(b)(ii) of the IR Act the WAIRC has, subject to a statutory cap, unlimited jurisdiction to determine a claim by an employee or ex-employee that they have not been allowed a "benefit … to which he [sic] is entitled under his [sic] contract of employment". This type of claim is determined by the WAIRC applying the law of contract. It involves the exercise of judicial power. But the exercise of this jurisdiction is not reflected in the objects. Additionally, at least to some extent, the exercise of the jurisdiction runs counter to object (c), of settling disputes with a minimum of legal form and technicality. That is because, axiomatically, determining what is effectively a claim for a breach of contract is all about legal technicality: the issues are, what were the terms of the contract of employment and did the employer fail to provide a benefit the employee was entitled to under the contract.

143. Another example of the WAIRC exercising judicial power is in declaring the "true interpretation of an award", "binding on all courts", as contained in s 46(1) of the IR Act. The "power to make a binding determination as to legal rights and liabilities arising under an award or agreement is, of its nature judicial power".[92] The Review notes there is presently a case before the High Court, which could affect the constitutionality of s 29(1)(b)(ii) and s 46(1) and s 46(3) of the IR Act.[93]

144. Section 26 of the IR Act reflects object (c); but is also difficult to reconcile with all of what the WAIRC does. The way in which the WAIRC is to conduct itself is set out in s 26(1) of the IR Act:

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92 *CFMEU v The Australian Industrial Relations Commission* (2001) 203 CLR 645 [29].

93 *Burns v Gaynor & Ors* S185/2017; appeal from [2017] NSWCA 3; heard 5 December 2017, decision reserved.

(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; and

(b) shall not be bound by any rules of evidence, but may inform itself on any matter in such a way as it thinks just; and

(c) shall have regard for the interests of the persons immediately concerned whether directly affected or not and, where appropriate, for the interests of the community as a whole; and

(d) shall take into consideration to the extent that it is relevant —

(i) the state of the national economy;

(ii) the state of the economy of Western Australia;

(iii) the capacity of employers as a whole or of an individual employer to pay wages, salaries, allowances or other remuneration and to bear the cost of improved or additional conditions of employment;

(iv) the likely effects of its decision on the economies referred to in subparagraphs (i) and (ii) and, in particular, on the level of employment and on inflation;

(v) any changes in productivity that have occurred or are likely to occur;

(vi) the need to facilitate 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;

(vii) the need to encourage employers, employees and organisations to reach agreements appropriate to the needs of enterprises and the employees in those enterprises.

145. Section 26(2A) sets out particular considerations the WAIRC must take into account in making a "public sector decision". That does not call for comment at this time.

146. As mentioned, the contents of s 26(1)(a) and s 26(1)(b) of the IR Act do not sit happily with all of the jurisdiction to be exercised by the WAIRC. As mentioned, the best example is the denial of contractual benefits jurisdiction. Not surprisingly, over time, the WAIRC and the IAC have grappled with the command in s 26 of the IR Act when exercising the denial of contractual benefits jurisdiction.[94]

[94] The issues, problems and position as at 1991 are summarised in M Brown, *Western Australian Industrial Relations Law*, Second Edition, 1991, [1009]. More recently the IAC and the WAIRC have decided that, despite s 26(1), the denial of contractual benefits jurisdiction is to be determined on contract law principles. See *Saldanha v Fujitsu Australia Pty Ltd* (2008) 89 WAIG 76 [80]-[82] and see also s 26(1) of the IR Act, in the context of the WAIRC exercising juridical functions; *Registrar v Liquor, Hospitality and Miscellaneous Union, Western Australian Branch* (2007) 87 WAIG 1199 [42]-[48] and *Director-General of Health In Right of the Minister for*

2.4 The Structure of the WAIRC

2.4(a) The Members of the WAIRC

147. As set out in s 8(2) of the IR Act, the members of the WAIRC are the President, Chief Commissioner, Senior Commissioner and "such number of other commissioners as may, from time to time, be necessary for the purposes" of the IR Act.[95] At present the WAIRC's members are the Chief Commissioner, an Acting President, an Acting Senior Commissioner, and two "other commissioners". The IR Act also creates the office of the Registrar, to administer the WAIRC.

148. The functions of the President and the Chief Commissioner are set out in s 14 and s 16 respectively of the IR Act. In general terms it might be said that the Chief Commissioner is the administrative head of the WAIRC and the President is the judicial head. The role of the Chief Commissioner, as the administrative head, is established by the clear terms of s 16(1aa) of the IR Act.

149. Section 10 of the IR Act currently provides that a member of the WAIRC must retire upon attaining 65 years of age.[96] This requirement was inserted in the then *Industrial Arbitration Act, 1912-1961* in 1963,[97] along with tenure for Commissioners until retirement age.[98] As set out below, a compulsory retirement age of 65 is probably not now appropriate.

2.4(b) The Constitution of the WAIRC and the Appellate Structure

150. Under the IR Act and other legislation the WAIRC can be constituted by a single Commissioner, a bench of three Commissioners,[99] the "Commission in Court Session", the "Full Bench" or the President.

Health (2008) 88 WAIG 543. Also instructive of the problem are the views expressed by Anderson J in *Hotcopper Australia v Saab* (2002) 117 IR 256 at [18], [26]; Kenner C in *Saldanha* at [312], [319] and Hasluck J in *BGC (Australia) Pty Ltd v Phippard* (2002) 115 IR 430 at [40], [54].

95 IR Act s 8(2)(d).

96 This is consistent with the compulsory retirement age of Fair Work members under the FW Act.

97 Inserted by *Industrial Arbitration Act Amendment Act (No.2), 1963* s 37.

98 Commissioners were appointed for a five-year period prior to this time.

99 In sitting, for example, to hear an appeal under s 33P of the *Police Act WA 1892*; with the Chief Commissioner or the Senior Commissioner to sit as the presiding member.

151. The IR Act also establishes "constituent authorities" that include or are constituted by members of the WAIRC, who are appointed and exercise the jurisdiction set out in the IR Act and other legislation. As will be set out later, the constituent authorities comprise the PSA,[100] the PSAB[101] and the Railways Classification Board.[102]

152. Under s 16(2A) of the IR Act, the Chief Commissioner must also designate a Commissioner who satisfies the requirements set out in s 8(3A) of the IR Act to exercise the jurisdiction conferred by s 51G of the *Occupational Safety and Health Act 1984* (WA) (OSH Act). As set out later, in exercising this jurisdiction the Commissioner sits as the Occupational Safety and Health Tribunal.

153. A Commissioner of the WAIRC can also sit as the Road Freight Transport Industry Tribunal (RFTIT) pursuant to s 38 of the *Owner-Drivers (Contracts and Disputes) Act 2007* (WA) (OD Act). The RFTIT exercises the jurisdiction provided under Part 9 of that Act.

154. The WAIRC also provides a legislated for mediation service pursuant to the *Employment Dispute Resolution Act 2008* (WA) (EDR Act).[103] As summarised in the Amendola Report, the EDR Act was enacted to give the WAIRC wider scope to resolve industrial disputes before they reach arbitration.[104] The WAIRC can provide the mediation service, where the parties are agreeable, even for constitutional corporations. Where parties have made a written agreement the EDR Act also provides the WAIRC with the jurisdiction to resolve industrial disputes.

155. The WAIRC also has a link to Boards of Reference that are provided for in awards, pursuant to s 48 of the IR Act. The link between the WAIRC and Boards of Reference is set out below.

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100 IR Act s 80D.
101 IR Act s 80H.
102 IR Act s 80M, s 80N, s 80R.
103 The use of the EDR Act is summarised in the Chief Commissioner's Annual Report 2017, 11.
104 The Amendola Report (above n 13) recommended the abolition of the EDR Act.

156. The WAIRC is linked, through appellate processes, with the Industrial Magistrates Court (IMC) and the IAC.

2.4(c) The Industrial Magistrates Court

157. The IMC is a Court established under s 81(1) of the IR Act and is constituted by an Industrial Magistrate. Pursuant to s 81CA of the IR Act, the IMC exercises both "general" and "prosecution" jurisdictions.

158. The IMC's general jurisdiction is governed by the *Magistrates Court (Civil Proceedings) Act 2004* (see s 81CA(2))[105] and the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005.*

159. When exercising prosecution jurisdiction, the IMC constitutes a Court of summary jurisdiction and the practice and procedure are those provided in the *Criminal Procedure Act 2004* and the *Criminal Procedure Regulations 2005*.

160. A primary function of the IMC is to enforce industrial awards, industrial agreements, statutory minimum conditions of employment and orders.

161. There are IMCs in Perth, Geraldton, Kalgoorlie and Albany but originating claims must be commenced in the Perth Court.[106]

162. The Perth IMC may hear and determine matters at any location within the State of Western Australia.

163. Although, customarily each person who is appointed as a Magistrate is also appointed as an Industrial Magistrate, the IMC Perth Registry is separately located to the General Registry of the Magistrates Courts. In Perth the IMC is, as a matter of practice, presided over by two or three Magistrates who gain specialisation in the matters that they hear. The Registry is also able to provide generalised procedural assistance to litigants.

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105 Although this is somewhat problematic as regulation 3(2) of the IMC Regulations provides: 'For the purposes of the Act section 81CA(2), the *Magistrates Court (Civil Proceedings) Act 2004* does not apply to, or in relation to, a Court' (meaning an Industrial Magistrates Court).

106 This summary is taken from the website of the IMC, read on 7 February 2018 - http://www.imc.wa.gov.au/

164. An appeal from the IMC may be made to the Full Bench of the WAIRC under s 84(2) of the IR Act. It is somewhat odd that there is an appeal from a Magistrates Court that proceeds outside of the ordinary judicial structure of the State. This oddity is somewhat ameliorated by the presence on the Full Bench of the President, who, as will be set out later, has the same entitlements as a member of the Supreme Court. The existence of the President's position in the IR Act therefore is premised upon the position having a particular status. That issue is referred to again later.

165. The IMC also hears cases for the enforcement of Federal industrial instruments under the FW Act. This is because the IMC is an "eligible State or Territory court" within the meaning of s 12 of the FW Act, for the purposes of Chapter 4 of the FW Act. Chapter 4 of the FW Act provides the IMC with jurisdiction to hear and determine claims for non-payments or underpayments of amounts required to be paid under the FW Act or a "fair work instrument", an alleged breach or breaches of the civil remedy provisions of the FW Act and other matters. The IMC is empowered to make orders for the payment of a sum of money, impose civil penalties, and order the payment of interest and costs.[107] Any appeal from these decisions of the IMC is to the Federal Court of Australia.

2.4(d) The Full Bench of the WAIRC

166. The Full Bench of the WAIRC is established by s 15 of the IR Act. It is constituted by not less than three members of the WAIRC, one of whom must be the President, who is the presiding member. The primary function of the Full Bench is to hear appeals against decisions of single Commissioners and the IMC.[108]

2.4(e) The Western Australian Industrial Appeal Court

167. The IAC is established by s 85 of the IR Act. Three members of the Supreme Court, nominated by the Chief Justice, constitute the IAC.[109] The main role of the IAC is to hear appeals, albeit on very limited grounds, from the Full Bench of the

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107 The exercise of the jurisdiction is explained in a Practice Direction published by the IMC – The Fair Work Act Industrial Magistrates Court Practice Direction No 2 of 2012.

108 IR Act s 49, s 84.

109 IR Act s 85(3a).

WAIRC.[110] It is not a state Supreme Court, however, and as such appeals may not be brought against decisions of the IAC to the High Court.[111] Additionally, the decisions of the IAC are amenable to be reviewed by the Supreme Court, by use of a prerogative writ, on limited grounds.[112] The existence of the IAC is somewhat anomalous and outside the ordinary judicial hierarchy of the State and Commonwealth.

168. The grounds upon which an appeal "lies" to the IAC are set out in s 90(1) of the IR Act, and the powers of the IAC are contained in s 90(3) of the IR Act, as follows:

> **90. Appeal from Commission to Court**
>
> (1) Subject to this section, an appeal lies to the Court in the manner prescribed from any decision of the President, the Full Bench, or the Commission in Court Session —
>
> (a) on the ground that the decision is in excess of jurisdiction in that the matter the subject of the decision is not an industrial matter; or
>
> (b) on the ground that the decision is erroneous in law in that there has 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; or
>
> (c) on the ground that the appellant has been denied the right to be heard, but upon no other ground.
>
> …
>
> (3) On the hearing of the appeal the Court may confirm, reverse, vary, amend, rescind, set aside, or quash the decision the subject of appeal and may remit the matter to the President, the Full Bench, or the Commission in Court Session, as the case requires, for further hearing and determination according to law.
>
> (3a) If any ground of the appeal is made out but the Court is satisfied that no injustice has been suffered by the appellant or a person who is a member of or represented by the appellant, the Court shall confirm the decision the subject of appeal unless it considers that there is good reason not to do so.

169. The limited grounds of appeal were included in the IR Act in 2002,[113] specifically to limit the number of appeals to the IAC. The grounds of appeal are more limited than those that can be used to appeal against decisions of other courts to the Supreme Court or the Court of Appeal, or the State Adminstrative Tribunal (SAT) to the Supreme Court or the Court of Appeal, or the IMC to the Full Bench of the

110 IR Act s 86, s 90.
111 *Holmes v Angwin* (1906) 4 CLR 297; and the IR Act s 85, s 87(2), s 88(2) and s 92(1).
112 *Re Western Australian Industrial Appeal Court ex parte Carter* (1992) 9 WAR 82.
113 *Labour Relations Reform Act 2002*. S 126.

WAIRC. In the case of appeals to the Supreme Court or the Court of Appeal from the SAT,[114] appeals may be made on leave being granted, "on a question of law".[115]

2.4(f) The Commission in Court Session

170. The CCS of the WAIRC is provided for in s 15(2) of the IR Act. The CCS is constituted by not less than three Commissioners and is responsible for dealing with matters of importance under the IR Act, such as General Orders.[116] These include the State Wage Order under s 50A of the IR Act. It is distinguishable from the Full Bench by the absence of the President. The thesis behind this is probably that the arbitrations undertaken by the CCS are more industrial than judicial. This illustrates, however, a problem with the name of the CCS. As for many of the idiosyncrasies of the State industrial system there is a historical reason that explains an anomaly. At present however, the naming of the CCS is apt to confuse as the word "Court" is used for a body that does not generally sit as a court (other than to the extent that the WAIRC is a court of record under s 12 of the IR Act) or exercise judicial power. As stated, at present it is distinguished from the Full Bench by virtue of the President not being a member, but apart from that the CCS simply involves at least three Commissioners sitting on industrial matters, rather than one.

2.4(g) Boards of Reference

171. Section 48 of the IR Act provides that each award in force under the IR Act is to have a Board of Reference. A Board of Reference may allow, approve, fix, determine, or deal with anything else specified in the award. Each Board of Reference consists of a chairman appointed by the Chief Commissioner and an equal number of employers' and employees' members (generally two each) nominated and appointed in the manner prescribed.

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114 SAT Act s 105(3).
115 SAT Act s 105(2).
116 IR Act s 50.

172. The Secretariat has informed the Review that historically Boards of Reference have dealt primarily with long service leave issues. However, for quite some time they have been rarely used. The Amendola Report said there had been 24 Boards of Reference having been conducted since 2001.[117] The WAIRC Registry has advised the Secretariat that no Board of Reference matters have been lodged with the WAIRC since 2014.

173. While Boards of Reference have the array of powers specified above they do not have the power to conciliate or make incidental orders to resolve a dispute.

174. The Fielding Review commented that Boards of Reference are inefficient and duplicate a task the WAIRC is better qualified to perform.[118] The Amendola Report recommended their abolition.[119]

175. Amendments to repeal s 48 of the IR Act were also included in the Green Bill. Clause 97 of the Green Bill proposed the deletion of s 48 of the IR Act, which, if passed, would have meant, after commencement, there would no longer have been a requirement for awards to include a Board of Reference. Clause 10 of the proposed Schedule 6 of the IR Act (clause 257 of the Bill), provided that a Board of Reference constituted under s 48, in relation to an award, immediately before the repeal of s 48 would continue in existence for as long as the award remained in force and a Board was required to be constituted in relation to it.

2.4(h) The Constituent Authorities

176. The "constituent authorities" are provided for in Part IIA of the IR Act and comprise the PSA, the PSAB and the Railways Classification Board. Each of the constituent authorities was originally set up as a specialist tribunal to deal with a range of industrial matters in the public sector and, prior to 1984, operated separately to the WAIRC.[120]

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117 Above n 13, 91 [165]

118 Commissioner G.L. Fielding, *Review of Western Australian Labour Relations Legislation,* A Report to the Hon. G.D. Kierath, MLA, Minister for Labour Relations, July 1995, 416.

119 Above n 13, 91, recommendation 12.

120 Fielding, above n 118, see pages 257-258 for historical background on the constituent authorities.

177. There are currently two of the WAIRC Commissioners appointed as PSAs. The PSAB, in any appeal matter, is comprised by the President or a PSA, an employer representative and an employee representative.[121]

178. The jurisdiction of the constituent authorities is referred to in detail in Chapter 3. For present purposes, the following may be noted. Collectively, the constituent authorities have exclusive jurisdiction to:

(a) Deal with any industrial matter relating to a government officer.[122]

(b) Hear appeals from government officers relating to interpretation of the *Public Sector Management Act 1994* (PSM Act), reduction in level or classification, and suspension, dismissal or termination arising out of substandard performance or discipline.

179. In contrast, because of the definitions of a "government officer", the WAIRC, in its general or ordinary jurisdiction, may hear and determine industrial matters involving employees such as teachers, nurses, fire-fighters, prison officers and employees of a "public authority", who are not on their "salaried staff".[123] This includes the unfair dismissal and denial of contractual benefits jurisdiction.[124]

180. The Amendola Review recommended the abolition of the constituent authorities.[125] The Green Bill also proposed to abolish the constituent authorities and confer the function and jurisdiction of the PSA and PSAB on single Commissioners. The topic is discussed in Chapter 3 of the Interim Report.

181. The Railways Classification Board is now obsolete. To explain this requires some historical explanation. Prior to 1920, salaried officers employed by the Western Australian Government Railways Commission were covered by the jurisdiction of

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121 A separate PSAB is established for each appeal lodged.

122 'Government officer' is defined in s 80C(1) and Sch 3 of the IR Act and includes all public servants, hospital salaried officers, medical practitioners, Main Roads professional (APEA) engineers and salaried officers.

123 Such as education assistants, enrolled nurses, nursing assistants, and some health support workers; see IR Act s 80C(1) and s 7(1).

124 This is reflective of the historical differences between salaried and wages employees, together with that of the public sector and the public service. See Fielding, above n 118, 5; and Cawley Review, (Dr Sally Cawley, 'The Industrial Relations Act 1979 and the Western Australian Industrial Relations Commission. A paper, with recommendations,' (2003) 15.

125 Above n 13, Recommendation 154.

the Court of Arbitration which dealt with industrial disputes under the *Industrial Arbitration Act 1912*. As the Court did not have the jurisdiction to deal with classifications, the Railways Classification Board was established. It became part of the WAIRC in 1984. The Board had jurisdiction to set salaries and conditions of service for "railway officers".

182. Industrial matters involving "wages" railway employees were and continue to be dealt with in the general jurisdiction of the WAIRC.

183. In accordance with s 80M(1) of the IR Act, a:

> …
>
> railway officer means any specified award employee (as defined in the *Government Railways Act 1904* (section 73) -
>
> (a) holding or acting in a salaried position; or
>
> (b) receiving a daily rate of pay as a temporary clerk in the service of the Public Transport Authority;

184. Section 73(4) of the *Government Railways Act 1904* (GR Act) defines a "specified award employee" to mean "a person who was employed under this section immediately before it was amended by the *Public Transport Authority Act 2003*, s 126 and, when that amendment took effect,[126] became an employee of the Authority but only if the person's employment was, before the amendment took effect, and continues to be, covered by -

(a) the Government Railways Locomotive Enginemen's Award 1973-1990 No. 13 of 1990; or

(b) the Railway Employees Award No. 18 of 1969".

185. Section 80M(1) of the IR Act defines "salaried position" to mean "a position in the service of the Public Transport Authority to which an annual salary is assigned but does not include –

[126] 1 July 2003, https://www.slp.wa.gov.au/pco/prod/filestore.nsf/FileURL/mrdoc_35818.pdf/$FILE/Proclamation%20Public%20Transport%20Authority%20Act%202003%20-%20%5B00-00-00%5D.pdf?OpenElement

(a) the position of head of branch or sub-head of branch; or

(b) a position held by a person engaged in a professional capacity".

186. The Government Railways Locomotive Enginemen's Award, referred to in s 73(4) of the GR Act was cancelled on 24 March 2006.[127] This and the Railway Employees Award were, and are, awards applying to "wages" employees and not "salaried staff".

187. In accordance with s 73(4) of the GR Act, a specified award employee can only be a person who was employed by the predecessor to the Public Transport Authority (PTA) immediately before 1 July 2003 and who was and continues to be employed under the above awards. The PTA has advised the Secretariat that no salaried officer of the PTA is covered by either of the awards nominated by s 73(4) of the GR Act. There are therefore no people employed by the PTA as "railway officers" as defined by the IR Act.

188. It should also be noted that every salaried officer employed by the PTA is a "person employed on the salaried staff of a public authority" and therefore falls within the definition of a "government officer" under s 80C(1) of the IR Act. Classification issues relating to these employees therefore fall within the jurisdiction of the PSA under s 80E(2) of the IR Act.

189. There are therefore no longer employees employed as railway officers as defined by s 80M(1) of the IR Act as all such employees are now employed as government officers.

190. The Railways Classification Board is therefore obsolete. As set out in Chapter 3 of the Interim Report, a proposed recommendation of the Review is that it be abolished.

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127 86 WAIG 888, https://www.slp.wa.gov.au/industrial/indgaz.nsf/3A70FAD638D3107B48257157000EAEB0/$File/v86Apr01.pdf. Rail car drivers are now covered by the Public Transport Authority Rail Car Drivers (Transperth Train Operations) Award 2006 and the Public Transport Authority (Transwa) Award 2006.

2.4(i) Occupational Safety and Health Tribunal

191. There was earlier reference to the Occupational Safety and Health Tribunal (OSH Tribunal). The OSH Tribunal is constituted under Part VIB of the OSH Act. The OSH Tribunal is comprised by a WAIRC Commissioner. Part 9 Division 3 of the *Mines Safety and Inspection Act 1994* (WA) (MSI Act) and Schedule 5 Division 5 of the *Petroleum (Submerged Lands) Act 1982* (WA) also provide for specified matters to be referred to the OSH Tribunal.

192. The jurisdiction of the OSH Tribunal includes the coverage of constitutional corporations. Section 27(2)(c) of the FW Act specifically provides that occupational health and safety laws are not excluded from applying to national system employers and employees.

193. The Amendola Report set out the history of the OSH Tribunal, which came into existence on 4 April 2005.[128]

194. Section 51G of the OSH Act provides that when the WAIRC exercises jurisdiction under the legislation it is to be called the OSH Tribunal. As set out above, the Chief Commissioner must designate a Commissioner to exercise the jurisdiction conferred. The OSH Tribunal therefore sits as a single Commissioner.[129]

195. Section 51G(3) of the OSH Act provides that when the OSH Tribunal makes a determination and an order containing the determination, the order becomes an instrument which can be enforced under s 83 of the IR Act.

196. Section 51J of the OSH Act provides the OSH Tribunal with the power to conciliate disputes and to issue a direction, order or declaration that is enforceable as if it were issued under s 32 of the IR Act.

197. Section 51K of the OSH Act provides that the OSH Tribunal has jurisdiction to hear certain matters concurrently. An example is an unfair dismissal claim under the IR Act as well as a matter referred under the OSH Act.

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128 Above, n 13, 105.

129 IR Act s 16(2A) provides for this designation.

198. The types of matters that can be dealt with by the OSH Tribunal vary slightly under each of the three relevant Acts,[130] but broadly include:

(a) Administrative and other matters that arise under changes to the OSH Act and the MSI Act.

(b) Hearing appeals and related OSH Act and MSI Act matters, including:

(i) The review of a decision by the WorkSafe Commissioner or the State Mining Engineer on the establishment of a safety and health committee.

(ii) The review of a decision by the WorkSafe Commissioner or the State Mining Engineer to change a safety and health committee.

(iii) The review of a decision about a prohibition or improvement notice by the WorkSafe Commissioner or the State Mining Engineer.

(iv) Resolving a safety and health representative election result that the Worksafe Commissioner or the State Mining Engineer could not resolve.

(v) The disqualification of a safety and health representative.

(vi) A change to entitlements for time off work with pay to attend safety and health representative training or payment for safety and health representative training in the safety and health representative's own time.

(vii) A "discrimination" claim by a safety and health representative.

199. The people that can refer a matter to the OSH Tribunal varies according to the applicable legislation,[131] but broadly includes:

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130 The following forms have been produced by the WAIRC to provide specific detail on the matters that can be referred under the legislation: Schedule 1 – *Occupational Safety and Health Act 1984*; Schedule 2 – *Mines Safety and Inspection Act 1994*; Schedule 3 – *Petroleum (Submerged Lands) Act 1982*

131 Ibid.

(a) Employers and employees.

(b) Workplace health and safety representatives.

(c) Contractors/sub-contractors.

(d) Member(s) of workplace health and safety committees.

(e) A member of a designated work group.

(f) The Mine Manager.

(g) The WorkSafe Western Australia Commissioner.

(h) The State Mining Engineer.

200. A decision of the OSH Tribunal can be appealed to the Full Bench of the WAIRC. Prosecutions arising from OSH Tribunal determinations are heard by Safety and Health Magistrates in the Magistrates Court.

201. The following Table 2B is OSH Tribunal applications heard and determined from 1 July 2004 – 30 June 2017:

Table 2B OSH Tribunal Statistics

Reporting Year	Finalised Applications[132]
1 July 2004 - 30 June 2005	3[133]
1 July 2005 – 30 June 2006	13
1 July 2006 – 30 June 2007	7
1 July 2007 – 30 June 2008	9
1 July 2008 – 30 June 2009	0
1 July 2009 – 30 June 2010	0
1 July 2010 – 30 June 2011	0
1 July 2011 – 30 June 2012	0
1 July 2012 – 30 June 2013	0
1 July 2013 – 30 June 2014	4
1 July 2014 – 30 June 2015	5
1 July 2015 – 30 June 2016	2
1 July 2016 – 30 June 2017	2

202. The Amendola Report thought the two main questions that arose about the OSH Tribunal were whether the safety matters dealt with by the OSH Tribunal

132 Data sourced from the Annual Reports of the Chief Commissioners of the Western Australian Industrial Relations Commission.

133 Note: 1 July 2004 – 30 June 2005 covers 3 months as Tribunal operative from April 2005.

(and any other matters arising under the OSH Act) are matters that should be determined by a tribunal, rather than a court; and if so, whether that tribunal should sit within the tribunal responsible for industrial relations matters.[134]

203. The Amendola Report said:[135]

> In relation to these two issues, I note that:
>
> (a) compliance matters are generally dealt with by a court, and in particular:
>
> (i) underpayment issues are generally dealt with by a court, and such matters will often involve disputes about whether an entitlement to payment under an instrument arises in a given fact scenario;
>
> (ii) a failure to comply with a safety notice may be the subject of a prosecution in a court; and
>
> (iii) where there is unlawful conduct relating to health and safety representatives this could be dealt with by a court.
>
> (b) administrative issues (that do not involve compliance) relating to safety notices, and concerning health and safety representatives, could be dealt with by the State Administrative Tribunal on review.

204. The Amendola Report also said:[136]

> In reviewing matters the subject of the jurisdiction of the OSH Tribunal and comparing them to the laws in other States, compliance matters (such as those referred to in paragraph 240 above) are invariably dealt with by a court. Insofar as "administrative" matters are concerned some States provide, in some instances, jurisdiction to an industrial tribunal, and in other instances to an administrative tribunal.

205. The Amendola Report recommended that compliance matters be dealt with by the Safety and Health Magistrate at first instance and any remaining administrative matters, where a review was required, should be dealt with by the SAT.

206. The Amendola Report did not discuss that under the FW Act, the FWC has a not dissimilar jurisdiction when acting as an appellate tribunal in offshore petroleum matters.[137]

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134 Above n 13, 105.

135 Above n 13, 105 [240].

136 Above n 13, 105 [241].

137 As explained by the Full Bench in *Sedco Forex International v National Offshore Petroleum Safety Marine Authority* (2016) 260 IR 121.

207. As set out earlier, the previous State Government did not act on any of the recommendations of the Amendola Report.

208. The present Government has established the Ministerial Advisory Panel on Work Health and Safety Reform (MAP), chaired by former WAIRC Commissioner Ms Stephanie Mayman.

209. The MAP is currently drawing together recommendations for a harmonised Work Health and Safety Bill to put to the Minister. It is envisaged that under the harmonised Bill there will be two courts; a civil court and a criminal court. To date, the operation of the "civil court" has been by the OSH Tribunal. The Review understands MAP is unlikely to be recommending the removal of the Tribunal from the structure of the WAIRC.

210. This view, by a specialist body set up to review health and safety laws in Western Australia, should be accorded weight by the present Review, which has a broader function. Therefore, the Review does not intend to make any recommendations about the OSH Tribunal unless persuaded otherwise by submissions made in response to the Interim Report.

2.4(j) The Road Freight Transport Industry Tribunal

211. The OD Act came into effect on 1 August 2008. It established the RFTIT that is comprised by a WAIRC Commissioner. The RFTIT also came into existence on 1 August 2008.

212. Although non-employee owner-drivers fall outside the State industrial relations system, they are afforded certain protections under the OD Act regulations that provide for a Code of Conduct.[138] The OD Act has coverage irrespective of whether the owner-driver or the business they work for is a constitutional corporation.[139]

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138 The *Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010* (WA) came into effect on 1 July 2010. The Code of Conduct deals primarily with standards of conduct during negotiations, penalty clauses, rates of interest, deductions from payments and record keeping requirements.

139 Despite the existence of the *Independent Contractors Act 2006* (Cth), s 7(2)(c) of the *Independent Contractors Act*, and the *Independent Contractors Regulation 2016*, regulation 6(g) preserves "all of the *OD Act"*.

213. The OD Act seeks to ensure that owner-drivers are paid a safe and sustainable rate and that payment is made within a reasonable time, even though the OD Act does not prescribe rates of pay or conditions of employment for employee drivers. These are regulated by State or national awards and agreements depending upon the jurisdiction of the employer.

214. The OD Act applies to owner-drivers of freight vehicles with a gross vehicle mass of greater than 4.5 tonnes.[140] Under the OD Act and the Code of Conduct:

(a) Owner-driver contracts cannot include an "if paid/when paid" condition.

(b) Payments must be made within 14 days, if there is nothing written in the owner-driver contract about payment times or 30 days in any other case; and interest is payable on overdue payment amounts.

(c) Unconscionable conduct is prohibited.

(d) Hirers must allow an owner-driver or their authorised representative to inspect certain operational records.

(e) The Road Freight Transport Industry Council has the power to develop and publish "Guideline Rates" for use by the industry.

(f) Hirers are required to provide owner-drivers with written information, such as the current Guideline Rates.

(g) There is provision for collective bargaining, the appointment of negotiating agents, and access to a low cost dispute resolution.

(h) The RFTIT[141] and the Road Freight Transport Industry Council are established.[142]

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140 See *Kingstyle Investments Pty Ltd v Mr Gene Lawson* [2013] WAIRComm 355, (2013) 93 WAIG 493.

141 The Tribunal is established by s 38 of the OD Act.

142 The Council is established by s 17 of the OD Act. The Council is a tri-partite body comprised of industry, union and other relevant parties which provides advice to the Minister for Transport on owner-driver issues including those relating to the Code of Conduct and the guideline rates. The Council reports directly to the Minister for Transport, however members of the Council are approved by Cabinet. The Council meets as required and the Department of Transport provides executive and any other required support.

215. Section 38 of the OD Act gives jurisdiction for a Commissioner of the WAIRC to deal with certain matters and sit as the RFTIT.

216. The RFTIT has jurisdiction to deal with:

(a) Disputes arising under or in relation to the terms of an owner-driver contract.

(b) Disputes arising under or in relation to the OD Act and the Code of Conduct.

(c) Matters arising in relation to the conduct of joint negotiations for an owner-driver contract.

217. The RFTIT can investigate or order compulsory conciliation conferences between parties to resolve disputes under the OD Act, or the Code of Conduct, including disputes over payment.

218. The Table 2C below shows the number of matters before the RFTIT from 1 July 2014 – 30 June 2017.

Table 2C Matters before the Road Freight Transport Industry Tribunal[143]

Reporting Year	Finalised Applications
1 July 2014 – 30 June 2015	31
1 July 2015 – 30 June 2016	31
1 July 2016 – 30 June 2017	17

219. The Amendola Report commented on the RFTIT as follows:

> In the circumstances and consistent with the goal of harmonizing the Federal system, I would recommend that the *Owner-Drivers (Contracts and Disputes) Act 2007* be repealed and as a consequence, the Road Freight Industry Tribunal be abolished. Disputes arising in relation to owner driver contracts should be resolved through the regime established under the *Independent Contractors Act 2006* or otherwise in the courts.[144]

143 Annual Report of the Chief Commissioner of The Western Australian Industrial Relations Commission 2016-17.

144 Above n 13, [248].

220. The Amendola Report then recommended that the OD Act be repealed, and thus the RFTIT be abolished.[145]

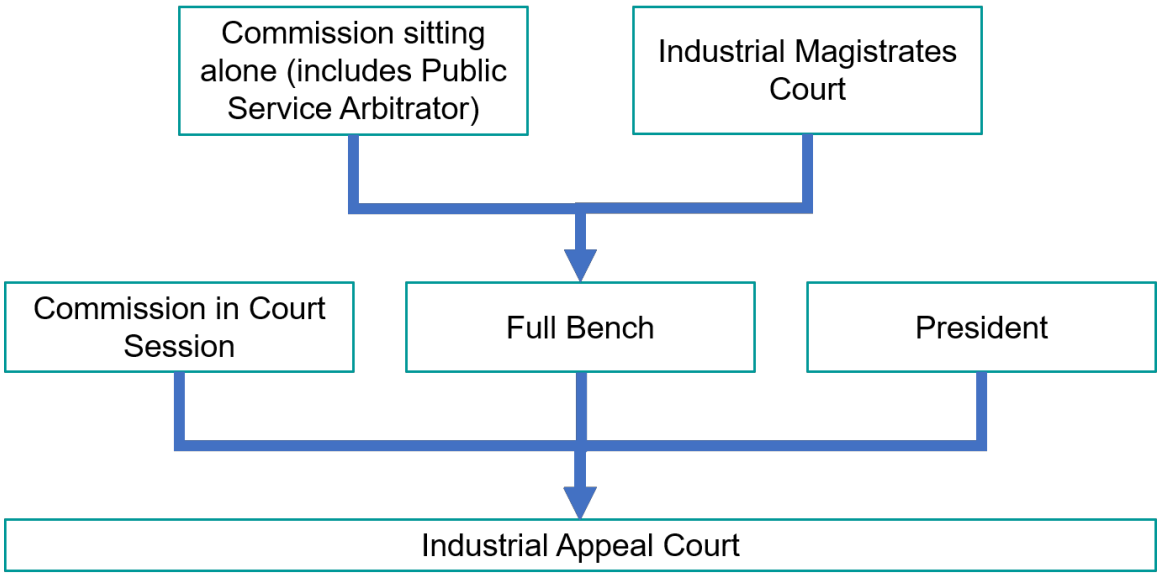
221. A subsequent review has recommended the retention of the OD Act and the RFTIT.[146]

222. The Review has not received any submissions about the OD Act and the RFTIT. The Review does not therefore intend to make any recommendations about it, unless persuasive submissions are made following the publication of the Interim Report.

2.4(k) Structure of the WAIRC in Diagrammatic Form

223. The structure of the WAIRC and its appellate relationship with the IMC and the IAC are set out in diagrammatic form in the 2016-2017 Annual Report of the Chief Commissioner.[147] It is convenient to reproduce that diagram here in Figure 2A.

Figure 2A – Structure of the WAIRC



145 Above n 13, recommendation 28.

146 Department of Transport *Review of the Owner-Driver (Contracts and Disputes) Act 2007 Report*, June 2014, Recommendation 3.

147 Chief Commissioner's 2016-2017 Annual Report, 2 [1.6].

2.5 The Jurisdiction of the WAIRC

2.5(a) Overview

224. The general or ordinary jurisdiction of the WAIRC has already been referred to. Reference has also been made to the specific jurisdiction exercised by the WAIRC under different pieces of legislation.

225. The 2016-2017 Annual Report of the Chief Commissioner, noted the WAIRC deals with industrial disputes in a range of matters arising under legislation other than the IR Act. The Chief Commissioner referred to the following legislation:

(a) The *Public Sector Management Act 1994*.

(b) The *Occupational Safety and Health Act 1984*.

(c) The *Mine Safety and Inspection Act 1994*.

(d) The *Employment Dispute Resolution Act 2008*.

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

(f) The *Construction Industrial Portable Paid Long Service Leave Act 1985*.

(g) The *Minimum Conditions of Employment Act 1993*.

(h) The *Long Service Leave Act 1958*.

(i) The *Police Act 1892*.

(j) The *Young Offenders Act 1994*.

(k) The *Prisons Act 1991*.

(l) The *Vocational Education and Training Act 1996*.

226. In addition to the above, and as set out in detail in chapter 3 of the Interim Report, the WAIRC also exercises public sector jurisdiction under the *Health Services Act 2016* (WA) (HS Act).

2.5(b) What Does the WAIRC Do?

227. As is evident from the above discussion, the WAIRC is a multi-faceted and chameleon like body. As set out earlier, although s 12 of the IR Act provides that the Commission is a court of record, most of its functions are not judicial. As commented upon by the IAC in *AMWSU v SEC*[148] the WAIRC is, in some respects, an administrative body and a "legislative body" as well as a court of record. Even that tripartite description is probably too simplistic today. Without attempting to be exhaustive, the WAIRC now has these roles and powers:

(a) Deals with and conciliates disputes about industrial matters involving non-national system employers and employees. This includes being involved in applications for awards and agreements that set safety net terms and conditions of employment. The making of awards is probably the quasi-legislative function the IAC had in mind in the AMWSU case cited above.[149]

(b) Under s 44 of the IR Act, can summon people before it for a conference to deal with industrial matters within the ordinary jurisdiction of the WAIRC. The WAIRC may then make orders with respect to an industrial matter "at or in relation to a conference" under s 44(6) of the IR Act.

(c) Exercises an arbitral power to determine the type of disputes referred to it under s 23 of the IR Act, or via the processes contained in s 32 or s 44 of the IR Act.

(d) As the CCS, the WAIRC exercises original jurisdiction[150] to make General Orders under s 50 and s 50A of the IR Act. It also has the functions under the MCE Act as set out in Part II Division 3A of the IR Act.

(e) Constituted as the Full Bench, the WAIRC determines appeals against decisions of Commissioners (including the OSH Tribunal and the RFTIT) and the IMC, considers some types of organisation rule alteration applications,

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148 (1979) 59 WAIG 494, 496.

149 Whether this now would be a correct description given the High Court decision of *Byrne & Frew v Australian Airlines Ltd* (1995) 185 CLR 410 is an interesting question.

150 See also for example s 51C(1) and s 80E(6)(a) of IR Act.

determines deregistration proceedings and applications for enforcement of some orders of the WAIRC. These functions involve both appellate and original jurisdiction.

(f) As an administrative body the WAIRC administers and maintains a record of the applications made, awards and orders made by the WAIRC, and maintains the rules of an organisation and determines some amendments to the rules of organisations.[151]

(g) The WAIRC also administers the provision of "right of entry" permits under s 49J of the IR Act.

(h) The WAIRC decides unfair dismissal cases, referred to the WAIRC under s 29(1)(b)(i) of the IR Act.

(i) The WAIRC decides denial of contractual benefits cases, referred to the WAIRC under s 29(1)(b)(ii) of the IR Act.

(j) The WAIRC exercises, in both its ordinary jurisdiction, and as the constituent authorities, jurisdiction over the public sector, as set out in detail in Chapter 3 of the Interim Report.

(k) The WAIRC decides applications under s 46 of the IR Act for a declaration of the "true meaning" of an award and other industrial instruments.

(l) The WAIRC provides a dispute resolution and mediation service under the EDR Act.

(m) The WAIRC registers employer-employee agreements under Part VII of the IR Act.

(n) The WAIRC can be involved in the arbitration of industrial agreements and make enterprise orders as provided for in Division 2B of Part II of the IR Act.

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[151] Fielding, above n 118, noted the different functions of the WAIRC at pages 42-44, but did not fully differentiate between them when looking at and trying to resolve what was seen as some of the problems besetting the WAIRC.

228. The Registrar of the WAIRC, amongst other things, refers to the Full Bench the enforcement of some orders,[152] administers the registration of industrial agents, maintains the rules of industrial organisations and keeps a register of all current awards and industrial agreements.

2.5(c) Jurisdiction over Industrial Matters

229. As also stated in the Chief Commissioner's 2016-2017 Annual Report, the structure of the WAIRC and its essential work centres on single Commissioners conciliating, and if necessary, "arbitrating employment disputes"; or, in the terms of the IR Act "industrial matters".

230. The ordinary jurisdiction of the WAIRC, set out in s 23(1) of the IR Act, has been quoted above. Subject to the employers and employees covered by the FW Act, to whom the IR Act generally does not apply, the breadth of the jurisdiction depends upon the meaning of an "industrial matter", together with the definitions of "industry", "employer" and "employee".

231. "Industrial matter" is defined in s 7 of the IR Act. It has evolved and expanded over time and presently it is defined very broadly as follows:

> ***industrial matter*** means any matter affecting or relating or pertaining to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein and, without limiting the generality of that meaning, includes any matter affecting or relating or pertaining to —
>
> (a) the wages, salaries, allowances, or other remuneration of employees or the prices to be paid in respect of their employment;
>
> (b) the hours of employment, leave of absence, sex, age, qualification, or status of employees and the mode, terms, and conditions of employment including conditions which are to take effect after the termination of employment;
>
> (c) the employment of children or young persons, or of any person or class of persons, in any industry, or the dismissal of or refusal to employ any person or class of persons therein;
>
> (ca) the relationship between employers and employees;
>
> (d) any established custom or usage of any industry, either generally or in the particular locality affected;
>
> (e) the privileges, rights, or duties of any organisation or association or any officer or member thereof in or in respect of any industry;

[152] IR Act s 84A.

(f) in respect of apprentices, these additional matters —

(i) their wage rates and, subject to the *Vocational Education and Training Act 1996* Part 7 Division 2, other conditions of employment; and

(ii) the wages, allowances and other remuneration to be paid to them, including for time spent in performing their obligations under training contracts registered under the *Vocational Education and Training Act 1996* Part 7 Division 2, whether at their employers' workplaces or not; and

(iii) without limiting subparagraphs (i) and (ii), those other rights, duties and liabilities of them and their employers under such contracts that do not relate to the training and assessment they are to undergo, whether at their employers' workplaces or not;

(g) any matter relating to the collection of subscriptions to an organisation of employees with the agreement of the employee from whom the subscriptions are collected including —

(i) the restoration of a practice of collecting subscriptions to an organisation of employees where that practice has been stopped by an employer; or

(ii) the implementation of an agreement between an organisation of employees and an employer under which the employer agrees to collect subscriptions to the organisation;

[(h) deleted]

(i) any matter, whether falling within the preceding part of this interpretation or not, where —

(i) an organisation of employees and an employer agree that it is desirable for the matter to be dealt with as if it were an industrial matter; and

(ii) the Commission is of the opinion that the objects of this Act would be furthered if the matter were dealt with as an industrial matter;

and also includes any matter of an industrial nature the subject of an industrial dispute or the subject of a situation that may give rise to an industrial dispute but does not include —

(j) compulsion to join an organisation of employees to obtain or hold employment; or

(k) preference of employment at the time of, or during, employment by reason of being or not being a member of an organisation of employees; or

(l) non-employment by reason of being or not being a member of an organisation of employees; or

(m) any matter relating to the matters described in paragraph (j), (k) or (l);

232. Critical to the definition of an "industrial matter" are an "employee", "employer" and "industry". These words are all defined in s 7 of the IR Act in the following way:

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;

employer includes —

(a) persons, firms, companies and corporations; and

(b) the Crown and any Minister of the Crown, or any public authority,

employing one or more employees and also includes a labour hire agency or group training organisation that arranges for an employee (being a person who is a party to a contract of service with the agency or organisation) to do work for another person, even though the employee is working for the other person under an arrangement between the agency or organisation and the other person;

industry includes each of the following —

(a) any business, trade, manufacture, undertaking, or calling of employers;

(b) the exercise and performance of the functions, powers, and duties of the Crown and any Minister of the Crown, or any public authority;

(c) any calling, service, employment, handicraft, or occupation or vocation of employees,

whether or not, apart from this Act, it is, or is considered to be, industry or of an industrial nature, and also includes —

(d) a branch of an industry or a group of industries;

233. The definition of an "employee" is material to Term of Reference 4 and will be considered in Chapter 5 about Term of Reference 4.

2.5(d) Who May Refer Industrial Matters to the WAIRC?

234. The way in which industrial matters are brought before the WAIRC has relevance to its structure. The entitlement to refer an industrial matter to the WAIRC is generally provided for in s 29 and s 44 of the IR Act.

235. Section 29(1)(a) and (b) of the IR Act provides:

> (1) An industrial matter may be referred to the Commission —
>
> (a) in any case, by —
>
> (i) an employer with a sufficient interest in the industrial matter; or
>
> (ii) an organisation in which persons to whom the industrial matter relates are eligible to be enrolled as members or an association that represents such an organisation; or
>
> (iii) the Minister;
>
> and
>
> (b) in the case of a claim by an employee —
>
> (i) that he has been harshly, oppressively or unfairly dismissed from his employment; or
>
> (ii) that he has not been allowed by his employer a benefit, not being a benefit under an award or order, to which he is entitled under his contract of employment,
>
> by the employee.

236. It can be seen that subject to the exceptions in s 29(1)(b), that deal with "unfair dismissal" and "denial of contractual benefits" claims,[153] an individual employee in the private sector may not generally refer an industrial matter to the WAIRC. If the matter is one of concern to an employee, only a registered organisation, generally a union,[154] may do so on their behalf. This involves an entrenchment of the power of registered organisations to refer matters to the WAIRC. The entrenchment has been in the industrial relations legislation of the State for a considerable period of time, subject to only minor dilutions.[155] The exceptions in s 29 arose after the report of Commissioner Kelly into the industrial relations laws of the State that preceded the making of the 1979 Act. As set out in an article by Ms Brown,[156] the following was relevant to the Kelly Report:

> The provision was introduced by Commissioner Kelly into a draft Act included in his report and recommendations on industrial relations legislation in 1978. Commissioner Kelly explained that, because the authors of Western Australia's

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153 There is also a rarely used exception in IR Act s 44(7)(a)(iii) (which would also arguably extend to national system employees, because it deals with the non-excluded matter of long service leave).

154 Although the word "union" is not used in the IR Act – it refers to an organisation as being an organisation of employees that is registered under the IR Act.

155 Brown, above n 77, [302].

156 The comments made are in the context of the article being about the denial of contractual benefits jurisdiction of the WAIRC, but the same applies to unfair dismissals as well; *Recovering Denied Contractual Benefits in the Industrial Relations Commission – A Western Australian Experience,* Brown M.V., 22 Western Australian Law Review, December 1992, 418, 418-419.

> *Industrial Arbitration Act 1912* recognised that the existence and viability of unions of employees was crucial to the operation of the system of conciliation and arbitration, it had been found necessary to create special privileges for unions in order to encourage them to register under the industrial arbitration laws. One of those privileges was to give registered unions of employees the sole right of access to industrial tribunals to the exclusion, not only of other associations of employees, but also of individual employees. That Act, accordingly, had no provision for access by an individual employee or a group of employees, who were dependent upon a union or association or, in some cases, the Industrial Registrar if they sought a remedy for any grievance…Commissioner Kelly was satisfied that the introduction of provisions allowing individual employees to protect certain basic entitlements posed neither a threat to the existence or viability of unions nor an incentive to them to leave the system. Moreover, he considered that the extension of rights to individual employees appeared to be supported by both logic and morality while the Act continued to make provision for exemption from membership.

237. The notion of restricting access for individuals to the WAIRC to protect the viability of unions seems almost quaint now, for at least two reasons. Firstly, as set out in Chapter 1, there has, since the time of the Kelly Report, been a substantial downturn in union membership. Secondly, the major private sector unions in the State are overwhelmingly involved in the Federal system.

238. This theme is present in the 2016-2017 Annual Report of the Chief Commissioner, where the following comments were made:[157]

> It is now just over ten years since the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) led to the exclusion from the Commission's jurisdiction of constitutional corporations (except claims by employees that they have been denied a benefit under their contract of employment *(Triantopoulos v Shell Company of Australia Ltd* [2011] WAIRC 00004; (2011) 91 WAIG 67)). This resulted in the Commission's private sector jurisdiction being limited to sole traders, partnerships, some trusts and not for profit organisations including independent schools, and, as a consequence, unions covering the private sector in Western Australia having very little involvement in the State system. This can be explained largely by the difficulty in enrolling and organising members amongst the employees in small businesses. It is noted though that the same difficulties do not appear to arise in the larger not for profit organisations within the Commission's jurisdiction.
>
> The Western Australian industrial relations system was established, and until 2006, operated largely on the basis of the resolution of disputes between unions and employers. There are two exceptions to this. The first is the period of operation of the *Workplace Agreements Act 1993* (WA), from December 1993 until 2002. This allowed individual employers and employees to enter into agreements which did not involve unions as parties. The second is that with the commencement of the Act in 1979, for the first time, individual employees could bring claims of unfair dismissal and denial of contractual benefits before the Commission. Prior to that time, such claims could only be referred to the Commission by a union.

[157] Page 17.

239. At the same page, under the heading "Union activity in the state private sector", the Chief Commissioner said:

> In the last year, unions in the private sector in the State system have had negligible involvement with matters before the Commission. Unions:
>
> 1 Made no applications for new awards;
>
> 2 Made no applications to vary awards to improve wages or conditions of employment;
>
> 3 Brought two applications for conciliation and arbitration on behalf of individual members or groups of members at particular workplaces. Both of these matters related to not for profit organisations. This constituted 3.3% of applications for conference pursuant to section 44 of the Act.
>
> 4 Made 53 applications for registration of industrial agreements. 33 of these relate to independent schools, and the remainder relate to not for profit organisations including political parties and community and legal centres. Three relate to one particular unincorporated private hospital.

240. There are also limits to the occasions when public sector employees can refer matters to the WAIRC, as individual employees, but there are some differences to the private sector. The rights of public sector employees to do so are discussed in detail in chapter 3 of the Interim Report. In summary, however, public sector employees who are not government officers (be it because they are not on the "salaried staff" of a public authority, as defined in the IR Act, or are employees excluded from the definition like State school teachers) have the same rights and restrictions to refer matters to the WAIRC as those of private sector employees. Government officers, as defined in the IR Act, can bring appeals against specified decisions of their employing authority to the constituent authorities of the WAIRC, but these decisions of employing authorities are themselves regulated by statute. Individual government officers cannot generally refer industrial matters to the constituent authorities; that right is generally limited to a public sector union.

241. In chapter 3 of this Interim Report there is also a discussion of submissions made about the prospect of the WAIRC having a role in stopping bullying in the public sector, similar to the jurisdiction exercised by the FWC under the FW Act. That jurisdiction can be exercised by an individual and there is no suggestion to date that the suggested anti-bullying jurisdiction in the public sector should only be able to be invoked by the referral of a matter to the WAIRC by a registered

organisation.[158] As is commented upon in chapter 3, the preliminary view of the Review is that the submission that the WAIRC ought to have an anti-bullying jurisdiction for public sector employees has merit, although further submissions are requested. If such a jurisdiction was conferred however, it would not, in the preliminary opinion of the Review, make sense or be fair to exclude private sector employees from also being able to refer such a matter to the WAIRC, as an individual, and therefore similar to the rights now held under s 29(1)(b) of the IR Act.

242. All of this suggests that it could, at some point, be timely to reconsider whether, in the private sector, the referral of general industrial matters on behalf of an employee should only be able to be made by an organisation on their behalf. Despite the inaction of private sector unions in the State industrial relations system in recent years, the Review would anticipate that any suggestion to entirely open up the ordinary jurisdiction of the WAIRC to individual employees, who are not employed by national system employers, would, understandably, be resisted by most registered organisations.[159] The issue if it is to be discussed, however, is one for another day. In the opinion of the Review, it is outside of the present Terms of Reference.

2.5(e) Matters Determined in 2016-2017

243. According to the Chief Commissioner's 2016-2017 Annual Report, 463 matters were concluded by the WAIRC. Numerically the largest types of matters were unfair dismissal claims (101), denial of contractual benefits claims (89), conferences (predominantly under s 44 of the IR Act) (60), the registration of new agreements made under the IR Act (40), appeals to the PSAB (21) and PSA matters (17).

244. According to the Chief Commissioner's Annual Report, in 2016-2017, 113 unfair dismissal claims and 103 denial of contractual benefits claims were lodged with the WAIRC. These two types of claims represented 21 per cent of all matters

158 Submissions are however noted on the topic by the Review.
159 The submission however was made by the ANF IUWP.

lodged with the WAIRC in 2016-2017. The Annual Report sets out that of these s 29 matters, 77 per cent were resolved without recourse to a formal hearing. Of the total claims, 34.8 per cent were discontinued, withdrawn or dismissed either in the Registry or before proceedings were commenced in the WAIRC. Additionally, 23.4 per cent of the total claims were arbitrated with an order issued, and 41.8 per cent were settled after proceedings commenced.

245. From information provided to the Review by the WAIRC, in the 2016-2017 financial year there were a total of 44 unfair dismissal and denial of contractual benefits claims applications arbitrated by the WAIRC. Of this total, 16 were unfair dismissal claims[160] and 28 were denial of contractual benefits claims.

246. Of these 16 unfair dismissal claims, 11 were dismissed. Five applications were upheld and in each instance compensation was ordered. Reinstatement was ordered in addition to compensation in one claim. The compensation awarded totalled $88,347.68 for "loss" and $2,500 for "injury", under s 23A(6) of the IR Act. No appeals were filed against decisions to uphold claims for unfair dismissal. One appeal was upheld against a decision to dismiss a claim for unfair dismissal. The Full Bench remitted the matter for further hearing, but the hearing has not yet taken place. Two other appeals were made against decisions to dismiss claims for unfair dismissal, with both appeals being unsuccessful. Of the 28 arbitrated denial of contractual benefits claims, eight were successful. In those cases, WAIRC single Commissioners ordered a total of $104,034.68 to be paid to the applicants. Appeals were lodged against two of the eight successful claims. The Full Bench upheld both appeals. The Full Bench quashed the decisions at first instance. These decisions had ordered the payment of approximately $16,500 and $44,000 respectively to the applicants. The latter decision is under appeal to the IAC. Three other appeals were lodged against decisions to dismiss denial of contractual benefits claims but the Full Bench dismissed all of those appeals.

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160 This includes one more than the total in the Chief Commissioner's Annual Report because one claim for unfair dismissal, which was resolved in late-2016, was not closed in the WAIRC file system until August 2017, after the statistics for the Annual Report were extracted from the system.

2.5(f) Unfair Dismissal and Denial of Contractual Benefits Claims

247. Given that unfair dismissal and denial of contractual benefits claims form the major part of the work done by the WAIRC, at present, the nature of this work is relevant to a consideration of the preferred structure of the WAIRC. Firstly, it should be noted there is an important difference between the unfair dismissal claims and denial of contractual benefits claims that can be heard by the WAIRC. The unfair dismissal jurisdiction is not available to national system employees, whereas the denial of contractual benefits claims jurisdiction of the WAIRC includes national system employees. As set out earlier, this jurisdiction is specifically preserved by s 27(2)(o) of the FW Act. The denial of contractual benefits jurisdiction of the WAIRC, for employees of constitutional corporations, was returned to the WAIRC following the enactment of the FW Act; having previously been excluded from the WAIRC by Work Choices.[161] The change was reaffirmed by Kenner C in *Duddington v Mario and Clara Enterprises Pty Ltd and Morgan Trading Pty Ltd.*[162]

248. Secondly, and as set out earlier, it is also now clear that in exercising the jurisdiction conferred by s 23 and referred under s 29(1)(b)(ii) of the IR Act with respect to a denial of contractual benefits claim, the WAIRC is determining, as a matter of law, the terms of the contract of employment and whether there has been a benefit under the contract which the employee has not been "allowed by his employer"; and if so what remedies, including damages, ought to be ordered by the WAIRC.[163] This may involve the assessment of past and future damages, including an assessment of whether there has been a mitigation of loss.[164] The cases just cited reinforce that the entitlement to the claim arises independently of the IR Act, pursuant to the law of contract. In deciding denial of contractual benefits cases, the authorities also establish that while s 26(1)(a) of the IR Act requires the WAIRC to deal with a matter in accordance with equity, good

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161 *Saldanha v Fujitsu Australia Pty Ltd* (2008) 89 WAIG 76.

162 [2017] WAIRC 885 and citing *Klara Margarette Stylianou v Country Realty Pty Ltd as trustee for the Marcelli Family Trust* (2011) 91 WAIG 2029; *Christos Triantopoulos v Shell Company of Australia Ltd* (2011) 91 WAIG 67.

163 *Saldanha* cited above; *Matthews v Cool Or Cosy Pty Ltd* (2004) 136 IR 156; *Health Services Union of Western Australia (Union of Workers) v Director-General of Health in Right of Minister for Health* (2008) 88 WAIG 543; *Triantopoulos*, above n 156.

164 See for example *The St Cecilia's College School Board v Grigson* (2006) 86 WAIG 3159.

conscience and the substantial merits of the case, it does not authorise the WAIRC to depart from the duty to apply the law or act in a discretionary manner.[165]

249. By contrast, the IR Act creates the entitlement to make a claim for an unfair dismissal and sets out the remedies that may be awarded. The jurisdiction is engaged, and a remedy can be ordered, if the WAIRC decides that the dismissal of an employee is harsh, oppressive or unfair.[166] This involves an evaluative judgment different to the type of judgment that is required to be made in a denial of contractual benefits case. The WAIRC is not, in an unfair dismissal claim determining, as a matter of law, whether the dismissal has been lawful or not, although the issue may incidentally arise. The test of an unfair dismissal is often expressed as the WAIRC deciding whether the lawful right of an employer to dismiss an employee has been exercised so harshly or oppressively against them so as to amount to an abuse of that right.[167] The WAIRC is deciding, in effect, whether the dismissal was fair or not, as a matter of substance and/or procedure and if so, whether and what remedy should be ordered, having regard to the terms and constraints set out in s 23A of the IR Act.

2.5(g) Consideration of the Denial of Contractual Benefits Jurisdiction

250. The different nature of the jurisdiction of the WAIRC when deciding a denial of contractual benefits claim and an unfair dismissal claim is relevant when one has regard to the type of body the WAIRC is overall and the basis upon which a Commissioner may be appointed.

251. There is no requirement under the IR Act that a Commissioner hold any particular legal qualifications or experience. This is understandable given some of the functions engaged in by Commissioners, but is not readily reconcilable with the obligation of a Commissioner to determine denial of contractual benefits claims. The nature of the claim is one that should ordinarily be determined by somebody legally qualified and traditionally in a court of law.

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165 See for eg *Saldanha*, above n 153.

166 IR Act s 23A.

167 *Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia* (1985) 632 WAIG 385.

252. As far back as 1992, Ms Marcelle Brown, Senior Lecturer at the University of Western Australia, described the provision as "unique" in Australia. Ms Brown drew attention to the anomaly of Commissioners without legal training or qualifications assuming a "common law jurisdiction over contractual rights", and also mentioned the apparent contradiction to the jurisdiction mentioned in s 26(1) of the IR Act, to act according to "equity, good conscience and substantial merits".[168]

253. Ms Brown suggested it "might be concluded that parliament did not give much attention to the consequences of extending the jurisdiction of the Commission in relation to individual claims for contractual benefits".[169] The article then referred to the difficulty of "prolonged legal argument being difficult for lay Commissioners to follow". The inherently problematic nature of the jurisdiction was a reason why Anderson J of the IAC decided, in *Hotcopper Australia v Saab*[170] that there was a superadded requirement before a denial of contractual benefits claim could be heard by the WAIRC, that the contractual dispute have an "industrial character". Whilst that criteria as being a prerequisite for the exercise of the jurisdiction has probably been implicitly overruled by the subsequent IAC decision of *Matthews v Cool or Cosy Pty Ltd*[171] his Honour's point about the apparent incongruity of a jurisdiction of this type ending up in a "lay tribunal" is, with respect, quite understandable.

254. The Fielding Review and the Amendola Report both recommended the denial of contractual benefits jurisdiction be exercised by the IMC and not the WAIRC. That opinion can be supported having regard to the above considerations. As against this, however, is anecdotal information received by the Review that suggests the denial of contractual benefits jurisdiction generally "works well" within the WAIRC. That is because an employee can readily obtain access to the WAIRC, proceed by way of conciliation, and if the matter does not settle, proceed to a hearing and obtain a decision within a reasonably short period of time. All of

168 Brown, above n 156, 418, 422.
169 Ibid 428.
170 (2002) 117 IR 256 at [26]-[28].
171 (2004) IR 156, and see *Saldanha* above n 161 at [124] but cf [312], [319].

these are important aspects of a jurisdiction where what an employee is seeking is something their employer ought to, but did not, provide them under their contract of employment. It is also a no costs jurisdiction, which is no doubt attractive to employees. On the other hand, the Review has heard of concerns about whether the no costs jurisdiction is fair to employers, and in particular small business employers. The issue of costs is further dealt with below.

255. The concern about Commissioners who are not legally qualified or experienced deciding contractual benefits claims could be overcome if only legally experienced members of the WAIRC decided these claims.

256. It could also be argued that at present at least the problem is more imagined than real, given that all of the present members of the WAIRC are legally qualified and Chief Commissioner Scott, although not having practised law, has by now many years of experience in the WAIRC determining denial of contractual benefits claims.

257. It could be argued with some force however, that the present practice and composition of the WAIRC is not a sound basis upon which to determine whether, as a matter of policy, the WAIRC should continue to exercise the denial of contractual benefits jurisdiction.

258. Overall, the Review is of the preliminary opinion that the structure of the WAIRC and/or its jurisdiction needs to be amended to remedy the deficiencies of the present position. There are different possibilities and the Review will invite further submissions upon the issue. The first possibility is to leave things as they are. The second possibility is to transfer the jurisdiction to the IMC. If that were to occur the procedures for dealing with denial of contractual benefits claims by the IMC could be enhanced by regulations ensuring that after a claim was lodged with the IMC it was conciliated, at an early stage, before proceeding to a hearing.[172] That is, the procedures could be adjusted to suit the nature of the jurisdiction. This option is enhanced by an associated idea, that the IMC should be

[172] Structures are in place that could accommodate this, as there are already pre-trial conferences conducted by the Clerk of the IMC in enforcement matters.

able to hear and determine denial of contractual benefits cases if they arise out of the same employment relationship as a claim involving the enforcement of an award or other industrial instrument. Thirdly, and as suggested in the article referred to earlier by Ms Brown,[173] the IR Act could be amended to set up an industrial court consisting of Commissioners with legal qualifications and experience to hear denial of contractual benefits claims, leaving the discretionary jurisdiction in the WAIRC for unfair dismissal claims, as well as the other industrial matters before the WAIRC.[174] Such an industrial court, as stated by Ms Brown could encompass the existing jurisdiction of the IMC. Fourthly, the IR Act could be amended so that only members of the WAIRC who were, before their appointment, Australian lawyers, within the meaning of that term in s 4 of the *Legal Profession Act 2008* (WA) (LP Act), and with a certain amount of legal experience, could hear and determine denial of contractual benefits cases. This legislative device is used in s 9 of the IR Act in relation to the appointment of the President. A person is not eligible unless the person is a lawyer and has had not less than five years' legal experience as defined in s 9(1) of the IR Act. If similar criteria were applied, for example, to the hearing of denial of contractual benefits cases, an exception could be included in any transitional provisions so that it would not apply to existing members of the WAIRC who do not meet the eligibility requirements. The restrictions would therefore only apply to future appointments.

259. The Review will seek further submissions on which of these models is supported by stakeholders. Similar issues apply to the jurisdiction to declare the meaning of an award under s 46 of the IR Act, and other cases in which members of the WAIRC are required to exercise judicial power and submissions are sought with respect to these matters as well.

260. Whichever model is to apply, the denial of contractual benefits jurisdiction could be expanded, so that if an employer had a claim for set off or counterclaim against

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173 Above n 156, 429.

174 This would require consequential amendments to the IR Act to require that, at any given time, the WAIRC is to be comprised of at least three Commissioners with the appropriate legal qualifications and experience.

the employee, that could be determined as part of the same set of proceedings. That would avoid a multiplicity of litigation.

2.6 Analysis of Structural Issues

2.6(a) The composition and workload of the WAIRC

261. As set out earlier the operational jurisdiction of the WAIRC,[175] and the volume of work it engages in, is now much reduced than when the IR Act was first passed, and compared to what it was prior to the enactment of Work Choices. There are fewer employers and employees that can use the WAIRC as part of the State industrial relations system; and the types of matters the WAIRC can deal with has retracted. A crude measure of these effects is the total number of matters concluded by the WAIRC during a financial year. The 2004 - 2005 Annual Report of the Chief Commissioner recorded that 2,877 matters of all types were concluded by the WAIRC in that year. The average for that year and the previous five years was 3,003 matters. The Annual Report of the Chief Commissioner for 2016-2017 recorded that 463 matters had been concluded during that year, with the average for the previous five years including that year being 654 matters.

262. Consistent with this reduction in jurisdiction, the WAIRC is presently constituted by an Acting President, the Chief Commissioner and Acting Senior Commissioner and, to use the wording of s 8 of the IR Act two "other commissioners". As noted by the Chief Commissioner in her Annual Report for 2016-2017, four Commissioners is the minimum number necessary to enable the Commission to exercise its various areas of jurisdiction, to deal with urgent matters and to allow for normal administrative arrangements including leave and illness.

263. Due to the reduced workload of the WAIRC it was decided in the first half of 2017 that the present Acting President, the Hon JH Smith, had the capacity to undertake other duties within the judicial system, and so arrangements were made for the Acting President to be also appointed as an Acting Justice of the Supreme Court.

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175 This phrase is used to describe the jurisdiction the WAIRC can exercise, having regard to the coverage of the Federal system under the FW Act.

264. By contrast, in the year to 30 June 2005 the WAIRC was constituted by a President, Chief Commissioner, Senior Commissioner and six Commissioners.[176]

265. With respect to the position of President, there has not been a person occupying this substantive office since the retirement of the Hon PJ Sharkey on 5 October 2005. Since the retirement of President Sharkey there have been three Acting Presidents of the WAIRC. Mr MT Ritter SC was appointed as Acting President on 17 October 2005 and continued in that position to 16 December 2009. The Barnett State Government then decided to appoint an existing member of the WAIRC to be the Acting President. Senior Commissioner JH Smith was then appointed as Acting President, as she had the necessary qualifications and experience as required by s 9(1) of the IR Act. Accordingly, on 17 October 2009 Senior Commissioner Smith was appointed as Acting President. The Hon Justice Le Miere of the Supreme Court of Western Australia was also appointed as an Acting President in 2010 to preside over an appeal in which Smith AP had a personal conflict.[177]

266. When Senior Commissioner Smith was appointed as Acting President, Commissioner Scott was appointed as Acting Senior Commissioner for the same initial period of appointment and then the same subsequent periods of appointment, as Smith AP.

267. This situation changed when Acting Senior Commissioner Scott was appointed to be the Chief Commissioner, following the retirement of Chief Commissioner Beech. The appointment of Chief Commissioner Scott as Acting Senior Commissioner ceased immediately prior to her appointment as Chief Commissioner on 26 June 2016. By then, Scott CC had been an Acting Senior Commissioner for over six years. On the same date, Commissioner Kenner was appointed as Acting Senior Commissioner.

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176 2004-2005 Annual Report of the Chief Commissioner.

177 *The Director-General, Department of Education v Liquor, Hospitality and Miscellaneous Union, Western Australian Branch*; see (2010) 90 WAIG 127; (2010) 90 WAIG 1517 and (2010) 90 WAIG 1526.

268. The acting appointments of Smith AP and Kenner ASC have continued. As set out previously, Smith AP has also been appointed as an Acting Justice of the Supreme Court.

269. It might be said, with respect, that the succession of acting appointments to senior positions within the WAIRC, since the end of 2009, has been somewhat shambolic. The appointments have lacked direction, a clear policy basis and shown scant regard for the proper constitution of the WAIRC. In making the acting appointments[178] the Government has shown insufficient respect to the WAIRC as an institution, and to the occupants of senior positions at the WAIRC.

270. It is clearly unsatisfactory to have had an Acting President for a period of in excess of 12 years. Whilst it may have been the policy of successive State Governments to abolish the position of President, proceeding with legislation to fulfil the policy has not occurred.

271. The use of acting appointments for a lengthy period is inapposite given that the WAIRC must be independent and undertakes many matters where the State or one of its emanations is a party to matters before it. Judges and academics have both set out the reasons for the undesirability of acting judicial or quasi judicial appointments.[179] The reasons relate to the rule of law and judicial and arbitral independence. Additionally, an acting appointment can undermine the importance of the office and the status of the person occupying the office.

272. Acting appointments may be made under s 17 and s 18 of the IR Act.

273. An Acting President may be appointed for no longer than two years and, upon expiration of this period, can be reappointed. For other members of the WAIRC an acting appointment may be for an indefinite period.

274. The Review considers it to be wrong in principle to have acting members of the WAIRC for long periods of time and, subject to receiving submissions to the

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178 After the appointment of Ritter AP, which the Review, for obvious reasons, does not comment upon.

179 See ffor example, R Ananian-Welsh and G. Williams, *Judicial Independence from the Executor: A First-Principles Review of the Australian Cases*, (2014) *40 Monash University Law Review 593*; Judges and Retirement Ages, A Blackham (2015-2016) *39 Melbourne University Law Review 738*, 750-751.

contrary to persuade it differently, will recommend to the Minister that the practice be discontinued.

2.6(b) The Position of the President

275. Since the introduction of Work Choices and the expansion of the national industrial relations system, matters dealt with by the President and the Full Bench have declined significantly.[180]

276. The 2012 Green Bill contained provisions that would have had the following effects:

(a) The abolition of the position of President.

(b) A Supreme Court judge be assigned by the Chief Justice of Western Australia to sit on the Full Bench as required.

(c) The conferral of the President's powers in relation to the rules of registered organisations to the Chief Commissioner.

277. The Fielding Review recommended that the position of President and the Full Bench be abolished and the CCS be redesignated the Full Bench.[181] The CCS was recommended to have an appellate role in reviewing only decisions of the WAIRC.[182] The Fielding Review also recommended that appeals from decisions of industrial magistrates be dealt with by the District Court or a single justice of the Supreme Court.[183]

278. The Cawley Review recommended the Full Bench be abolished and the CCS be redesignated the Full Bench with the same authority to deal with appeals that had been dealt with by the Full Bench.[184]

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180 In 2005-06 there were 46 matters dealt with by the Full Bench, compared with 18 matters in 2016-17.

181 Above n 118– recommendation 10.

182 Above n 118, 50.

183 Above n 118 – recommendations 179 and 180.

184 Dr Sally Cawley, '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, (2003), Recommendation 19.

279. The Amendola Review recommended the Full Bench be abolished; that matters for enforcement and civil remedy provisions be matters for a court alone; and that appeals from a single member of the WAIRC be heard by a body called "a Full Bench", consisting of three members.[185] The Amendola Report also recommended the abolition of the President's position.

280. As set out earlier, the workload of the WAIRC is now such that the appointment of a President on a full-time basis cannot be justified on the basis of efficiency.

281. There is debate however as to what to do about this.

282. The primary function of the President is to preside over the hearing and determination of appeals from decisions of single Commissioners and industrial magistrates, with at least two Commissioners, as part of the Full Bench.[186] Given that appellate role, the position of President is primarily judicial in nature. The President also has powers in relation to the rules of registered organisations, under, for example s 62 and s 66 of the IR Act.

283. As stated, the 1995 Fielding Review, the 2003 Cawley Review, and the Amendola Report all recommended the abolition of the position of President.[187]

284. In 2005, the IR Act was amended to enable the appointment of an Acting President, with a view to abolishing the position.[188] In 2008, the Industrial Relations Amendment Bill 2008 was introduced into State Parliament to abolish the position of President and to enable a Supreme Court judge to sit on the Full Bench, as and when required. The Bill lapsed when a State election was called and Parliament was prorogued. Following the subsequent election of the first Barnett Government, no similar legislation was introduced.

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185 Above n 13 – Recommendations 14, 16 and 19.

186 The Full Bench can also deal with questions of law under s 27(1)(u) and enforcement proceedings under s 84A of the IR Act. The President can deal with stay applications under s 49(11) and certain union-related matters under Part II Division 4 of the IR Act.

187 Fielding Review (above n 118) – Recommendation 11; Cawley Review (above n 184) – Recommendation 26; and Amendola Review (above n 13) – Recommendation 14.

188 *Industrial Relations Amendment Act 2005* (WA)

285. It is evident, from the arrangements that have been made this year and the declining jurisdiction of matters before the WAIRC involving the President, that it is not structurally efficient for the WAIRC to have a full-time President who is entitled to all of the conditions of a Supreme Court justice.[189] This was foreshadowed after the introduction of the Work Choices legislation, when the State Labor Government introduced, in 2008, the Industrial Relations Amendment Bill referred to above.

286. However, in the opinion of the Review, the analyses which lead to the recommendations in the Fielding Review were, with respect, in some instances inadequate and in others have been overtaken by events.

287. As mentioned earlier, the Amendola Report recommended that the role of the President and the Full Bench be abolished. The Amendola Report said that the roles of the President and the Full Bench just served to complicate both the system and its operation and should therefore be abolished.[190] Apart from a general endorsement of the positions taken by the Fielding Review and the Cawley Review, however, the Amendola Report did not analyse the issue in any depth.

288. To illustrate the earlier comment about changes since the Fielding Review, that Review said a problem arose because of a lack of definition in the administrative functions associated with the office of Chief Commissioner and the President.[191] The Fielding Review then said the arrangement had been the source of "misunderstanding and comment within and outside the WAIRC".

289. This was, it may be said with respect to all, a product of the times and peculiar to the then occupants of the offices. The same difficulties have not been evident since October 2005.

290. Furthermore, and more structurally significant, the lack of certainty about the delineation of responsibilities issue has largely, if not entirely, been resolved by legislation in 2005 when s 16(1) of the IR Act was repealed and ss 16(1), 16(1aa),

189 IR Act s 20(1).
190 Above n 13 [168].
191 Fielding Review (above n 118), 52.

16(1ab) and 16(1ac) were introduced into the IR Act. These subsections set out the powers and duties of the Chief Commissioner in some detail.

291. These subsections provide legislative clarity which did not exist at the time of the writing of either the Fielding Review or the Cawley Review. This therefore colours what these Reviews said on the issue. For example, in the Fielding Review it was said that the President and Chief Commissioner were compelled to confer about a range of matters affecting the WAIRC which really called for the decision of one person. That has not been the situation since the 2005 legislation.

292. The Fielding Review also mentioned[192] some of the observations made by the Minister for Labour Relations and Industry when the 1979 Bill, including the appointment of the President, was before Parliament. The Fielding Review referred to the Minister saying the President's role in the WAIRC was designed to "bring about closer co-ordination between the functions of award-making and award enforcement", "to create a heightened impartiality in these matters" and to "enable deregistration and penalty provisions to be implemented more expeditiously". This is, with respect, an incomplete summary of what the Hon. Raymond O'Connor MLA, then Minister for Labour and Industry, said in the Parliamentary Debates in 1979 in the Second Reading of the Industrial Arbitration Bill.[193]

293. In the Minister's Second Reading Speech, the reasons in support of the President's position were said to be:

(a) It would enhance the operations and standing of the WAIRC.[194]

(b) It was consistent with the Government's desire to extend the powers of the WAIRC to cope with conciliation and arbitration processes.[195]

(c) To facilitate closer co-ordination between award-making and award enforcement.[196]

192 Fielding Review, above n 118, 44.
193 Western Australia, *Parliamentary Debates*, Legislative Assembly, 3619 – 3620, (O'Connor).
194 Ibid.
195 Ibid.

(d) To create a heightened impartiality in these matters.[197]

(e) To enable deregistration and penalty provisions to be implemented more expeditiously.[198]

(f) To reduce appeals to the IAC and thereby reduce delays.[199]

294. The Fielding Review does not refer to reasons (a) and (b). Part of what was meant by (a), in the context of the Minister's speech as a whole, was that there would remain a high standard of decision making even if appeals against Commissioners' decisions could no longer be appealed directly to the IAC. This was because of the presence, as part of the Full Bench, of a President with the status of a puisne judge of the Supreme Court. Governments making appointments to the position could thereafter be expected to take this status into account when making appointments to the position of President.

295. The Fielding Review also stated that the existing structure had not enabled de-registration and penalty provisions to be implemented rapidly. Again, this comment is a product of the time of the Fielding Review. There is no evidence presently before the Review to support this complaint in the past 12 years.

296. The Fielding Review then refers to the reason for the establishment of the position of the President, namely that it would reduce the number of appeals to the IAC. Fielding analyses the figures from 1979 to 1995. The Fielding Review says in "recent years" the number of matters finding their way to the IAC is not significantly less than was the case in 1979. Again, this observation is a product of the time of the writing of the Fielding Review. It cannot now be said that the number of appeals to the IAC is not significantly less than 1979.[200] This could probably be attributed to the lessening numbers of matters before the WAIRC as well as the limited grounds of appeal to the IAC under s 90(1) of the IR Act. However, the 2016-2017 Annual Report of the Chief Commissioner records only

196 Ibid.
197 Ibid.
198 Ibid.
199 Ibid 3620.
200 Compare Fielding Review (above n 118), 54.

two appeals to the IAC in 2016-2017 and only 10 in total in the three years before that.

297. The Fielding Review then says that if, as it proposed, the WAIRC no longer acted as the appellate tribunal from the IMC the need for a judicial President would be even less.[201] This recommendation from the Fielding Review has never been acted upon, although that is not to say it is not with merit. At present, appeals from the IMC still proceed to the Full Bench. Therefore, this argument of the Fielding Review in support of not having a President does not presently exist.

298. The Fielding Review then recommended the office of a President with judicial status be abolished and that the administrative and titular head of the WAIRC be the occupant of the office titled Chief Commissioner.[202]

299. The Cawley Review endorsed the position of the Fielding Review with respect to the abolition of the position of President but, with respect, suffered from similar analytic constraints.

300. The Review considers that there is value in having a person with the status of a Supreme Court Judge presiding over appeals to the Full Bench and other matters which presently require determination by the Full Bench including the President. However, the Review acknowledges that with the diminishing workload of the WAIRC it is not efficient to have a person appointed as a President of the WAIRC to hear appeals as part of the Full Bench, and act as the judicial head.

301. Subject to what is said below the Review is of the preliminary view that the Full Bench of the WAIRC, when constituted to hear appeals and otherwise exercise jurisdiction, should be headed by a Supreme Court Judge, who is to sit as the Presiding Member of a Bench to be called the Industrial Commission Judicial Bench (Judicial Bench). The Full Bench could be otherwise constituted by two members of the WAIRC as designated by the Chief Commissioner.

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201 Above n 118, 54.

202 Above n 118, 55.

302. This view is consistent with the Green Bill and the 2008 Bill referred to earlier. The Chief Justice, after consultation with the members of the IAC[203] has confirmed that for many years, the court has offered to take on the jurisdiction exercised by the President on the basis that those responsibilities would be discharged by a member of the General Division of the court; although it would be likely that administrative arrangements would be made so those responsibilities were discharged by a small number of members of the court who either had or would develop expertise in the area. The Attorney General has endorsed, in principle, members of the Supreme Court being able to exercise the jurisdiction now undertaken by the President. Although there are resource implications for the State if these jurisdictional changes were made, the Review understands they are capable of resolution.

303. The position is also supported by submissions made by the Construction, Forestry, Mining and Energy Union, Construction and General Division, WA Divisional Branch (CFMEU) and Combined Small Business Alliance of WA Inc. (CoSBA) to the Review, whilst UnionsWA said it was not opposed to the idea as long as the position was "properly funded" and matters were still dealt with in a timely manner. Some submissions expressed concern that if this amendment were made the WAIRC would lose the expertise of a judicial head with industrial relations law expertise, and the jurisdiction of the WAIRC Full Bench could be more formalistic and take longer to resolve. These submissions are noted but in the opinion of the Review, can probably be overcome. As set out above, they are likely to be considered by the Chief Justice when deciding who should sit as the Presiding Member in an individual case, and in co-operation between the Chief Commissioner and the Presiding Member. Other stakeholders submitted that the current structure of the WAIRC is working well. Whilst this may be so, at least in the opinion of the submitters, the point ignores the lack of the existing workload of the position of President and the desire for an efficient and streamlined WAIRC.

304. Accordingly, the Review considers, provisionally, that an amendment to the IR Act should be made to abolish the office of the President of the WAIRC and the Full

[203] Subject to the proper resourcing of the Supreme Court to take on the position.

Bench. Instead there ought to be an amendment to the IR Act establishing the Judicial Bench to be presided over by a Supreme Court justice, to be allocated by the Chief Justice on a case-by-case basis. The justice would sit with two Commissioners of the WAIRC, assigned by the Chief Commissioner.

305. Apart from the jurisdiction exercised by the President as part of the Full Bench, the President also hears and determines some matters alone. These are primarily applications under s 66 of the IR Act, with respect to the rules of industrial organisations, referrals from the Full Bench under s 72A(6) of the IR Act, with respect to employee organisations and who they represent, and applications for a stay pending an appeal under s 49(11) of the IR Act. The Review is provisionally of the opinion that the first two of these types of matters may in the future be heard and determined by the Chief Commissioner, or, in the case of a s 66 application, another member of the WAIRC as delegated by the Chief Commissioner. An application for a stay of an appeal under s 49(11), as an adjunct to the role of the Presiding Member in an appeal, could be heard by a Supreme Court justice, as allocated by the Chief Justice. This need not be the same justice as who would later preside over the appeal. This will increase flexibilities.

306. Another power currently exercised by the President alone under the IR Act is that of the conferral with the Registrar, under s 62 of the IR Act, about alteration of the rules of an organisation. That section could be amended so that the Chief Commissioner exercises the power. The amendment would be consistent with the role of the Chief Commissioner as the administrative head of the WAIRC.

307. An alternative model to the Judicial Bench model would be for the appeals and other work which it is suggested be undertaken by the Judicial Bench, could instead be heard by a single justice of the Supreme Court, sitting alone. This would include therefore appeals from single Commissioners and appeals from decisions of the IMC. Under this model, Commissioners of the WAIRC would not sit on appeals and other matters presently before the Full Bench, apart from those matters which are currently heard by the Full Bench but which, as discussed later, would be heard by an Industrial Commission Arbitral Bench.

308. The hearing of appeals from the IMC by a single justice of the Supreme Court would mirror the appellate process within the criminal jurisdiction of the Magistrates Court.

309. Additionally, such a system would still have the benefit of the underlying reason for the inclusion of the President in the IA Act, in that appeals being determined by a Supreme Court justice would enhance appellate decision-making.

310. There are some resourcing issues inherent in this model in that there would likely be additional work for the Supreme Court, albeit it is hard to assess whether that would be different from the resources issue for the Supreme Court inherent in the alternative model just discussed. There would also be resources issues in the loss of appellate work for the WAIRC. The Review is not in a position, at least at this stage, to assess these resourcing issues.

311. The Review has consulted with the Chief Justice about this model. The Chief Justice, after conferral with members of the IAC and whilst emphasising that matters of policy were for the Government, advised that they did not consider that it would be desirable to confer appellate jurisdiction upon a single judge of the court. The view of his Honour and the IAC justices was that the current system of appeals has worked quite well, and the provision of a right of appeal to a judge sitting alone would, in effect, create the prospect of two tiers of appeal within the court, as appeals lie from judges of the court sitting alone to the Court of Appeal pursuant to s 58 of the *Supreme Court Act 1935*. In the view of the Chief Justice and the members of the IAC it was desirable to restrict appeals to the court to one tier only.

312. Whilst the Review would be interested in any submissions on this alternative model it is not at present disposed to recommend it in the Final Report.

2.6(c) The Commission in Court Session

313. The Review has earlier referred to the anomaly in the CCS being called a "court", or saying that the "Commission" is in "Court Session". In this context, it is a

meaningless epithet and apt to mislead, as the CCS is not generally engaged in a judicial function when, for example, issuing General Orders.

314. The preliminary opinion of the Review is that the CCS should be redesignated the Industrial Commission Arbitral Bench (Arbitral Bench). As the Arbitral Bench it would continue to exercise the jurisdiction currently now held by the CCS and exercise the jurisdiction exercised by the Full Bench under ss 53, 54, 55, 58, 59 60, 62, 68, 71, 72, 72A and 73 of the IR Act.

2.6(d) The Industrial Appeal Court

315. The IAC's jurisdiction and composition has already been referred to.

316. Part IV of the IR Act establishes the IAC constituted by three judges of the Supreme Court of Western Australia. The IAC hears appeals from decisions of the President, the Full Bench and the CCS, but only on the very limited grounds outlined in s 90(1) of the IR Act.[204]

317. The IAC was first established in 1963 by the *Industrial Arbitration Act Amendment Act (No. 2), 1963* (WA). Although constituted by judges of the Supreme Court, it is not a division of or constituted as the Supreme Court. The Supreme Court does, however, have supervisory jurisdiction over all courts in Western Australia. This jurisdiction may be sought by obtaining a prerogative writ from the Supreme Court, notwithstanding the privative clauses in ss 34(3)-(4) and 87(2) of the IR Act.[205]

318. The Fielding Review recommended that the IAC be abolished, and that there instead be a right of appeal to the Full Court of the Supreme Court from decisions of the WAIRC Full Bench.[206]

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204 The IAC also hears appeals from Industrial Magistrates under s 96K of the IR Act.

205 See for example the discussion on the effect of privative clauses in *Sealanes (1985) Pty Ltd v The WAIRC constituted by J L Harrison and Ors* [2005] WASC 158 at [28]-[30]. While the Court did not grant prerogative relief in that case, Commissioner Owen-Conway QC observed (at [38]) "the intention of the privative clause in s 34(4) is to direct appeals, where appeals lie, to the relevant superior industrial tribunal. Where there is jurisdictional error and no such appeal lies however, the privative clause cannot exclude the prerogative writ."

206 Fielding Review (above n 118), Recommendation 181. The Amendola Report (above n 13) also recommended abolition of the IAC – Recommendation 159.

319. It is very questionable whether the IAC should remain a specially constituted court under the IR Act, given the limited number of appeals that now proceed to it each year.[207]

320. The future of the IAC has been raised by the Review with the Chief Justice, the Attorney General and Solicitor General of Western Australia. The Chief Justice, after consultation with the members of the IAC, and although emphasising that the question of whether the IAC should be maintained or abolished and its jurisdiction conferred on the Court of Appeal is essentially a matter of policy for Executive Government and Parliament, said if a decision was made to abolish the IAC and jurisdiction (whatever its ambit) conferred on the Court of Appeal, there would be no difficulty in the Court of Appeal exercising that jurisdiction, including by utilising the services of a judge or judges from the General Division sitting as an acting judge or judges of appeal, as necessary, to deal with appeals concerning industrial relations matters.

321. It is also recognised that the current grounds of appeal to the IAC are very narrow. There are historical reasons for this, but the Review is of the preliminary opinion that they are too narrow to be consonant with a fair and modern industrial relations system. After consultation on the issue with the Chief Justice, who has conferred with members of the IAC, the preliminary view of the Review is that, like the *State Administrative Tribunal Act*, an appeal could proceed with leave, to the Court of Appeal "on a question of law".

322. This, the Review contemplates, is broader than the existing ground of appeal under s 90(1)(b) of the IR Act. For example, the legal effect of a document is a question of law, as is whether there is any (as opposed to some but not much) evidence to support a factual finding. The compendious "question of law" ground would make the existing grounds in s 90(1)(a) and s 90(1)(c) of the IR Act unnecessary as each of these grounds would inevitably be on a "question of law"; that is whether there is a decision in "excess of jurisdiction" or whether an

[207] There have only been 12 concluded appeals to the IAC in the past four financial years (2016-17 Annual Report of The Chief Commissioner of the WAIRC, 5).

appellant has been "denied" a right to be heard axiomatically involve questions of law.

323. If the IAC was abolished consideration should be given to:

(a) Whether the cost of lodging an appeal in the Supreme Court under the IR Act should be modified (the filing fee in the IAC is currently $5.00[208] compared with $3,287 in the Supreme Court).[209]

(b) Whether the Supreme Court's ability to order representation costs should be limited to where proceedings are frivolously or vexatiously instituted or defended, as is currently the case for the IAC under s 86(2) of the IR Act.

(c) Whether employer organisations, unions and industrial agents should be able to represent parties before the Supreme Court.

2.6(e) Section 34 of the Industrial Relations Act – Decisions Not to be Challenged

324. It is appropriate to consider these sections at this juncture as they have a general association with the appeals process and the circumstances in which the decisions of the WAIRC could be reviewed.

325. Section 34(3) and s 34(4) of the IR Act provide:

> (3) Proceedings before the President, the Full Bench, or the Commission shall not be impeached or held bad for want of form nor shall they be removable to any court by *certiorari* or otherwise —
>
> (a) on any ground relating to jurisdiction; or
>
> (b) on any other ground.
>
> (4) Except as provided by this Act, no award, order, declaration, finding, or proceeding of the President, the Full Bench, or the Commission shall be liable to be challenged, appealed against, reviewed, quashed, or called in question by any court —
>
> (a) on any ground relating to jurisdiction; or
>
> (b) on any other ground.

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208 *Industrial Relations (General) Regulations 1997* (WA), Sch 2 item 3.

209 Consisting of a $205 fee for filing the appeal notice, plus $3,082 for filing the appellant's case (higher fees apply to a corporation). Reduced fees apply if the party is a small business, not-for-profit association or eligible individual.

326. The history and purpose of these subsections are discussed in the text of Brown at [209]. They are largely ineffectual in preventing any review by the Supreme Court of any decision that involves a "jurisdictional error", and are, quite possibly, unconstitutional.[210] In the preliminary opinion of the Review they now serve no useful purpose and may be repealed from the IR Act. The Review proposes making a recommendation to this effect.

2.6(f) Dual Appointments

327. The IR Act allows for a member of the WAIRC to be appointed to the FWC, under s 14A of the IR Act but not the converse. Section 631 of the FW Act would enable a FWC member to be dually appointed to the WAIRC. The Review sees merit in this occurring. The Review proposes to recommend this amendment to the Minister.

2.6(g) Retirement Age of Members of the WAIRC

328. There are compelling reasons to extend the age of compulsory retirement for members of the WAIRC from 65 to 70, as:

(a) That is the compulsory retirement age for judges in Western Australia.[211]

(b) Although the compulsory retirement age for magistrates in Western Australia is 65,[212] there is currently a Bill before the Western Australian Parliament to increase the retirement age of magistrates to 70.[213]

(c) There is a recognised desire by many older workers to participate in the workforce.[214]

(d) Increased life expectancy.[215]

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210 See *Re Harrison, ex parte Hames* [2015] WASC 247, Beech J [104]-[106] citing amongst other cases, *Kirk v Industrial Court of New South Wales* (2010 239 CLR 531 [97]-[100].

211 *Judges' Retirement Act 1937* s 3(1) and *District Court of Western Australia Act 1969* s 16. The retirement age for magistrates is 65.

212 *Magistrates Court Act 2004* (WA), Sch 1, Cl 11(1).

213 Courts Legislation Amendment Bill 2017, Part 3.

214 The past three Censuses show that the proportion of people in the labour force aged 65 years and over has been steadily increasing from 9.4 per cent in 2006 to 14 per cent in 2016. One in every five people (21 per cent) aged 65 to 74 years was in the labour force in 2016; ABS *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (2071.0).

(e) The arbitrariness of forced retirement if a person is ready, willing and able to work.

329. Consideration could also be given to enabling the appointment of Commissioners on a part-time basis, to facilitate more flexible working arrangements and to better meet the WAIRC's operational needs at a given time.[216]

2.7 Procedural Issues Affecting how the WAIRC Performs its Functions

2.7(a) Representation Before the WAIRC – Legal Representation and Industrial Agents

330. Section 31 of the IR Act specifies who may appear before the WAIRC. Pursuant to s 31(1) a party may appear in person, by an agent or by a legal practitioner in the circumstances set out in s 31(1)(c) and s 31(4) as follows:

> (1) Any party to proceedings before the Commission, and any other person or body permitted by or under this Act to intervene or be heard in proceedings before the Commission, may appear —
>
> …
>
> (c) where —
>
> (i) that party, person or body, or any of the other parties, persons or bodies permitted to intervene or be heard, is UnionsWA, the Chamber, the Mines and Metals Association, the Minister or the Minister of the Commonwealth administering the Department of the Commonwealth that has the administration of the *Fair Work Act 2009* (Commonwealth); or
>
> (ii) the proceedings are in respect of a claim referred to the Commission under section 29(1)(b) or involve the hearing and determination of an application under section 44(7)(a)(iii); or
>
> (iii) all parties to the proceedings expressly consent to legal practitioners appearing and being heard in the proceedings; or
>
> (iv) the Commission, under subsection (4), allows legal practitioners to appear and be heard in the proceedings,
>
> by a legal practitioner.
>
> …

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215 Life expectancy in Australia between 1890 and 2015 has increased significantly – from 47.2 years to 80.4 years for males, and from 50.8 years to 84.5 years for females; ABS *Life Tables, States, Territories and Australia, 2014-2016* (3302.0.55.001).

216 See for example the Green Bill s 15(1), which would have amended the IR Act to enable the appointment of part-time Commissioners. A key question on the issue however would be the steps required to ensure independence and a lack of conflicts.

(4) Where a question of law is raised or argued or is likely in the opinion of the Commission to be raised or argued in proceedings before the Commission, the Commission may allow legal practitioners to appear and be heard.

331. Section 112A provides for the registration of "industrial agents". Industrial agents may appear before the WAIRC, the IMC and the IAC. They may also provide advice and other services in relation to industrial matters. Industrial agents are given an exemption from s 12 of the LP Act, which would otherwise prohibit them from engaging in legal practice unless they were also a legal practitioner.

332. Industrial agents therefore have unfettered representation rights before the WAIRC, while legal practitioners do not. Additionally, there is currently minimal regulation of industrial agents under the IR Act.

333. The registration of industrial agents has been noted as problematic since the Fielding Review and Cawley Review.[217] In particular there are problems with:

(a) The absence of any minimum qualification/competence requirements.

(b) The risk that there is a perception among clients that industrial agents are formally registered and therefore "quality assured".

(c) The inability of the WAIRC or any other body to effectively deal with improper conduct by industrial agents, or to satisfactorily investigate client complaints against industrial agents.[218]

(d) Despite (a) and (c), under s 31(3) of the IR Act a person or body appearing by agent is bound by their acts.

334. The Fielding Review and Cawley Review recommended more stringent regulation of industrial agents. Part 11 of the Green Bill would have amended the IR Act to, amongst other things, require industrial agents to have professional indemnity insurance, empower the Registrar to inquire into the conduct of an industrial agent and enable the WAIRC to take disciplinary action against an industrial agent.

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217 See Fielding Review (above n 118), 122-126 and Cawley Review (above n 184), 66-72.

218 See eg the commentary at [14]-[27] of the decision in *Reynolds v Director General of Health* (2010) 91 WAIG 79.

335. In contrast to the IR Act, s 596(1) of the FW Act provides that a person may be represented by a paid agent or legal practitioner only with the permission of the FWC. Section 596(2) sets out the circumstances in which the FWC may grant permission. An example is where it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter.

336. A recent decision of a Full Bench of the FWC considered the scope of s 596 of the FW Act and the meaning of "representation" by lawyers and paid agents. The Full Bench determined that s 596 applies to the participation of lawyers and paid agents who undertake tasks in the preparation of a hearing, as well as those who advocate at a hearing.[219] This decision has been criticised by the legal profession.[220]

337. The Review has some difficulty with the notion that a person cannot be legally represented before the WAIRC, in all matters and in particular when they can be so represented by an industrial agent. The Law Society of Western Australia submitted to the Review that parties before the WAIRC ought to be entitled to be represented by a legal practitioner if they choose to be.

338. In considering this issue, it might have been said the WAIRC was, traditionally, a "lay tribunal", but that is not necessarily the practice these days. In unfair dismissal and denial of contractual benefits cases, there is already an entitlement to representation. This is also the position in matters before the PSAB[221] and the OSH Tribunal[222] albeit not the RFTIT.[223]

339. Additionally, in civil matters before courts representation is ordinarily an important incident of the right to a fair hearing. In some instances it has been referred to as a "human right", the denial of which could be detrimental to a public sector employee or small business employer in a particular case.

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219 *Fitzgerald v Woolworths Limited* [2017] FWCFB 2797 at [44]-[45].

220 http://www.afr.com/business/legal/shadow-lawyers-barred-from-advising-on-fair-work-WAIRC-cases-20171031-gzc0az.

221 IR Act s 80L(2).

222 OSH Act s 51I(2), *Mines Safety and Inspection Act* s 68C(3).

223 Under OD Act s 42(b), any party may appear, with the leave of the Tribunal, by a legal practitioner.

340. In *Orellana-Fuentes v Standard Knitting Mills Pty Ltd and another; Carey v Blasdom Pty Ltd t/as Ascot Freightlines and Another,* Ipp JA said,[224] in the context of the NSW workers compensation legislation:

> **[96]** It is self-evident that legal representation is ordinarily an important part of procedural fairness and, ordinarily, it is in the public interest that citizens be allowed legal representation for the purposes of the conduct of litigation...
>
> **[97]** Thus, while there is no fundamental absolute right in Australia to legal representation before a Ch III Court or otherwise, there may well be circumstances in which a person's right to a fair hearing would be negated if that person did not have legal representation. On the other hand (and much less frequently), there may be circumstances where the interests of justice will be sufficiently served by hearing only the parties themselves. The need for legal representation must depend on the background of the party concerned, the nature of the proceedings, the nature of the tribunal and the nature of the claim.

341. One difficulty with legislating for an entitlement to legal representation in all matters is the differing roles and functions the WAIRC has. The conciliation of a small business industrial dispute is, for example, different from a case where an award is to be construed; where questions of law are involved and the impact is potentially widespread.

342. The Review intends to seek further submissions on the issue. The Review hopes the submissions will address whether there ought to be a recommendation that the IR Act be amended to generally allow for representation as of right, with the WAIRC retaining a jurisdiction to deny representation in a particular case if it is unfair to one of the parties.

2.8 Structural Issues Involving the Powers of the WAIRC

2.8(a) A No Costs Jurisdiction

343. There is currently limited capacity for the WAIRC to order costs under the IR Act. While s 27(1)(c) enables the WAIRC to order costs for a party's expenses, no costs may be ordered for the services of a legal practitioner or agent.

344. The Green Bill would have given the WAIRC a capacity to order legal costs, including where:

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224 (2003) 57 NSWLR 282, and with the concurrence of Spigelman CJ and Handley JA.

(a) A person initiated proceedings, or responded to proceedings, vexatiously or without reasonable cause.

(b) It should have been reasonably apparent to a person that proceedings initiated or responded to by the person had no reasonable prospect of success.[225]

345. The FW Act enables the FWC to order costs in similar circumstances to those proposed by the Green Bill.[226] As set out in decisions of the FWC, there is a distinction in the law as to the awarding of party/party costs and solicitor/client costs, sometimes referred to as indemnity costs. The FWC has said that generally, party/party costs might be considered to be about two thirds of solicitor/client costs. In some circumstances the FWC has held that indemnity costs may and should be ordered by it.[227] The FWC has made indemnity costs orders where:

(a) An appellant's appeal was largely based on fabricated documentary evidence and dishonest oral evidence.[228]

(b) An applicant did not reasonably assess the prospects of his case and refused a settlement offer made by the respondent. The settlement offer was not made in conciliation, but rather was made openly on the basis that it was "without prejudice save as to costs".[229]

(c) An applicant lodged a general protections claim shortly after she entered into a settlement agreement with her employer, which was in full and final settlement of all claims relating to her employment.[230]

346. The Green Bill would have also empowered the WAIRC to order that a party's representative pay costs, consistent with the legislation that applies to the FWC and SAT.[231] Again this was to have been in limited cases.

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225 Green Bill s 20. See also IR Act s 83C(2) and FW Act s 611.

226 See for eg FW Act ss 611 and 400A.

227 "Indemnity costs" referring to the total of both party/party and solicitor/client costs: *Steven Post v NTI Limited T/A NTI* [2016] FWCFB 6765 at [25], [26]-[29].

228 *Armstrong v Taxation Management Services Pty Ltd* [2016] FWCFB 1179.

229 *Ferry v GHS Regional WA Pty Ltd* [2016] FWC 3120.

230 *Fadheel v Douglass Hanly Moir Pathology Pty Ltd* [2017] FWC 3382.

231 See for eg FW Act ss 401 and 780 and *State Administrative Tribunal Act* s 87(6).

347. In submissions to the Review from employer groups and the Law Society of Western Australia, there was support for the WAIRC to be able to make costs orders in similar circumstances as set out in the FW Act.

348. The Review notes 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 conciliates under s 32 and s 44 to try and resolve a dispute. Accordingly, the Review considers it may only be appropriate for costs to be ordered in arbitrated matters and on the limited bases set out in the FW Act. As this position has not been addressed in submissions, stakeholders and others are requested to make submissions on the point.

2.8(b) The Structure of the WAIRC and the Procedures of the WAIRC

349. There are currently two separate processes that apply when the WAIRC is dealing with industrial matters under the IR Act. These processes are set out in s 32 and s 44 of the IR Act. These are two of the lynchpin provisions of the IR Act. The processes are different but ultimately both provide for conciliation and arbitration. The key differences between the two processes are shown below in Table 2D.

Table 2D Differences between s 32 and s 44 of IR Act

Issue	Section 32	Section 44
Process for invoking section	• Section 32 applies to proceedings in respect of an industrial matter referred to the WAIRC under s 29 • Under s 29, a party applies to the WAIRC for specific relief (see s 29A(1))[232]	• Under s 44(7), a party applies to the WAIRC for a conference (rather than for specific relief) • Unless and until the WAIRC decides to convene a conference under s 44, there is no matter before it (in contrast to s 29, where a matter is before the WAIRC once an application is made)
Who has standing to invoke section	• Under s 29(1)(a), an industrial matter may be referred by an employer with sufficient interest, an organisation or the Minister • Under s 29(1)(b), an industrial matter may be referred by an employee or former employee	• Under s 44(7), an application for a conference may be made by employer, an organisation, the Minister, an employee (in relation to long service leave) or on the WAIRC's own motion where industrial action has occurred or is likely to occur

[232] Although in granting relief, the WAIRC is not restricted to the specific claim made – IR Act s 26(2).

Issue	Section 32	Section 44
Timeframes under *Industrial Relations Commission Regulations 2005*	• Where an application is made under s 29, a respondent generally has 21 days to file an answering statement – reg 13(6) • The 21-day timeframe may be shortened by the WAIRC or on application – reg 13(5) and (6)	• No answering statement is required to an application for a s 44 conference – reg 30(2)
Attendance at a conference	• The parties or their representatives – s 32(3)(a) • Attendance not compulsory unless the WAIRC issues a direction to this effect	• Any person whom the WAIRC summons under s 44(1) • Attendance is compulsory
Is the WAIRC required to conciliate the matter	• Yes, unless the WAIRC is satisfied that conciliation would not assist with resolution of the matter	• Yes, impliedly under s 49(9), which only authorises arbitration where the matter has not been settled by agreement of the parties
Does the WAIRC have power to make interim order at a conference	• Yes – s 32(8) • Although not expressly stated, an interim order may vary the operation of award or industrial agreement[233]	• Yes – s 44(6) • Interim order may vary operation of award or industrial agreement – s 44(6a)(b)
Can the same Commissioner conciliate and arbitrate	• Yes – no express stipulation in s 32	• Yes – unless a party objects and the Chief Commissioner reallocates the matter for hearing – s 44(11)
Terminology – arbitration vs. hear and determine	• WAIRC may decide a matter by "arbitration" – s 32(6)	• WAIRC may "hear and determine" question, dispute or disagreement – s 44(9)
Arbitration powers	• WAIRC must resolve the matter on terms "that could reasonably have been agreed between the parties in the first instance or by conciliation" – s 32(7)[234] • No express power to make retrospective order, although other sections of IR Act may enable retrospectivity (e.g. ss 39(3), 40(4) and 40B(4) in relation to awards)	• Order may only bind the parties to the dispute – s 44(9) • Order may have retrospective effect – s 44(13)
Consent arbitration	• No express capacity for consent arbitration in s 32	• Section 44(12a) expressly enables consent arbitration, in which case there is no capacity to appeal the WAIRC's final decision

233 *Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union* (1986) 66 WAIG 1553.

234 See *Robe River Iron Associates v Australian Workers Union, WA Branch* (1987) 67 WAIG 320.

350. Section 44 of the IR Act, in containing a process by which an employer might be summonsed before the WAIRC to deal with an industrial matter[235] is, in the experience of the Review, a jurisdiction jealously guarded by unions in Western Australia. It has the benefit of enabling parties to quickly proceed before the WAIRC to try and settle a dispute about an industrial matter.

351. It was questioned in some submissions, whether it was appropriate for the same Commissioner to preside over the conciliation of an industrial matter and then arbitrate the dispute if conciliation could not settle the matter, as set out in s 32 of the IR Act. The Review is of the opinion that sometimes this will be appropriate and sometimes it will not. It is something that should be decided on a case by case basis. If both parties consent, there is no reason why the same Commissioner may not hear and determine the matter. On the other hand, if a party objects then the Chief Commissioner ought to be able to appoint another Commissioner to hear and determine the matter by arbitration.

352. There may be merit in the IR Act being amended so that there is greater harmonisation between the s 32 and s 44 processes. That may not be entirely easy to achieve as, to some extent, the two processes are for different purposes and are used in different circumstances. The Review seeks additional submissions from stakeholders and interested parties on whether the structure of the WAIRC and the proceedings before it will be likely to be enhanced by any attempt to achieve this, and if so how that might best be done.

353. Another point raised with the Review is that the orders of the WAIRC should be able to be enforced by the individuals or organisations for whose benefit the orders have been made, without the need for the orders to be enforced by the Registrar or a Deputy Registrar of the WAIRC, as is currently the situation under s 84A(1) of the IR Act. The Review sees some merit in this but as it was not the subject of submissions generally by stakeholders, the Review will seek further submissions about it. The Review considers that perhaps there ought to still be some sort of a brake on parties trying to enforce orders. An appropriate process

[235] IR Act s 44(7).

could be for the Registrar or Deputy Registrar to consider and give leave to a party to commence such proceedings. That would mean that the Registrar or Deputy Registrar could still bring the proceedings if they thought it was not appropriate to give leave in any given case.

2.9 The Status of the WAIRC – Offences Committed Before the WAIRC

354. One issue that was raised with the Review was whether the IR Act should include a part broadly similar to Part 5-1 Division 9 of the FW Act, about offences before the WAIRC. This division of the FW Act provides, for example, for offences for insulting or disturbing a FWC member and interrupting proceedings, intimidation, failure to appear or take the oath and false and misleading evidence. The Review did not receive submissions generally on the topic. Whilst the Review thinks these matters are worthy of attention, it requests additional submissions before considering whether to make a recommendation to this effect to the Minister.

2.10 Procedural Issues and Streamlined Processes

355. The Green Bill contained a number of provisions to streamline the general processes and procedures of the WAIRC, including interlocutory processes.[236] Among other things, the Green Bill would have enabled the WAIRC to:

(a) Dismiss a matter (or part thereof) on the ground that it was vexatious, trivial or without substance.

(b) Dismiss a matter (or part thereof) on the ground that it had no reasonable prospect of success.

(c) Make a finding without a hearing.

(d) With the parties' consent, make a final decision without a hearing.

(e) Correct a clerical mistake in a decision or any error arising from an accidental slip or omission.

[236] See in particular Green Bill ss 19 and 28.

356. The Review is of the view that items (a), (b), (d) and (e) have merit. The Review is not at the present time convinced of the need for (c), unless the parties consented. The entitlement of a party to be heard and present a case if they wish is ordinarily an important incident of procedural fairness.

357. Other consequential procedural matters have been raised with the Review that are supported on a preliminary basis, as streamlining the processes of the WAIRC. These include:

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

(b) 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 speaking to the minutes is requested, the WAIRC may issue the order in the terms of the minutes.

358. A submission was made that the WAIRC ought to, in some circumstances, be able to conduct conciliations by telephone, as is the position in the FWC. Whilst the use of that process has its limitations, it may be suitable to some circumstances, in particular involving small businesses or employees who may find it difficult to travel to the WAIRC or who reside in remote locations. The Review considers it would be appropriate for the WAIRC to have a discretion to have a conciliation conference by telephone in an appropriate case. A proposed recommendation is to this effect.

359. Consideration should also be given to streamlining processes to remove the necessity for a party to make an application to the WAIRC for certain interlocutory matters. For example, the discovery, production and inspection of documents is not a matter of right in the WAIRC.[237] The WAIRC has the power to make such an order pursuant to s 27(1)(o) of the IR Act. One option would be to enable parties

[237] A party to WAIRC proceedings may apply for an order for discovery – see *Industrial Relations Commission Regulations 2005* reg 20.

to require discovery as a matter of right, subject to any order of the WAIRC to the contrary, in a particular case;[238] or at least in certain types of cases, like an unfair dismissal. The Review seeks additional submissions on any other procedural issues that could be amended to streamline the processing of matters by the WAIRC, without compromising fairness.

360. A submission was made that suggested an additional use of s 46 of the IR Act might be to amend an award or agreement if it was justified in the circumstances of the case. The Review can understand why the submission was made but considers there are potential complexities and difficulties. For example, not all parties who may be interested in the question of the amendment of the award or industrial agreement may be present before the WAIRC at the time when the application is heard and determined. Additionally, there are existing rules in place for the amendment of awards and other industrial instruments. The Review does not at this stage perceive that there is any clamoring for a change to these processes. Indeed, as set out in chapter 7, there have been few applications for the amendment of awards in the private sector in recent years.

361. In a number of submissions there were complaints about the regulations and forms of the WAIRC. The Review understands that from late last year the Chief Commissioner has conducted a review of the regulations and forms, and that the review is currently ongoing. Accordingly, the Review does not consider it necessary to say anything further about the issue at this time. The Review is confident the Chief Commissioner will take on board any reasonable submissions made to the Review in her review of the regulations and forms of the WAIRC.

2.11 Submissions Made About Matters Outside the Term of Reference

362. In some submissions to the Review there were complaints made about the way in which information is conveyed to stakeholders and the public via the WAIRC website and otherwise. The Review considers these matters to be outside the

238 Similar to the processes for discovery in the Supreme Court of Western Australia – see Order 26, rule 1 of the *Rules of the Supreme Court 1971*.

Term of Reference. They do not affect the structure of the WAIRC as such. That is not to say the WAIRC will not take the submissions on board.

363. Submissions were made upon whether the jurisdiction of the WAIRC to engage in the registration of employer-employee agreements should be maintained. The Review considers that to be outside the Terms of Reference of the Review as it involves the context of the jurisdiction of the WAIRC, as opposed to its structure.

364. The attention of the Review was also brought to the position of the South Australian Employment Tribunal that is something of a one-stop shop in dealing with industrial and employment rights for the public sector and all private sector discrimination matters and workers' compensation. The transformation of the WAIRC into such a body, encompassing the jurisdiction currently exercised by the SAT and WorkCover, in these areas may have merit. It is however a larger question than the ones that the Review has been established to consider, and would involve a multiplicity of economic, "machinery of government" and other issues the Review is not equipped to consider. It may well be a debate that should occur but not as part of this Review.

365. There were also submissions made about the regulations and structure of the IMC. The structure of the IMC and the way in which it conducts itself procedurally is, in the opinion of the Review, outside the Term of Reference. The IMC has some association with the Term of Reference because of its structural appellate links with the WAIRC. That is not the same however as the Review being able to look at the structure, procedures and processes of the IMC.

2.12 Proposed Recommendations and Requests for Additional Submissions

366. With respect to Term of Reference 1 the Review of the State Industrial Relations System proposes the following recommendations and seeks additional submissions, as follows:

Proposed Recommendations

1. The *Industrial Relations Act 1979* be amended, in accordance with these proposed recommendations and be renamed the *Industrial Relations Act 2018* (WA) (2018 IR Act).[239]

2. The 2018 IR Act is to be reviewed after three years of operation.

3. The 2018 IR Act is to be in a plain English drafting style and gender neutral.

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.

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).

[239] The year will be the year in which the amending Act is enacted.

(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[240] 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.

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,[241] 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);[242] or

(c) Be exercised by the IMC; or

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

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

242 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 WAIRC prior to the commencement of the 2018 IR Act.

(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.

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), in 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.

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

PART A – Introduction and Overview

3.1 Term of Reference

367. The second 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:
>
> 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.

368. There is a link between the first and second Terms of Reference. This is because the structure of the WAIRC is linked to the jurisdiction and powers it may exercise over public sector employees.

369. The first issue in considering this Term of Reference is to ascertain who are the "public sector employees". It is then necessary to consider the jurisdiction and powers exercised by the WAIRC with respect to those public sector employees. The Review will then need to consider how the access of those employees is restricted and whether and to what extent that could and should change.

3.2 Complexity and the Need for Wholesale Change

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,[243] 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

[243] Including industrial agreements and enterprise orders under the IR Act.

also of importance, such as the HS Act, the *School Education Act 1999* (WA) (School Education Act), the *Police Act 1892* (WA), the *Youth Offenders Act 1994* (WA) (Youth Offenders Act) and the *Prisons Act 1981* (WA) (Prisons Act).

371. As the analysis in 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 PSA and the 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 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.

378. The more difficult question is, what ought to be the nature and extent of the jurisdiction, 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. On these questions the Review seeks further submissions, as is later set out.

379. Initially, however, the Review needs to justify the comments just made by an analysis of the existing system.

3.3 The Public Sector - Differences to the Private Sector and Evolution

380. In Western Australia, as in the rest of Australia, there have been historical differences between the regulation of work in the public and private sectors.[244] An ongoing question is whether, and to what extent, the differences ought to remain. The engagement of the public sector was based on the Westminster system of an independent public service, or executive, as one of the checks and balances on the elected government.

381. As commented upon in Creighton & Stewart,[245] however, there has over relatively recent times, been "strenuous attempts … to bring [public sector] work organisation and employment conditions more into line with the private sector". The authors refer to governmental focus upon the tenure of public servants. Reference is made to tenure as, historically, the "major distinguishing feature of engagement" of the public sector, coupled with advancement according to seniority rather than merit. As the authors state, these concepts are explicable in terms of the desire to ensure an independent and impartial public service, free of political patronage. As the authors also comment, however, successive Commonwealth and State Governments have diluted those characteristics over time, under the rubric of introducing more efficient management practices into the public sector. In Western Australia, as is later set out, the PSM Act specifically

244 Creighton & Stewart, above n 19 [10.48].
245 Ibid, [10.50].

eschews promotion based on length of service in favour of a merit and equity based system. As for tenure, this has been steadily eroded in Western Australia, so that public sector employees may now be both voluntarily and involuntarily made redundant.

PART B – The Public Sector and the Public Service

3.4 Definition of the Public Sector

382. The Term of Reference does not define what it means by "public sector employees". The Review takes the view that the Term of Reference is intended to refer to and apply to the "public sector" as defined in Western Australian legislation.

383. "Public sector" is defined in s 3 of the PSM Act.

384. It is defined in this way:

> Public sector means all –
>
> (a) the agencies; and
> (b) the ministerial officers; and
> (c) the non-SES organisations.

385. The PSM Act also defines a "public sector body" to mean an agency, ministerial office or non-SES organisation.

386. An "agency" is in turn, defined in s 3 of the PSM Act to mean a "department" or a SES organisation. A "department" is defined to mean a department established under s 35 of the PSM Act. Section 35 provides for the establishment, designation, amalgamation, abolition and alteration of departments by the Governor on the recommendation of the Public Sector Commissioner. Section 35(4) of the PSM Act provides, however, that the Minister may direct the Public Sector Commissioner in making these recommendations.

387. An SES organisation is also defined in s 3 of the PSM Act as follows:

SES organisation means an entity which consists of –

(a) a body, whether corporate or unincorporate, or the holder of an office, post or position, being a body or office, post or position –

(i) established or continued for a public purpose under a written law; and

(ii) specified in column 2 of Schedule 2; and

(b) persons employed by or for the purpose of that body or holder under that written law or another written law.

388. Schedule 2 to the PSM Act sets out numerous public entities as being SES organisations. Examples are the Chemistry Centre WA, the Lotteries Commission, the Perth Theatre Trust, the Library Board of Western Australia and the Wheatbelt Development Commission. These examples are selected to show the variety of public entities within the definition of an SES organisation.

389. The second category within the definition of the public sector in the PSM Act is "ministerial officers". This term is also defined in s 3 of the PSM Act to mean one or more ministerial officers appointed to assist a "political office holder". The expression "political office holder" is also defined in s 3 of the PSM Act. The definition includes a Minister, the Parliamentary Secretary of the Cabinet, a Parliamentary Secretary, the Government Whip, the Leader of the Opposition in the Legislative Council and the Leader of the Opposition in the Legislative Assembly.

390. The third category within the definition of public sector in the PSM Act, is the non-SES organisations. This expression is also defined in the PSM Act, as follows:

non-SES organisation means an entity which consists of –

(a) a body, whether corporate or unincorporate, or the holder of an office, post or position, being a body or office, post or position that is established or continued for a public purpose under a written law; and

(b) persons employed by or for the purposes of that body or holder under that written law or another written law,

and which neither is or includes –

(c) an SES organisation; or

(d) an entity specified in Column 2 of Schedule 1.

391. Accordingly, the primary criteria for a non-SES organisation is that it is an entity established for a public purpose under a written law. However, to be a non-SES

organisation the entity also needs to be neither an SES organisation, nor an entity specified in Column 2 of Schedule 1.

392. The definition of an SES organisation has been described above.

393. Column 2 of Schedule 1 sets out 23 different entities that are neither SES nor non-SES organisations. They include the Governor's Establishment, the electorate office of a member of Parliament, courts and tribunals, the Police Force, universities established under specified Western Australian legislation, the R & I Bank of Western Australia Ltd, SGIO Insurance Limited, any local government or regional local governments or the council of a local government or regional local government, Racing and Wagering Western Australia, ports established under the *Port Authorities Act 1999*, the Western Australian Land Authority, the Western Australian Treasury Corporation, a body established under s 4 of the *Water Corporations Act 1995*, the Western Australian Greyhound Racing Association and a body established under s 4 of the *Electricity Corporations Act 2005*. Again the examples are chosen simply to illustrate the types of entities that are neither SES nor non-SES organisations, and therefore not within the "public sector", as defined in the PSM Act.

394. The Public Sector Commission website[246] sets out examples of non-SES organisations and the Minister responsible for them. The non-SES organisations specified include the Agricultural Produce Commission, the Veterinary Surgeons Board, the Western Australian Meat Industry Authority, the Legal Aid Commission of Western Australia, the Legal Practice Board, the Director of Equal Opportunity in Public Employment, the State Ombudsman, the Salaries and Allowances Tribunal, the Health Professionals Registration Board, the Queen Elizabeth II Medical Centre Trust, the Combat Sports Commission, the Western Australian Sports Centre Trust, the Western Australian Building Management Authority and many more. Again, these bodies are simply mentioned for illustrative purposes.

395. The definition of the "public sector" in the PSM Act is therefore quite complex and includes a broad range of entities and their employees.

246 https://publicsector.wa.gov.au/chart-of-the-western-australian-government accessed on 21 January 2018.

3.5 Definition of the Public Service

396. The PSM Act also has legislative provisions about the "public service", as defined and constituted under s 34.

397. The public service is defined as constituted by:

(a) Departments; and

(b) SES organisations, insofar as any posts in them, or persons employed in them, or both, belong to the Senior Executive Service; and

(c) Persons employed under this Part, whether in departments or in the Senior Executive Service in SES organisations, or otherwise.

398. Accordingly, whilst the employees of non-SES organisations are part of the public sector, they are not part of the public service.

399. The PSM Act also defines, in s 3, a "public service officer" to mean an executive officer, permanent officer or term officer employed in the public service under Part 3 of the PSM Act.

400. An "**executive officer**" is a "chief executive officer" or "senior executive officer". A "chief executive officer" is defined to mean a person holding office under Part 3 of the PSM Act as the chief executive officer of an agency or a person deemed to be a chief executive officer under the regulations referred to in s 4 of the PSM Act. A "senior executive officer" is a member of the "senior executive service" other than a "chief executive officer". Further, the "senior executive service" is defined to mean the "senior executive service" as constituted under s 43 of the PSM Act.

401. A "**permanent officer**" is a person appointed under s 64(1)(a) of the PSM Act for an indefinite period.

402. A "**term officer**" is a person appointed under s 64(1)(b) for a term not exceeding 5 years.

403. Another relevant concept in the PSM Act, defined in s 5, is that of the "employing authority". Section 5(1)(c) of the PSM Act has the effect, for example, that the employing authority of an employee in a department, is the chief executive officer of the department.

PART C – The WAIRC Constituent Authorities

3.6 Constituent Authorities - Overview

404. Part of the structure of the WAIRC is the "constituent authorities".

405. The constituent authorities are provided for in Part IIA of the IR Act. As mentioned, they comprise the PSA, the PSAB and the Railways Classification Board. Each of the constituent authorities was originally set up as a specialist tribunal to deal with a range of industrial matters in the public sector and, prior to 1994, operated separately to the WAIRC.[247]

406. The jurisdiction of the PSAB and the PSA will be discussed in depth below. The sources of the jurisdiction are contained in the IR Act and other legislation as follows:

(a) Section 80E(1) of the IR Act, provides the PSA may deal with any industrial matter relating to a government officer as defined in s 80C(1) of the IR Act and Schedule 3 of the IR Act.

(b) Under s 80I(1) the PSAB may hear appeals from public service officers and government officers against the decisions there specified. For example, s 80I(1)(d) of the IR Act provides for appeals to the PSAB against a dismissal other than appeals in relation to s 78(1) of the PSM Act or s 172(2) of the HS Act. That is, a dismissal for reasons other than those arising out of substandard performance or discipline.

(c) The School Education Act (s 239), the *Prisons Act* (s 98) and the Youth Offenders Act (s 11(1C)) provide specified employees, who are employees covered by these Acts, with access to the PSAB in relation to substandard performance or discipline decisions or findings. This occurs by the statutes applying Part 5 of the PSM Act to the specified employees in those Acts.

[247] Fielding Review, above n 118 257-258; Brown above n 77[206]; Amendola Report, above n 13 [193].

(d) The PSAB has jurisdiction to hear appeals against a decision or finding referred to in s 78(1)(b) of the PSM Act, as well as against a decision or finding referred to in s 172(1)(b) of the HS Act.

407. As will be later set out, there are difficulties with the coverage and nature of the jurisdiction of the constituent authorities. The Amendola Report recommended the abolition of the constituent authorities.[248]

408. The Green Bill also proposed to abolish the constituent authorities and confer the jurisdiction of the PSA and the PSAB upon single commissioners of the WAIRC.

409. In her annual report for 2015-2016, Chief Commissioner Scott set out her view that the work of the PSAB "would be best absorbed into the work of the WAIRC under its general jurisdiction…".[249] The Chief Commissioner provided substantial reasons in support of this opinion. The Chief Commissioner repeated this opinion in her 2016-2017 Annual Report.[250]

3.7 Constitution of the Public Service Arbitrator

410. Section 80D(1) of the IR Act provides that at least one PSA shall be appointed within the WAIRC. The PSA is to be appointed by the Chief Commissioner from amongst the other Commissioners.[251] More than one additional PSA may be appointed.[252] In her last two annual reports, the Chief Commissioner has suggested the removal of the restriction that the Chief Commissioner not be able to be a PSA.[253]

3.8 Constitution of the Public Service Appeal Board

411. The PSAB is established "within and as part of the" WAIRC, under s 80H(1) of the IR Act. The PSAB is comprised by three members.[254] Depending on the type of "appeal" to be heard by the PSAB, it is heard by either the President of the WAIRC,

248 Amendola Report,above n 13 recommendation 154.
249 *Industrial Relations Act 1979: Report of the Chief Commissioner of the Western Australian Industrial Relations Commission 2015-16*, 4.
250 *Industrial Relations Act 1979: Report of the Chief Commissioner of the Western Australian Industrial Relations Commission 2016-17,* 19.
251 IR Act s 80D(3).
252 IR Act s 80D(2).
253 Above, n 249, 3 and n 250.
254 IR Act s 80H(2).

or a PSA.[255] In both instances, the PSAB is also comprised by an employer's representative, and an employee's representative appointed by the Civil Service Association of Western Australia Incorporated (CSA), unless the appellant is a member of another registered organisation, in which case, that organisation.[256] The jurisdiction and procedures of the PSAB are set out in the IR Act in s 80I, s 80J, s 80K and s 80L, and will be later referred to.

3.9 The Railways Classification Board

412. Part IIA of the IR Act provides for a third constituent authority – the Railways Classification Board. As set out in chapter 2 of the Interim Report, there are no longer employees employed as railway officers (as defined by s 80M(1) of the IR Act); all such employees are now employed as government officers. Therefore, the Railways Classification Board is redundant and the Review proposes to recommend that it be abolished.

PART D – The Public Sector Commissioner and the Regulation of Employment of the Public Sector

3.10 The Role of the Public Sector Commissioner

413. One of the key aspects of public sector employment in Western Australia, in the present day, is the existence of the office of the Public Sector Commissioner and the publication of public sector standards. The Public Sector Commissioner is established by s 16 of the PSM Act. The functions of the Commissioner are set out in Part 3A, Division 2 of the PSM Act. Section 21A sets out the general functions of the Commissioner. More significantly for present purposes, however, is s 21 of the PSM Act that sets out the functions of the Commissioner with respect to the publication of public sector standards, codes of ethics and codes of conduct. These standards are established by the Commissioner having regard to public sector principles set out in Part 2 of the PSM Act constituted by s 7 to s 9 of the PSM Act. Section 7 is about public administration and management principles, s 8 is about human resource management principles and s 9 is about principles of conduct by public sector bodies.

255 IR Act s 80H(3) and s 80H(4).
256 IR Act s 80H(3), s 80C(1) and s 80H(4), 80H(5) and 80H(6).

414. Section 8 of the PSM Act is directed, in part, to selection processes, and establishes a departure from the promotion based on seniority principle earlier referred to as being a historical lynchpin of the public service. Section 8(1)(a) provides that all selection processes are to be directed towards, and based on, a proper assessment of merit and equity.

415. Although it is lengthy, it is worthwhile setting out in full s 21 of the PSM Act, which sets out the functions and role of the Public Sector Commissioner, in the regulation of the employment of public sector employees.

> **Public sector standards, codes of ethics and codes of conduct, establishing etc.**
>
> (1) The functions of the Commissioner are, having regard to the principles set out in sections 7, 8 and 9 —
>
> (a) to issue Commissioner's instructions establishing public sector standards setting out minimum standards of merit, equity and probity to be complied with in the Public Sector in —
>
> (i) the recruitment, selection, appointment, transfer, secondment, performance management, redeployment, discipline and termination of employment of employees; and
>
> (ii) such other human resource management activities relating to employees as are prescribed,
>
> and monitor compliance with those public sector standards; and
>
> (b) to issue Commissioner's instructions establishing codes of ethics setting out minimum standards of conduct and integrity to be complied with by public sector bodies and employees, and monitor compliance with those codes; and
>
> (c) to assist public sector bodies to develop, amend or repeal codes of conduct —
>
> (i) setting out minimum standards of conduct and integrity to be complied with by themselves and their employees; and
>
> (ii) consistent with codes of ethics established under paragraph (b),
>
> and monitor compliance with those codes; and
>
> (d) to assist public sector bodies and employees to comply with public sector standards, codes of ethics and codes of conduct established or developed, as the case requires, under this subsection; and
>
> (e) to monitor compliance by public sector bodies and employees with the principles set out in sections 8(1)(a), (b) and (c) and 9; and
>
> (f) subject to regulations referred to in section 98, to establish procedures of the kind referred to in section 97(1)(a).
>
> (2) The Commissioner may amend or repeal any public sector standard or code of ethics.

(3) In establishing, amending or repealing any public sector standards, the Commissioner shall take into account the impact which those public sector standards may have on the efficiency and effectiveness of the Public Sector, and shall endeavour to minimise any adverse impact.

[(4) deleted]

(5) Each public sector standard and code of ethics shall be published in the *Gazette*.

(6) A public sector standard or code of ethics comes into operation on the day on which it is published in the *Gazette* or on such later day as is specified in the public sector standard or code of ethics.

(7) Section 42 of the *Interpretation Act 1984* applies to and in relation to a public sector standard or code of ethics as if it were regulations within the meaning of that section.

(8) Subsections (5) to (7) also apply to an amendment or repeal of a public sector standard or code of ethics.

(9A) The Commissioner may by order published in the *Gazette* exempt the whole or any part of any public sector body from compliance with the whole or any part of a public sector standard or code of ethics.

(9B) The Commissioner may by order published in the *Gazette* repeal or amend an order made under subsection (9A).

(9) Subject to subsection (10), a public sector standard or code of ethics has in relation to other Acts and subsidiary legislation made under them the force of law as if enacted as part of this Act, but may be amended or repealed by regulations made under section 108.

(10) Nothing in subsection (9) prevents a court from inquiring into, and deciding, whether or not a public sector standard or code of ethics or any of its provisions —

(a) has been validly established; or

(b) is inconsistent with a provision of this Act; or

(c) is unrelated to the power conferred by this Act to establish public sector standards or codes of ethics, as the case requires,

as if the public sector standard or code of ethics or that provision were regulations within the meaning of the *Interpretation Act 1984*.

(11) To the extent that —

(a) a public sector standard is inconsistent with a code of ethics, a code of conduct or another Commissioner's instruction, the public sector standard prevails; or

(b) a code of ethics is inconsistent with a code of conduct or another Commissioner's instruction (other than a Commissioner's instruction establishing a public sector standard), the code of ethics prevails.

3.11 Public Sector Commissioner's Instructions

416. Section 22A of the PSM Act sets out that the Commissioner may issue written instructions concerning a variety of matters. Again, although the section is lengthy, it is set out in full below so as to reinforce an understanding of the nature and extent of the powers and functions of the Public Sector Commissioner.

Commissioner's instructions

(1) The Commissioner may issue written instructions concerning the following

(a) the management and administration of public sector bodies;

(b) the management and administration of the Senior Executive Service;

(c) human resource management, including the disposition of employees and offices under section 22B;

(d) official conduct;

(e) the taking of improvement action;

(f) dealing with suspected breaches of discipline, disciplinary matters and the taking of disciplinary action, under Part 5 Division 3;

(ga) dealing with —

(i) redeployment and redundancy of employees; and

(ii) termination of employment;

(g) any other matter in respect of which Commissioner's instructions are required or permitted under this Act;

(h) any other matter in connection with the functions of the Commissioner in respect of which the Commissioner considers it is necessary or desirable to issue instructions.

(2A) The Commissioner must issue instructions to ensure that, if a decision is made under section 81(1)(a) in respect of an employee, the employee is —

(a) notified in writing of the possible breach of discipline; and

(b) given a reasonable opportunity to respond.

(2) The Commissioner's instructions must not be inconsistent with this Act and must have regard to the principles set out in sections 7, 8 and 9.

(3) The Commissioner's instructions may apply —

(a) generally; or

(b) to a public sector body or class of public sector body specified in the instructions; or

(c) to an office or class of office specified in the instructions; or

(d) to an employee or class of employees specified in the instructions.

(4) Except as provided in section 21, the Commissioner's instructions need not be published in the Gazette but must be made publicly available in such manner as the Commissioner thinks appropriate.

(5) The Commissioner may amend or revoke the Commissioner's instructions.

(6) The Commissioner must, before issuing, amending or revoking a Commissioner's instruction, consult such persons as the Commissioner considers it desirable and practicable to consult.

(7) The Commissioner's instructions are not subsidiary legislation for the purposes of the Interpretation Act 1984.

3.12 The Public Sector Standards

417. The Public Sector Commissioner has acted upon these duties and functions to publish public sector standards in human resource management to apply to all public sector employees and employing authorities.

418. According to the Public Sector Commission website,[257] the following public sector standards (collectively termed "Public Sector Standards in Human Resource Management") apply to all public sector employees and employing authorities:

(a) **Employment Standard**: applies when filling a vacancy by way of recruitment, selection, secondment, transfer and temporary deployment (acting).

(b) **Performance Management Standard**: applies to the performance management of employees but does not apply to substandard performance or disciplinary matters.

(c) **Grievance Resolution Standard**: applies to the process used by an employing authority to resolve or redress an employee's grievance. It does not apply to judging the merits of the grievance, substandard performance or disciplinary action or allegations of victimisation following the lodgment of a grievance.

(d) **Redeployment Standard**: applies only to redeployment matters which are not covered by the PSM Act or the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* (the PSMRR Regulations).

257 https://publicsector.wa.gov.au/publications-resources/instructions-standards-and-circulars/public-sector-standards-human-resource-management

(e) **Termination Standard**: applies to all forms of cessation of employment but does not apply to substandard performance or disciplinary matters.

(f) **Discipline Standard**: applies to the disciplinary process used by an employing authority following a suspected breach of the employment contract by an employee. It does not apply to judging the merits of the grievance, substandard performance or disciplinary action, or the appropriateness of any sanction imposed by the employing authority at the conclusion of a disciplinary process.

3.13 The Public Sector Management (Breaches of Public Sector Standards) Regulations

419. The *Public Sector Management (Breaches of Public Sector Standards) Regulations 2005* (BPSS Regulations) establishes procedures for a person who is adversely affected by a breach of a public sector standard to make a claim for relief to the public sector body.[258] The public sector body is to make reasonable attempts to resolve a claim, but if it is not resolved within 15 days, the body must send the claim to the Public Sector Commissioner.[259] The Public Sector Commissioner must then attempt to conciliate the claim, but conciliation can only occur if both the claimant and the agency agree to it.[260] A claim may then be settled by agreement, but, if it is not, it is reviewed.[261] A conciliation and review officer, who reports to the Public Sector Commissioner, generally conducts the review.[262] The Public Sector Commissioner then reviews the claim and decides if there is a breach of the standard or not.[263] If there is a breach the Public Sector Commissioner may recommend or direct that relief be provided.[264] If the Public Sector Commissioner makes a recommendation and the public sector body or employing authority does not follow the recommendation within the specified period, the Commissioner may direct that the body or employing authority give the specified relief.[265] In a

258 BPSS Regulations, regulation 6.
259 BPSS Regulations, regulation 10.
260 BPSS Regulations, regulations 11, 13, 14, 15 and 16.
261 BPSS Regulations, regulations 16 and 17.
262 BPSS Regulations, regulation 19.
263 BPSS Regulations, regulation 20.
264 BPSS Regulations, regulation 21(1).
265 BPSS Regulations, regulation 21(2A).

claim about an appointment, the Public Sector Commissioner may direct that a specific person not be appointed but cannot recommend the appointment of the claimant or another person to the office.[266]

420. There have been longstanding complaints by public sector employees and unions about the lack of enforceable remedies for breaches of the public sector standards and an inability to refer a complaint about a breach of a standard to the WAIRC. That subject is discussed in Part I of this chapter of the Interim Report.

421. In 2003, the then Minister Assisting the Minister for Public Sector Management, Hon. John Kobelke MLA commissioned a *Review of the Public Sector Management Act 1994* by Mr Noel Whitehead. Mr Whitehead's report recommended the removal of the restrictions on access to the WAIRC and the PSA with respect to issues arising from the standards. This recommendation has not been implemented. No one who made submissions to the present Review suggested the Whitehead Review recommendations be resurrected. In this context it is also noted that, since Mr Whitehead's report, the breach of public sector standards regulations have been amended;[267] in particular, to enable the Public Sector Commissioner to direct that relief be given to an employee by an agency.[268]

PART E - Access to the WAIRC by Public Sector Employees

3.14 Introduction

422. The access to, and the jurisdiction and powers of, the WAIRC varies according to whether the public sector employee is a government officer, a public service officer, a person employed by a public authority who is "not on the salaried staff",

266 BPSS Regulations, regulation 21(2).

267 The BPSS Regulations replaced the *Public Sector Management (Examination and Review Procedures) Regulations 2001* on 20 August 2005. The major changes brought in by the new regulations were that the Public Sector Commissioner can, in some instances, direct relief to be provided by the public sector body to the claimant. Relief may include recommencing a process from the start or the point the breach occurred; changes to the public sector body's policies and processes to minimise future breaches, or that a person not be appointed.

268 Above n 23.

an HS Act employee, a police officer, a State school teacher, a TAFE lecturer,[269] a prison officer or a youth custodial officer.

423. "Government officers" may access the WAIRC via the specific jurisdiction of the constituent authorities and, in some instances, via the ordinary jurisdiction of the WAIRC using, for example, the procedures contained in s 23, s 29, s 32 and s 44 of the IR Act. As will be set out, a significant section of the public sector are not included in the definition of a "government officer" for the purposes of the IR Act. It includes the category of public authority employees who are "not on the salaried staff of a public authority". This group is sometimes called "wages employees", but there are some difficulties with the use of that title. For want of a better title, the Review will call the group "non-salaried staff public sector employees". Non-salaried staff public sector employees can, in contradistinction to government officers, access the **ordinary jurisdiction** of the WAIRC.

3.15 The Meaning of "Government Officer" in the *Industrial Relations Act*

424. The jurisdiction and powers of the PSA and PSAB, as constituent authorities of the WAIRC, turn upon the definition of a "government officer" under s 80C(1) of the IR Act, as well as s 76(1) of the PSM Act.

425. A "government officer" is, under the IR Act, a different category of employee from being an employee in the "public service" or an employee in "the public sector". The definition in s 80C(1) is:

> **government officer** means —
>
> (a) every public service officer; and
>
> (aa) each member of the Governor's Establishment within the meaning of the *Governor's Establishment Act 1992*; and
>
> (ab) each member of a department of the staff of Parliament referred to in, and each electorate officer within the meaning of, the *Parliamentary and Electorate Staff (Employment) Act 1992*; and
>
> (b) every other person employed on the salaried staff of a public authority; and

[269] The phrase "TAFE lecturers" is used to describe people who lecture in technical and further education (TAFE) subjects and who are employed by the vocational and education colleges that are constituted under the *Vocational Education and Training Act 1996* (WA) (VET Act), pursuant to s 47 of the VET Act.

(c) any person not referred to in paragraph (a) or (b) who would have been a government officer within the meaning of section 96 of this Act as enacted before the coming into operation of section 58 of the *Acts Amendment and Repeal (Industrial Relations) Act (No. 2) 1984*,

but does not include —

(d) any teacher; or

(e) any railway officer as defined in section 80M; or

(f) any member of the academic staff of a post-secondary education institution.

426. The definition of a "government officer" includes, in (b), reference to a "public authority". That is defined in s 7 of the IR Act as follows:

> ***public authority*** means the Governor in Executive Council, any Minister of the Crown in right of the State, the President of the Legislative Council or the Speaker of the Legislative Assembly or the President of the Legislative Council and the Speaker of the Legislative Assembly, acting jointly, as the case requires, under the *Parliamentary and Electorate Staff (Employment) Act 1992*, the Governor or his or her delegate under the *Governor's Establishment Act 1992*, State Government department, State trading concern, State instrumentality, State agency, or any public statutory body, corporate or unincorporate, established under a written law but does not include a local government, regional local government or regional subsidiary.

427. A "teacher" is defined in s 80C(1) of the IR Act as follows:

> ***teacher*** includes –
>
> (a) any person employed as a member of the teaching staff under section 235(1)(b) of the *School Education Act 1999*;
>
> (b) any person who is a member of the teaching staff or another person appointed under section 236(2) and who is employed at a community kindergarten registered under Part 5 of the *School Education Act 1999*,
>
> but does not include any public service officer, whether or not that public service officer holds or acts in a position in respect of which a teaching academic qualification is required.

428. A teacher is employed by the Education Department, as being the department of the public service that assists in the administration of the School Education Act.[270] Therefore a teacher as defined includes what might be generally described as a State school teacher but does not include a private school teacher.

429. As quoted above, the definition of a government officer excludes any member of the academic staff of a post-secondary education institution. "Post-secondary

[270] School Education Act ss 4, 228.

education institution" is defined in s 7 of the IR Act to mean an institution or part of an institution established or continued by or under the *University of Western Australia Act 1911*, the *Curtin University Act 1966*, the *Murdoch University Act 1973*, the *Edith Cowan University Act 1984* or the *Vocational Education and Training Act 1996* (VET Act).[271]

430. The VET Act provides[272] for the creation of colleges to provide vocational education and training in Western Australia. The colleges are constituted by, relevantly, a governing council.[273] Section 47 of the VET Act provides for the employment of such persons as the governing council of a college considers necessary. This includes the employment of people to lecture in technical and further education, usually referred to as "TAFE lecturers". Accordingly, TAFE lecturers are members of the academic staff of a post-secondary institution and are therefore not government officers for the purposes of the IR Act. Thus, whilst State school teachers and TAFE lecturers are amongst the salaried staff of a public authority, they are excluded from the definition of a government officer.

431. The definitions of "employer" and "employing authority" in s 80C(1) of the IR Act are also relevant and are as follows:

> ***employer —***
>
> (a) in relation to a government officer who is a public service officer, means the employing authority of that public service officer; and
>
> (aa) in relation to a government officer who is an employee within the meaning of the *Health Services Act 2016* section 6, means the employing authority of the employee; and
>
> (b) in relation to any other government officer, means the public authority by whom or by which that government officer is employed;
>
> ***employing authority*** means —

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271 It should be noted that academic staff of a university are not only excluded from the definition of government officer but the universities are also entities which are not organisations under the PSM Act (see Sch 1, items 6, 7, 8 and 10). Furthermore, as trading corporations, the universities are regulated by the national industrial relations system.

272 VET Act s 35.

273 VET Act s 36.

(a) in relation to a government officer who is an employee within the meaning of the *Health Services Act 2016* section 6, an employing authority within the meaning of section 103 of that Act;

(b) in relation to any other government officer, an employing authority within the meaning of the *Public Sector Management Act 1994* section 5.

432. From the definitions referred to in detail above, all public service officers are government officers; however not all government officers are public service officers.

433. Section 80C(2) of the IR Act states that Part IIA, Division 2 of the IR Act is to be read in accordance with the PSM Act. The link between the two Acts is continued by the definition of a "government officer" in the IR Act in that it includes every "public service officer", and that expression is defined in s 7 of the IR Act to mean a "public service officer" within the meaning of the PSM Act.

434. Section 80C(3) of the IR Act provides that 80E and 80F do not apply to a government officer if and when they occupy an office paid pursuant to the *Salaries and Allowances Act 1975* (WA), or an office for which the rate is determined by the Governor.

3.16 The Coverage of People Employed by a Public Authority who are not on the Salaried Staff

435. This is the category referred to earlier and called non-salaried staff public sector employees for the purposes of the Review. The definitions in s 80E of the IR Act make it clear that non-salaried staff public sector employees are not subject to the jurisdiction of the PSAB. This is because they are excluded from the definition of a "government officer". Non-salaried staff public sector employees can therefore access the ordinary jurisdiction of the WAIRC. The Secretariat has advised the Review that the majority of public sector employees are within the category of non-salaried staff public sector employees and others who are specifically excluded from the definition of "government officer" including State school teachers and TAFE lecturers. Groups of employees who are customarily regarded by the Public Sector Labour Relations Division in DMIRS as being non-salaried staff

public sector employees include non-senior registered nurses,[274] enrolled nurses, health support workers, education assistants, rail car drivers and park rangers.

436. If a person is an employee of a public authority, whether they are a government officer or not, for the purposes of the IR Act, depends upon if they can be categorised as being "employed on the salaried staff". If not, they are subject to the ordinary jurisdiction of the WAIRC.

3.17 Employees Employed under the *Health Services Act*

437. There is different regime for the public sector workforce, comprised by employees or former employees as defined in the HS Act, for substandard performance and disciplinary decisions and findings.

438. Section 6 of the HS Act defines an employee to mean a person "employed in a health service provider", including four specified categories of people and officers. These are the "chief executive of the health service provider", a "health executive" employed in the health service provider, a person employed in the "health service provider" under s 140 of the HS Act and a person seconded to the health service provider under s 136 or s 142 of the HS Act. These terms are further defined in s 6 of the HS Act. The "chief executive" in relation to a health service provider is the person appointed as the chief executive of the health service provider under s 108(1) of the HS Act. A "health executive" is a person holding an office referred to in s 105(1)(b) of the HS Act but does not include a chief executive. A "health service provider" means a health service provider established by an order made under s 32(1)(b) of the HS Act.

439. Section 32 of the HS Act provides for the establishment of a health service provider by order of the Minister as published in the Government Gazette. Under the section, the Minister may declare a part of the State, a public hospital, a public health service facility or a public health service to be a health service area and establish a health service provider for the health service area. The Minister may

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274 See the decision in *The Australian Nursing Federation, Industrial Union of Workers v The Minister for Health* (2004) 84 WAIG 2867 [19]-[20], referred to later, as a decision of Kenner C which decided that senior registered nurses were "salaried employees".

also assign a corporate name to the health service provider and specify whether the health service provider is to be a "board governed provider" or a "chief executive governed provider".[275] Section 32(2) of the HS Act provides that a health service provider is body corporate with perpetual succession. Under s 32(3) of the HS Act proceedings may be taken by or against a health service provider in its corporate name. Section 33 of the HS Act states that a health service provider is an agent of the State and has the status, immunities and privileges of the State. Section 34 to s 39 of the HS Act set out the functions of and commercial activities and general powers that may be engaged in by a health services provider.

440. The Department of Health's website[276] states that the State's health service providers include the Child and Adolescent Health Service, North Metropolitan Health Service, South Metropolitan Health Service, East Metropolitan Health Service and WA Country Health Service. The website links to an explanation of what each of these services includes. For example, the North Metropolitan Health Service[277] is the largest health service in the metropolitan area and includes Sir Charles Gairdner Hospital, the QE II Medical Centre, King Edward Hospital and numerous other health services.

441. Part 11, Division 4 of the HS Act (Substandard performance and disciplinary matters) gives rights to employees covered by that Act to refer specified decisions and findings to the WAIRC.

442. The rights under Part 11 of the HS Act apply to both a government officer and a public sector employee who is not a government officer, who is an "employee" or "former employee" as defined in s 6 of the HS Act. It is noted that an employee under the HS Act does not include a public service officer employed by the Department of Health. These employees are instead covered by Part 5 of the PSM Act (Substandard performance and disciplinary matters).

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275 These phrases are also defined in HS Act s 5.

276 http://ww2.health.wa.gov.au/About-us, accessed 3 February 2018.

277 http://ww2.health.wa.gov.au/About-us/North-Metropolitan-Health-Service, accessed 3 February 2018.

443. The regime for health service employees differs from other public sector employees in relation to substandard performance and discipline matters as set out below.

444. All government officers employed in a health service provider (other than public service officers) may appeal against specified substandard performance and discipline decisions and findings to the PSAB. This is in contrast to other government officers in the public sector who may only appeal against specified substandard performance and discipline matters to the PSAB if they are employees who are "prescribed for the purposes of this section" under s 76(1) of the PSM Act or to whom Part 5 of the PSM Act otherwise applies. If they are not so prescribed, Part 5 of the PSMA does not apply. For government officers who are not covered by Part 5 of the PSM Act, industrial matters which relate to issues of substandard performance and discipline can be referred by a union to the PSA.

445. Employees employed in a health service provider who are not government officers are covered by the same substandard performance and discipline provisions as government officers employed in a health service provider. Such employees may refer specified substandard performance and discipline decisions and findings to the ordinary jurisdiction of the WAIRC. This is in contrast to other public sector employees who are not government officers. These employees are not covered by Part 5 of the PSM Act. Consequently, industrial matters which relate to issues of substandard performance and discipline are then referred by a union to the ordinary jurisdiction of the WAIRC.

446. If the matter does **not** involve the HS Act substandard performance and discipline provisions (Part 11) - that is, it relates to any other industrial matter - government officers employed in a health service provider access the PSA like non-health service government officers, and employees employed in a health service provider who are not government officers access the ordinary jurisdiction of the WAIRC like non-health public sector employees who are not government officers.

447. These distinctions are productive of some complexity and confusion as elsewhere in this chapter of the Interim Report.

3.18 Police Officers

448. Historically, police officers have not been regarded as employees due to their basis of appointment and the particular powers and duties they exercise at common law and under statute.[278] The *Industrial Relations Amendment Act 2000* (WA) (IR Amendment Act) changed this, to a limited extent, for the purposes of the IR Act. The IR Amendment Act added s 115 and Schedule 3 to the IR Act. Section 115 simply says that Schedule 3 has effect. Clause 2 of Schedule 3 sets out the application of the IR Act to a police officer.

449. Clause 2(1) of Schedule 3 provides that the IR Act is taken to apply to and in respect of a police officer and has had the effect as if the police officer were an employee and the Minister for Police were the employer of the police officer.

450. Clause 2(2) of Schedule 3 provides that the IR Act applies in respect of a police officer and has effect as if the police officer were a government officer within the meaning of s 80C of the IR Act and the Commissioner of Police were the employer of the police officer within the meaning of s 80C of the IR Act.

451. Clause 2(3) of Schedule 3 then contains a significant limitation upon the rights of access of police officers to the WAIRC, as constituted by the PSAB, or otherwise.[279]

452. Clause 2(3) of Schedule 3 to the IR Act is as follows:

> Despite subclause (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.

453. Clause 3 of Schedule 3 provides that the Western Australian Police Union of Workers (the Police Union) is taken to be and always have been an organisation of employees under the IR Act.

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278 An examination of some of the cases and issues are considered in a New South Wales perspective in *State of New South Wales v Briggs* (2016) 264 IR 309, [50]-[61].

279 Sch 3 Cl 1 provides that in the Schedule the word "arbitrator" has the same meaning as in s 80C(1).

454. The Police Union has provided the Review with a written submission that argues for the repeal of clause 2(3) of Schedule 3, due to the restrictions it places upon the rights of access of their members to the WAIRC. That submission will be discussed in greater detail below.

455. Part IIA of the *Police Act* provides for the establishment of a Police Appeal Board. Under section 33E of the *Police Act*, a member of the Police Force, a police auxiliary officer, a police cadet or an Aboriginal Police Liaison Officer with a right of appeal to the Board on disciplinary offences for which the member has been discharged or dismissed from the Police Force, suspended, removed from office, reduced in rank, fined or transferred by way of punishment.

456. The *Police Act* contains a regime for the Police Commissioner to initiate "removal action"[280] in respect of a "member", meaning, a commissioned officer, a non-commissioned officer, a constable, an Aboriginal Police Liaison Officer or a Police Auxiliary Officer.[281] This can be initiated when the Police Commissioner does not have confidence in a member's suitability to continue as a member, having regard to the member's integrity, honesty, competence, performance or conduct.

457. Section 33P of the *Police Act* provides that if a member is removed from office by or as a result of removal action the member 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. An appeal so instituted is to be heard by the WAIRC as constituted by not less than three industrial 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 PSAB cases, where the PSAB is constituted as described above.

280 As defined the *Police Act,* s 33K.

281 *Police Act* s 33K.

458. There are specific rules in the *Police Act* about the evidence the WAIRC can hear in determining an appeal under s 33P of the *Police Act*. Generally, "new evidence", as defined, is not admissible.[282] The WAIRC can set aside a removal decision.[283]

459. In determining a *Police Act* s 33P appeal the WAIRC has said it applies the same test as in its "ordinary jurisdiction" and even though a police officer is not, technically, an employee - that is, whether the lawful right of an employer to dismiss an employee has been exercised so harshly or oppressively against them so as to amount to an abuse of that right.[284]

460. Nevertheless, the *Police Act* controls the process to be engaged in by the WAIRC in a way that is different to unfair dismissal cases that are determined in the ordinary jurisdiction of the WAIRC. This is because s 33Q of the *Police Act* provides:

> **33Q. Proceedings on appeal**
>
> (1) On the hearing of an appeal instituted under this Part, the WAIRC shall proceed as follows —
>
> (a) first, it shall consider the Commissioner of Police's reasons for deciding to take removal action;
>
> (b) secondly, it shall consider the case presented by the appellant as to why that decision was harsh, oppressive or unfair;
>
> (c) thirdly, it shall consider the case presented by the Commissioner in answer to the appellant's case.
>
> (2) The appellant has at all times the burden of establishing that the decision to take removal action was harsh, oppressive or unfair.
>
> (3) Subsection (2) has effect despite any law or practice to the contrary.
>
> (4) Without limiting the matters to which the WAIRC is otherwise required or permitted to have regard in determining the appeal, it shall have regard to —
>
> (a) the interests of the appellant; and
>
> (b) the public interest which is taken to include —
>
> (i) the importance of maintaining public confidence in the integrity, honesty, conduct and standard of performance of members of the Police Force; and

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282 *Police Act* s 33R.

283 *Police Act* s 33U.

284 *Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia* (1985) 632 WAIG 385, as applied in *Beverly v The Commissioner of Police* (2017) 97 WAIG 627 [39].

(ii) the special nature of the relationship between the Commissioner of Police and members of the Force.

461. Therefore the way in which, and the basis upon which, police officers may access the WAIRC and challenge decisions relating to disciplinary offences and dismissals is different from other parts of the public sector[285] and private sector employees.

3.19 Prison Officers and Youth Custodial Officers

462. There is also a distinct regime for the appointment, regulation of employment, process of removal and right to appeal against a decision to remove a prison officer, as defined in the Prisons Act and a custodial officer as defined in the Youth Offenders Act. The provisions in these Acts about the removal of officers and appeal rights were included by amendments to the legislation effected by the *Custodial Legislation (Officers Discipline) Amendment Act 2014* (WA). As stated in the Explanatory Memorandum to the Custodial Legislation (Officers Discipline) Amendment Bill 2013, there was to be enacted a new division in the Prisons Act to empower the Chief Executive Officer to remove a prison officer due to loss of confidence. As stated, the provision contained in the division was modelled on similar provisions in the *Police Act* "which empower the Commissioner of Police to remove a police officer due to loss of confidence in the officer's suitability to remain as a police officer having regard to the officers' integrity, honesty, competence, performance or conduct". The Explanatory Memorandum said that the same intention and effect applied to the amendments to the Youth Offenders Act. In both of these Acts there is now an entitlement to appeal against a decision of removal to the WAIRC, which is modelled on the process that applies to a police officer under the *Police Act*.[286]

463. Section 76(1) of the PSM Act provides that:

> Subject to subsections (3) and (4), this Part[287] applies to and in relation to —
>
> (a) all public service officers and ministerial officers; and

285 An example of the exercise of the jurisdiction is in *Beverly v The Commissioner of Police* (2017) 97 WAIG 627.

286 Appeals can be made under Prisons Act s 106 and the Youth Offenders Act s 11CH.

287 Being Part 5 – Substandard performance and disciplinary action.

(b) such other employees, or members of such other class of employees, as are or is prescribed for the purposes of this section.

464. Prison officers and youth custodial officers are prescribed in the respective Acts for the purposes of s 76(1)(b) of the PSM Act.[288]

465. Section 78(1) of the PSM Act provides that:

> Subject to subsection (3) and to section 52, an employee or former employee who —
>
> (a) is or was a Government officer within the meaning of section 80C of the *Industrial Relations Act 1979*; and
>
> (b) is aggrieved by —
>
> (i) a decision made in respect of the employee under section 79(3)(b) or (c) or (4); or
>
> (ii) a finding made in the exercise of a power under section 87(3)(a)(ii); or
>
> (iii) a decision made under section 82 to suspend the employee on partial pay or without pay; or
>
> (iv) a decision to take disciplinary action made under section 82A(3)(b), 88(b) or 92(1),
>
> may appeal against that decision or finding to the Industrial Commission constituted by a Public Service Appeal Board appointed under Division 2 of Part IIA of the *Industrial Relations Act 1979* and that Public Service Appeal Board has jurisdiction to hear and determine that appeal under and subject to the Division.

466. Section 78(2) of the PSM Act provides that:

> Despite section 29 of the *Industrial Relations Act 1979*, but subject to subsection (3), an employee or former employee who —
>
> (a) is not a Government officer within the meaning of section 80C of that Act; and
>
> (b) is aggrieved by —
>
> (i) a decision made in respect of the employee under section 79(3)(b) or (c) or (4); or
>
> (ii) a finding made in the exercise of a power under section 87(3)(a)(ii); or
>
> (iv) a decision made under section 82 to suspend the employee on partial pay or without pay; or

[288] Prisons Act s 98 and Youth Offenders Act s 11(1C) and *Young Offenders Regulations 1995* reg 53.

(iv) a decision to take disciplinary action made under section 82A(3)(b), 88(b) or 92(1),

may refer the decision or finding mentioned in paragraph (b) to the Industrial Commission as if that decision or finding were an industrial matter mentioned in section 29(b) of that Act, and that Act applies to and in relation to that decision accordingly.

467. Accordingly, these employees may appeal decisions and findings relating to substandard performance and discipline to the WAIRC.

468. In *McGinty v Department of Corrective Services*[289] it was decided that prison officers are not government officers and so have access to the ordinary jurisdiction of the WAIRC for appeals under s 78(2) of the PSM Act. According to the submission provided to the Review by the Department of Justice, youth custodial officers are, by contrast, government officers. If this is so, these employees can appeal to the PSAB under s 78(1) of the PSM Act.

3.20 State School Teachers and TAFE Lecturers

469. The employment and regulation of employment of State school teachers and TAFE lecturers also illustrates the differences that apply to different employees within the public sector.

470. As set out above, State school teachers and TAFE lecturers are not within the definition of a "government officer" under the IR Act. Therefore, industrial matters relating to their employment are not covered by the jurisdiction of the PSA or the PSAB. They instead access the ordinary jurisdiction of the WAIRC.

471. The principal legislation dealing with the employment of State school teachers is the School Act. The School Education Act establishes a department of the Public Service to assist the Minister in the administration of the Act. Section 235 of the School Education Act provides that, to enable the functions of the department to be performed, persons are to be employed in the department in different categories. The categories are public service officers appointed or made available under Part 3 of the PSM Act; members of the "teaching staff"; "other officers"; or

289 (2012) 92 WAIG 190.

"wages staff". The term "wages staff" is not defined in the School Education Act. Section 236(6) of the School Education Act provides that, for the avoidance of doubt, it is declared that members of the teaching staff, other officers and wages staff are employed for and on behalf of the Crown.

472. Section 237 of the School Education Act provides that "teaching staff" includes school administrators (principals), teachers and any other office or position, or class of office or position as prescribed by regulations.

473. Section 236 of the School Education Act provides that Part 3 of the PSM Act, which deals with the Public Service, does not apply to teaching staff, other officers and wages staff. Instead, the section provides that the powers to engage, transfer, promote and otherwise manage the members of the teaching staff, other officers and wages staff are vested in the chief executive officer.

474. Section 236(3) of the School Eduation Act provides that the terms and conditions of service of members of the teaching staff, other officers and wages staff are to be in accordance with any relevant industrial award, order or agreement; and not less than those provided for by the MCE Act.

475. It should be noted that s 239 of the School Education Act provides that Part 5 of the PSM Act, which deals with substandard performance and disciplinary matters, has effect as if in that Part references to an employee included a member of the teaching staff, an officer who comes within s 235(1)(c) and an employing authority included references to the chief executive officer.

476. As a consequence, if a State school teacher is dismissed on the basis of – for example, substandard performance – they may challenge the decision under s 29(1)(b)(i) of the IR Act, pursuant to a combination of s 239 of the School Education Act and s 78(2) of the PSM Act.[290]

477. In contrast to State school teachers, TAFE lecturers are not prescribed employees under s 76(1) of the PSM Act, and there is no provision in the VET Act for the

290 *Anderson v Director General, Department of Education* [2017] WAIRC 792 [2].

application of Part 5 of the PSM Act to them. If a TAFE lecturer is dismissed therefore they may refer an alleged unfair dismissal to the WAIRC under s 29(1)(b)(i) of the IR Act.

3.21 Chief Executive Officers

478. Section 52(2) of the PSM Act provides that the employment of a chief executive officer or any matter, question or dispute relating to any such employment is not an industrial matter for the purposes of the IR Act. This exclusion is echoed in s 118 of the HS Act, which removes any right of a "chief executive", as defined, to have recourse to the WAIRC, under s 172 of the HS Act.

479. Section 52(6) of the PSM Act also provides that an appeal does not lie under the IR Act in relation to the employment of a chief executive officer.

PART F – The Jurisdiction of the Constituent Authorities and the WAIRC

3.22 Jurisdiction of the Public Service Arbitrator

480. Section 80E(1) of the IR Act provides that the PSA has the exclusive jurisdiction to enquire into and deal with any industrial matter[291] relating to a government officer, a group of government officers or government officers generally.

481. Section 80E(2) of the IR Act provides that without limiting the generality of s 80E(1), the jurisdiction 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 the government officer, in respect of the particular salary within that range of salary allocated to the government officer;[292] and

(b) A claim in respect of a decision of an employer to downgrade any office that is vacant.[293]

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291 As defined in s 7(1) of the IR Act.
292 IR Act s 80E(2)(a).
293 IR Act s 80E(2)(b).

482. Section 37(2) of the PSM Act provides the PSA with the jurisdiction to hear and determine an appeal from a public service officer who was in an organisation that has been absorbed by the public service, where the employing authority has determined that the employee's remuneration is to be less than it was when the officer was an employee of the organisation.

483. Pursuant to s 80E(7)(a) of the IR Act, the PSA does not have jurisdiction to enquire into or deal with, or refer to the CCS or the Full Bench, any matter in respect of which a decision is, or may be, made under regulations referred to in s 94 or s 95A of the PSM Act. As to this:

(a) Section 94 of the PSM Act provides the Governor may make regulations prescribing arrangements for registerable employees in relation to redeployment, retraining, and redundancy.

(b) Section 95A of the PSM Act provides the Governor may make regulations providing for the termination of employment of a registered employee; and the terms and conditions (including remuneration) which are to apply to a registered employee whose employment is terminated under the regulations.

484. Regulations have been made pursuant to this power and they are the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* (the PSMRR Regulations).

485. Pursuant to s 80E(7)(b) of the IR Act, the PSA also does not have the jurisdiction to enquire into or deal with, or refer to the CCS or the Full Bench, any matter in respect of which a procedure referred to in s 97(1)(a) of the PSM Act is or may be prescribed under that Act.

486. Section 97(1)(a) of the PSM Act provides for the making, amendment or repeal of regulations prescribing procedures, whether by way of appeal, review, conciliation, arbitration, mediation or otherwise, for employees and other persons to obtain relief in respect of the breaching of public sector standards. This is a reference to Public Sector Standards under the PSM Act.

3.23 Jurisdiction of the Public Service Appeal Board

487. The PSAB is given its jurisdiction by the IR Act, the PSM Act and the HS Act.

3.24 The Public Service Appeal Board and the *Industrial Relations Act*

488. Pursuant to s 80I of the IR Act, the PSAB has the jurisdiction, subject to s 52 of the PSM Act, s 118 of the HS Act, and s 80I(3) of the IR Act, to hear and determine:

(a) An appeal by any public service officer against any decision of an employing authority in relation to an interpretation of any provisions of the PSM Act and any provision of the regulations made under that Act concerning the conditions of service (other than salaries and allowances) of public service officers.[294]

(b) An appeal by a government officer under s 78 of the PSM Act against a decision or finding referred to in s 78(1)(b). [295]

(c) An appeal by a government officer under s 172 of the HS Act against a decision or finding referred to in s 172(1)(b).[296]

(d) An appeal by a government officer against a decision that the government officer be dismissed.[297]

489. Section 80I(1) provides the PSAB has jurisdiction to "adjust all such matters". The restrictions inherent in this "power" will be later commented upon.

3.25 The Public Service Appeal Board and the *Public Sector Management Act*

490. As set out at [465], s 78(1) of the PSM Act provides government officers with appeal rights to the PSAB. This is, however, subject to the application of Part 5 of

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294 IR Act s 80I(1)(a).

295 IR Act s 80I(1)(b). It should be noted that not all government officers may appeal against a decision or finding referred to in s 78(1)(b) of the PSM Act. Part 5 of the PSM Act only applies to public service officers, ministerial officers and government officers who are prescribed under s 76(1) of the PSM Act or government officers who are otherwise covered by Part 5 of the PSM Act by virtue of other legislation such as youth custodial officers under the *Young Offenders Act*. This means that a government officer who does not fall within one of these categories is not covered by Part 5 of the PSM Act and therefore does not have appeal rights under s 78(1) of the PSM Act or s 80I(1)(b) of the IR Act.

296 IR Act s 80I(1)(c). As set out later in this chapter, there is probably a typographical error in s 80I(1)(c) of the IR Act.

297 IR Act s 80I(1)(d). This does not include an appeal under PSM Act s 78(1) or HS Act s 172(2).

the PSM Act to certain government officers specified in s 76(1) of the PSM Act or other legislation.

491. Figure 3A-1 in **Attachment 3A** provides more detail of the applicable sections of the PSM Act as they relate to government officers.

3.26 The Public Service Appeal Board and the *Health Services Act*

492. Section 172(2) of the HS Act provides that, subject to s 118 and s 173, an "employee" or "former employee" who is or was a "government officer" (as defined in s 80C of the IR Act)[298] and who is aggrieved by a "disciplinary decision or finding" made in respect of the government officer, may appeal against that decision or finding to the PSAB.

493. Section 172(1)(b) of the HS Act defines a "disciplinary decision or finding" to mean:

(a) a decision made under s 159(1)(b) or (c);

(b) a finding made in the exercise of a power under s 165(5)(a)(ii);

(c) a decision made under s 147, s 148 or s 164 to suspend a government officer on partial pay or without pay;

(d) a decision to take disciplinary action made under s 150(1), s 163(3)(b) or s 166(b); or

(e) a decision to terminate the employment of a government officer under s 168(1).

494. Figure 3B-1 in **Attachment 3B** contains additional details about these sections of the HS Act.

3.27 Limits on the Jurisdiction of the Public Service Appeal Board

495. Section 80I(3) of the IR Act provides that the PSAB does not have the jurisdiction to hear and determine an appeal by a government officer from a decision made under regulations referred to in s 94 or s 95A of the PSM Act. That is, it cannot deal with decisions concerning redeployment and redundancy, or the termination of registered employees.

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298 HS Act s 171. It should be noted that the HS Act provides access to the PSAB for all government officers employed in a health service provider.

3.28 Public Sector Employees and the Ordinary Jurisdiction of the WAIRC

496. The jurisdiction the WAIRC can exercise over employees in the public sector is not limited to that exercised by the PSA and the PSAB as constituent authorities. In addition, and confusingly, the WAIRC has jurisdiction over public sector employees who are not "government officers" under the IR Act, the PSM Act and the HS Act.

3.29 Jurisdiction under the *Industrial Relations Act* for Public Sector Employees who are not Government Officers

497. As set out in chapter 2 of the Interim Report, s 23(1) of the IR Act provides that the Commission has cognizance of and authority to enquire into and deal with any industrial matter. As the exclusive jurisdiction of the PSA and the PSAB is restricted, under the IR Act, to a "government officer", public sector employees who are not government officers may access the ordinary jurisdiction of the WAIRC, with respect to "industrial matters". This includes the category of employees excluded from the definition of a government officer because they are employees of public authorities who are not "on the salaried staff" or who are explicitly excluded from the definition.

3.30 Jurisdiction under the *Public Sector Management Act* for Public Sector Employees who are not Government Officers

498. As set out at [466], s 78(2) of the PSM Act provides employees who are or were not government officers with the right to refer a decision or finding to the ordinary jurisdiction of the WAIRC.

499. Figure 3A-2 in **Attachment 3A** provides more detail of the applicable sections of the PSM Act as they relate to these employees.

500. There is a typographical error in s 78(2) as there is no s 29(b) of the IR Act; the reference to "industrial matter" appears in s 29(1) of the IR Act.

3.31 Jurisdiction under the *Health Services Act* for Employees who are not Government Officers

501. Section 172(4) of the HS Act provides that, despite s 29 of the IR Act, but subject to s 173, an employee or former employee who:

(a) is not a government officer; and

(b) is aggrieved by a disciplinary decision or finding made in respect of the employee,

may refer the decision or finding referred to in the Industrial Commission (defined to mean the WAIRC)[299] as if that decision or finding were an industrial matter that could be so referred under the IR Act, and that Act applies to and in relation to that decision or finding accordingly.

502. As set out at 493 "disciplinary decision or finding" is defined in s 172(1) of the HS Act.

503. Figure 3B-2 in **Attachment 3B** contains additional details about these sections of the HS Act.

3.32 Jurisdiction under the *Public Sector Management Act* which is the Same for Government Officers and Public Sector Employees who are not Government Officers

504. Section 78(3) of the PSM Act provides that:

> Despite s 29 of the *Industrial Relations Act 1979*, but subject to section 52, an employee or former employee -
>
> (a) against whom proceedings have been taken under that Part for a suspected breach of discipline arising out of alleged disobedience to, or disregard of, a direction which is by virtue of section 94(4) a lawful order for the purposes of section 80(a); and
>
> (b) who is aggrieved by -
>
> (i) a decision made under section 82 to suspend the employee on partial pay or without pay; or
>
> (ii) a finding made in respect of the person referred to in section 82A(3)(a), s 87(3)(a)(i) or s 88(a),
>
> may refer the decision or finding referred to in paragraph (b) to the Industrial Commission as if that decision or finding were an industrial matter mentioned in s 29(b) of that Act, and that Act applies to and in relation to that decision or finding accordingly.

[299] HS Act s 171 and IR Act s 7(1).

505. "Employee" is defined in s 3(1) of the PSM Act to mean a person employed in the public sector by or under an employing authority. As set out above, the "public sector" means all the agencies, ministerial offices and non-SES organisations.

506. As noted previously, s 76(1) prescribes the employees to whom Part 5 applies. Section 76(3) of the PSM Act, however, provides that if the employing authority of an employee who is not a public service officer suspects that the employee has disobeyed or disregarded a direction which is by virtue of s 94(4) a lawful order for the purposes of s 80(a), the employee is taken to be a public service officer for the purposes of Part 5 and proceedings may be taken accordingly under Part 5 against that employee.

507. The definition of employee in s 78(3) and the application of s 76(3) therefore extends to both government officers and public sector employees who are not government officers.

508. Figure 3A-3 in **Attachment 3A** provides more detail of the applicable sections of the PSM Act as they relate to these employees.

509. Section 95(2) of the PSM Act (which falls within Part 6 of the PSM Act) provides that a s 94 decision (being a decision made under regulations referred to in s 94 of the PSM Act)[300] may be referred to the WAIRC:

(a) under s 29(1)(a) of the IR Act; or

(b) by an employee who is aggrieved the decision,

as if it were an industrial matter that could be so referred under the IR Act.

510. Again in this context, "employee" is defined broadly in s 3 of the PSM Act to mean a person employed in the public sector by or under an "employing authority" and so includes both government officers and public sector employees who are not government officers.

511. In exercising this jurisdiction, the WAIRC must confine itself to determining whether or not regulations referred to in s 94 have been fairly and properly

[300] Section 95(1) of the PSM Act.

applied to or in relation to the employee concerned.[301] The WAIRC does not have jurisdiction in respect of a s 94 decision if the employment of the employee concerned is terminated.[302]

512. It should be noted that s 95 of the PSM Act confers jurisdiction on the "Industrial Commission" to deal with s 94 decisions. It does not confer this jurisdiction on the PSA.[303] This amendment to the PSM Act was effected by the *Workforce Reform Act 2014*.[304] Although the amendment is not explained in the accompanying Explanatory Memorandum,[305] in the Minister's second reading speech it was stated:

> …the bill establishes rights of appeal to the Western Australian Industrial Relations Commission, but not to its constituent authorities, (emphasis added) such as the Public Service Arbitrator or the Railways Classification Board. This will ensure all appeals are placed on a common footing.[306]

513. This means a government officer who is aggrieved by a s 94 decision may utilise the ordinary jurisdiction of the WAIRC, rather than make an application to the PSA.

514. Figure 3A-4 in **Attachment 3A** provides more detail of the applicable sections of the PSM Act as they relate to these employees.

515. Section 96A(2) of the PSM Act provides that a decision made or purported to be made under regulations referred to in s 95A(2) (a "s 95A decision") may be referred to the WAIRC:

(a) under s 29(1)(a) or the IR Act; or

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301 PSM Act s 95(5).

302 PSM Act s 95(6).

303 In contrast to PSM Act s 37(2).

304 State Law Publisher, https://www.slp.wa.gov.au/pco/prod/filestore.nsf/FileURL/mrdoc_25833.pdf/$FILE/Workforce%20Reform%20Act%202014%20-%20%5B00-00-02%5D.pdf?OpenElement

305 Parliament of Western Australia: http://www.parliament.wa.gov.au/Parliament/Bills.nsf/CE265E1918DB4D9248257C0D001A4A7E/$File/EM%2B42-1.pdf

306 Western Australia, *Parliamentary Debates*, Legislative Assembly, 23 October 2013, 5369 (Colin Barnett, Premier).

(b) by an employee or former employee[307] who is aggrieved by the decision,

as if it were an industrial matter that could be so referred under the IR Act.

516. Section 96A(1) of the PSM Act provides, however, that a decision made or purported to be made under regulations referred to in s 95A to terminate the employment of an employee or any matter, question or dispute relating to the decision is not an industrial matter for the purposes of the IR Act.

517. Section 96A(5) of the PSM Act further provides that, in exercising this jurisdiction, the WAIRC:

(a) must confine itself to determining whether or not the employee concerned has been allowed the benefits to which the employee is entitled under the regulations; and

(b) does not have jurisdiction to exercise its powers under section 23A of the IR Act (unfair dismissal claims).

518. As noted above in relation to s 94 decisions, government officers aggrieved by a s 95A decision can utilise the ordinary jurisdiction of the WAIRC, and not the PSA.

519. Figure 3A-5 in **Attachment 3A** provides more detail of the applicable sections of the PSM Act as they relate to these employees.

3.33 Jurisdiction Under the *Health Services Act* which is the Same for Government Officers and Non-Government Officers Employed under the *Health Services Act*

520. Section 173(4) of the HS Act provides that, despite s 29(1) of the IR Act, but subject to s 118 of the HS Act, an employee or former employee:

(a) against whom proceedings have been taken under that Part for a suspected breach of discipline arising out of alleged disobedience to, or disregard of, a direction which is by virtue of s 173(2) a lawful order for the purposes of s 161(a) of the HS Act; and

(b) who is aggrieved by:

[307] The definition of "employee" for the purposes of this section is again that contained in s 3 of the PSM Act, referred to earlier.

(i) a decision made under s 164 to suspend the employee on partial pay or without pay; or

(ii) a finding made in respect of the person referred to in s 163(3)(a), s 165(5)(a)(i) or s 166(a) of the HS Act,

may refer the decision or finding referred to in paragraph (b) to the WAIRC as if that decision or finding were an industrial matter that could be so referred under that Act.

521. Section 173(5) provides that the IR Act applies to and in relation to the decision or finding referred to in s 173(4) as if the decision were an industrial matter referred to the WAIRC in accordance with that Act.

522. Section 173(6) of the HS Act provides that in exercising its jurisdiction under s 173 in relation to a direction consisting of a lawful order referred to in s 173(2), the WAIRC must confine itself to determining whether or not that direction has been, or is capable of having been, complied with.

523. As set out above, an "employee" is defined in s 6(1) of the HS Act to mean a person employed in a health service provider. The entitlement under s 173(4) therefore applies to both government officers and employees who are not government officers. As discussed previously, it does not, however, apply to "public service officers", as they are not within the definition of an "employee" under the HS Act.[308].

524. Figure 3B-3 in **Attachment 3B** contains additional details about these sections of the HS Act.

3.34 Limits on the Ordinary Jurisdiction of the WAIRC

525. In accordance with s 23(2a) of the IR Act, the WAIRC does not have the jurisdiction to enquire into or deal with, or refer to the CCS or the Full Bench any matter in respect of which a procedure referred to in s 97(1)(a) of the PSM Act is, or may be,

308 Public service officers are employed by the CEO of the Department of Health under Part 3 of the PSM Act. They are therefore covered by Part 6 of the PSM Act.

prescribed under that Act. That is, a procedure for obtaining relief of a breach of a public sector standard.

PART G - Individual Employee and Union Access to the WAIRC

526. The times and circumstances in which individual public sector employees and/or their unions may make applications to the WAIRC are determined by the IR Act, the PSM Act and the HS Act. Similarly, to private sector employees, there are different times and circumstances in which an individual public sector employee may make applications to the WAIRC as opposed to the employee's union, in their own right, or on behalf of the employee.

3.35 Access to the WAIRC by Individual Government Officers

527. An individual government officer and a public service officer can directly pursue redress in the WAIRC as set out below.

528. A **government officer** may:

(a) Refer to the PSA:

(i) A claim in respect of the salary, range of salary or title allocated to their office, and their particular salary within that range.[309]

(ii) Any question, dispute or difficulty relating to their employment under an employer-employee agreement.[310]

(b) Refer to the ordinary jurisdiction of the WAIRC:

(i) A decision or finding referred to in s 78(3) of the PSM Act.

(ii) A s 94 PSM Act decision.[311]

(iii) A s 95A PSM Act decision.[312]

(iv) A decision or finding referred to in s 173(4)(b) of the HS Act.

309 IR Act s 80F(2).
310 IR Act s 80F(4).
311 PSM Act s 95(2).
312 PSM Act s 96A(2).

(c) Institute an appeal to the PSAB:[313]

(i) Under s 78(1) of the PSM Act against a decision or finding referred to in s 78(1)(b), but only if the government officer is prescribed under s 76(1) of the PSM Act or Part 5 of the PSM Act otherwise applies.[314]

(ii) Under s 172(2) of the HS Act against a decision or finding referred to in section 172(1).[315]

(iii) Against a decision that the government officer be dismissed.[316]

529. A **public service officer** (as distinct from a government officer) may:

(a) Appeal to the PSA:

(i) A determination by an employing authority to decrease their rate of remuneration where they are in an organisation that became part of the public service.[317]

(b) Institute an appeal to the PSAB against any decision or finding of an employing authority:

(i) In relation to an interpretation of any provisions of the PSM Act and any provision of the regulations made under that Act concerning the conditions of service (other than salaries and allowances) of public service officers.[318]

(ii) Referred to in s 78(1)(b) of the PSM Act.

3.36 Access to the WAIRC by Individual Public Sector Employee who is not a Government Officer

530. A public sector employee who is not a government officer may refer to the WAIRC:

313 IR Act s 80J(b).
314 IR Act s 80I(1)(b).
315 IR Act s 80I(1)(c) and HS Act s 172(2).
316 IR Act s 80I(1)(d). This does not include an appeal under s 78(1) of the PSM Act or s 172(2) of the HS Act.
317 PSM Act s 37(2).
318 IR Act s 80I(1)(a).

(a) A claim that they have been harshly, oppressively or unfairly dismissed from their employment.[319]

(b) A claim that they have not been allowed a benefit, not being a benefit under an award or order, to which they are entitled under their contract of employment.[320]

(c) A decision or finding under s 78(2) of the PSM Act where they are a prescribed employee under s 76(1) of the PSM Act or Part 5 of the PSM Act otherwise applies.

(d) A decision or finding under s 78(3) of the PSM Act.[321]

(e) A s 94 PSM Act decision.[322]

(f) A s 95A PSM Act decision.[323]

(g) A decision or finding under s 172(4) of the HS Act.[324]

(h) A decision or finding referred to in s 173(4)(b) of the HS Act.[325]

3.37 Public Sector Union Access to the WAIRC

531. A union representing government officers may:

(a) Refer to the Public Service Arbitrator:

(i) Industrial matters.[326]

(ii) Claims relating to an employer's decision to downgrade any office that is vacant.[327]

(b) Refer to the ordinary jurisdiction of the WAIRC:

319 IR Act s 29(1)(b)(i).
320 IR Act s 29(1)(b)(ii).
321 IR Act s 29(b).
322 PSM Act s 95(2)(a).
323 PSM Act s 96A(2)(a).
324 HS Act s 172(4).
325 HS Act s 173(4).
326 IR Act s 80F(1). This right does not extend to individual employees.
327 IR Act s 80F(3). This right does not extend to individual employees.

(i) A s 94 PSM Act decision.[328]

(ii) A s 95A PSM Act decision.[329]

(c) Institute an appeal to the PSAB under s 80I on behalf of a government officer.[330]

532. A complication in understanding this jurisdiction is that there seems to be a typographical error in s 80I(1)(c) of the IR Act. This paragraph provides the PSAB with the jurisdiction to hear and determine an appeal by a government officer under s 172 of the HS Act against a "decision or finding referred to in **(1)(b)** of that section". A typographical error seems evident because, strictly, there is no s 172(1)(b) to the HS Act. Section 172(2) of the HS Act gives an employee or former employee who is a government officer a right of appeal to the PSAB against any "disciplinary decision or finding". Section 172(1) contains the definition of "disciplinary decision or finding" for the purposes of s 172 of the HS Act. It does so by specifying five types of decisions and findings as listed from (a) to (e). The typographical error adds to the uncertainties of the jurisdiction, but overall, the intent of the legislature would appear to be to give the PSAB the jurisdiction contemplated by s 172(2) of the HS Act, even though this is not mirrored by the text in s 80I(1)(c) of the IR Act.

533. In the present context it should be noted that the HS Act does not provide registered organisations with a right to bring appeals on behalf of aggrieved members against the decisions and findings referred to in s 172(1) of the HS Act. The entitlement of organisations to institute an appeal under s 80J of the IR Act is to bring an appeal under s 80I of the IR Act. The extent of the entitlement is made uncertain by the typographical error.

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328 PSM Act s 95(2)(a). Under s 29(1)(a)(ii) of the IR Act, a union in which persons to whom the industrial matter relates are eligible to be enrolled as members may refer an industrial matter to the WAIRC.

329 PSM Act s 96A(2)(a). Under s 29(1)(a)(ii) of the IR Act, a union in which persons to whom the industrial matter relates are eligible to be enrolled as members may refer an industrial matter to the WAIRC.

330 It does not appear that a union may institute an appeal to the PSAB on behalf of a government officer in respect of a finding mentioned in s 172(1)(a), (c), (d) or (e) of the HS Act as such provision is not included in either the HS Act or the IR Act.

3.38 Access to the WAIRC by Public Sector Unions Representing Public Sector Employees who are not Government Officers

534. A union representing public sector employees who are not government officers to whom an industrial matter relates and who are eligible to be enrolled as members may refer to the WAIRC:

(a) An industrial matter.[331]

(b) A s 94 PSM Act decision.[332]

(c) A s 95A PSM Act decision.[333]

3.39 The Australian Medical Association

535. Section 72B of the IR Act provides that the WA Branch of the Australian Medical Association Incorporated (AMA) may represent the industrial interests of medical practitioners as if it were an organisation of employees (union). This section extends Divisions 2 and 3 of Part II, s 80C(4) and s 80F and Parts III and VIA of the IR Act to the WA Branch of the AMA as if it were a union.

3.40 The WA Police Union

536. As set out earlier, Schedule 3 of the IR Act provides police officers with access to the constituent authorities as government officers. Schedule 3 also recognises the Western Australian Police Union of Workers as a union under the IR Act.

PART H - Public Sector Employees and the Powers of the WAIRC

537. The WAIRC is provided with its powers by the IR Act, PSM Act and HS Act. These powers vary according to whether or not the employee is a government officer.

3.41 Government Officers and the Powers of the WAIRC

538. The powers that may be exercised by the WAIRC vary between the two constituent authorities which therefore need to be discussed in turn.

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331 IR Act s 29(1)(a)(ii). This right does not extend to individual employees.

332 PSM Act s 95(2)(a). Under s 29(1)(a)(ii) of the IR Act, a union in which persons to whom the industrial matter relates are eligible to be enrolled as members may refer an industrial matter to the WAIRC.

333 PSM Act s 96A(2)(a). Under s 29(1)(a)(ii) of the IR Act, a union in which persons to whom the industrial matter relates are eligible to be enrolled as members may refer an industrial matter to the WAIRC.

3.42 Powers of the Public Sector Arbitrator

539. In exercising its jurisdiction under the IR Act, the PSA has the capacity to review, nullify, modify or vary a decision of an employing authority.[334]

540. Section 80G(1) of the IR Act provides that, subject to Division 2 of Part IIA, the provisions of Part II Divisions 2 to 2G of the IR Act that apply to or in relation to the exercise of the jurisdiction of the Commission constituted by a commissioner shall apply to the exercise of the PSA's jurisdiction, with such modifications as prescribed or as may be necessary or appropriate.

541. Section 80G(2) provides that for the purposes of subsection (1), s 49 (appeals) shall not apply to a decision of the PSA on a claim mentioned in s 80E(2).[335]

3.43 Powers of the Public Sector Appeal Board

542. Section 80L of the IR Act provides that the provisions of ss 22B, 26(1) and (3), 27, 28, 31(1), (2), (3), (5) and (6), 34(3) and (4), and 36 that apply to or in relation to the exercise of the jurisdiction of the Commission constituted by a commissioner shall apply to the exercise of the PSAB's jurisdiction, with such modifications as prescribed or as may be necessary or appropriate.

543. The PSAB does not conciliate an appeal; it only hears and determines the appeal.[336] The PSAB hears appeals on a de novo basis; that is, it hears and determines matters as if an original decision maker, based on the evidence and materials adduced before the PSAB.[337]

544. In hearing and determining an appeal, the PSAB has the jurisdiction to "adjust" all such matters. This includes ordering a:

(a) Reprimand.

(b) Fine.

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334 IR Act s 80E(5).

335 Being claims in respect of salary, range of salary or title allocated to the office occupied by a government officer or a decision of an employer to downgrade any office that is vacant.

336 IR Act s 80I(1).

337 *Titelius v Public Service Appeal Board* [1991] WASCA 19 [58].

(c) Transfer; or

(d) Reduction in salary or classification level.

545. The Full Bench of the WAIRC has determined that the term "adjust" does not include capacity for the PSAB to award compensation.[338] Rather, the power to adjust a decision can only be a decision to reform the decision in some way.[339]

546. There is no provision in the IR Act for a party to appeal against a decision of the PSAB to the Full Bench or the IAC.[340]

3.44 Powers of the WAIRC Exercising Ordinary Jurisdiction over Public Sector Employees who are not Government Officers

547. Broadly, the WAIRC's powers, and the exercise thereof, are set out in the IR Act in s 23(3), s 26, s 27 and s 28.

548. With respect to a claim that a public sector employee who is not a government officer has been harshly, oppressively or unfairly dismissed from their employment, the WAIRC may order:

(a) The employer to reinstate the employee to the employee's former position on conditions at least as favourable as the conditions on which the employee was employed immediately before dismissal.[341]

(b) Where the WAIRC considers that re-instatement would be impracticable, the employer to re-employ the employee in another position that the WAIRC considers the employer has available and is suitable.[342]

(c) An order it considers necessary to maintain the continuity of the employee's employment.[343]

338 *Insurance Commission v Johnson* (1997) 77 WAIG 2169.
339 Ibid 2170.
340 Above n 97 [4].
341 IR Act s 23A(3).
342 IR Act s 23A(4).
343 IR Act s 23A(5)(a).

(d) The employer to pay the employee the remuneration lost, or likely to have been lost, by the employee because of the dismissal.[344]

(e) If (and only if) the WAIRC considers reinstatement or re-employment would be impracticable, the employer to pay an amount of compensation (not exceeding six months' remuneration)[345] for loss or injury caused by the dismissal.[346]

549. A decision of the WAIRC with respect to such a claim may be appealed to the Full Bench of the WAIRC under s 49 of the IR Act. An appeal against the decision of the Full Bench may, on limited grounds, be appealed to the IAC. This procedure is discussed in chapter 2.

3.45 WAIRC Powers with Respect to Both Government Officers and Public Sector Employees who are not Government Officers

550. In relation to appeals to either the WAIRC or the PSAB under s 78 of the PSM Act, s 78(5) provides that, if it appears to the WAIRC or the PSAB that the employing authority failed to comply with a (Public Sector) Commissioner's instruction or the rules of procedural fairness in making the decision or finding the subject of a referral or appealed against, the WAIRC or the PSAB:

(a) Is not required to determine the reference or allow the appeal solely on that basis and may proceed to decide the reference or appeal on its merits; or

(b) May quash the decision or finding and remit the matter back to the employing authority with directions as to the stage at which the disciplinary process in relation to the matter is to be recommenced by the employing authority if the employing authority continues the disciplinary process.

551. In relation to appeals to the WAIRC or the PSAB under s 172 of the HS Act, s 172(6) provides that, if it appears to the WAIRC or the PSAB that the employing authority

344 IR Act s 23A(5)(b).
345 IR Act s 26A(8).
346 IR Act s 23A(6).

failed to comply with the relevant policy framework or the rules of procedural fairness in making the decision or finding the subject of a referral or appealed against, the WAIRC or the PSAB:

(a) Is not required to determine the reference or allow the appeal solely on that basis and may proceed to decide the reference or appeal on its merits; or

(b) May quash the decision or finding and remit the matter back to the employing authority with directions as to the stage at which the disciplinary process in relation to the matter is to be recommenced by the employing authority if the employing authority continues the disciplinary process.

Part I – Analysis of Issues and Submissions and Review Interim Opinions

3.46 Abolition of the Constituent Authorities

552. There was a consistent pattern within the submissions favouring the abolition of the constituent authorities, consistent with previous reviews and the intimations made by the Chief Commissioner in her Annual Reports.

553. The Chief Commissioner has mentioned there are logistical problems with constituting the PSAB. Additionally, because of the terms of the IR Act, the Chief Commissioner cannot sit on the PSAB and this hinders the effective running of the PSAB and the WAIRC as a whole.

554. As set out in chapter 2 of this Interim Report, the abolition of the constituent authorities was recommended by the Fielding Review[347] and Amendola Report[348] and was included in the Green Bill in 2012. The Review at present cannot see any benefit in keeping the constituent authorities and at present is proposing to recommend their abolition.

[347] Fielding Review, above n 118, 257 - 261, recommendation 140.
[348] Amendola Report, above n 13, 218-220, recommendation 154.

555. On this issue the Review has found particularly persuasive the opinion expressed, in his personal capacity, by Mr Ray Andretich of the State Solicitor's Office. His submission was to the effect that the constituent authorities were not necessary and all industrial matters within their scope should be given to the WAIRC, constituted by a Commissioner sitting alone at first instance. This view was supported by submissions from the Department of Communities, the Department of Health, the Community and Public Sector Union/Civil Service Association (CPSU/CSA), the Community Legal Centres Association (WA), the Employment Law Centre of Western Australia (ELC), Slater & Gordon, and the Law Society of Western Australia. There were also confidential submissions that supported this viewpoint.

556. The Health Services Union of Western Australia (HSUWA) submission suggested that there should be retention of the PSA. This view was in part supported by the CCI who also submitted the PSA and PSAB jurisdiction should be retained.

557. The preliminary opinion of the Review is that it sees strength in the majority of the submissions favouring the abolition of the PSA and the PSAB. This will remove uncertainties and complexities and allow for greater efficiency in a streamlined jurisdiction for public sector employees within the WAIRC. It will avoid the logistical and other problems noted by the Chief Commissioner in her last two Annual Reports as detailed earlier.

558. The CPSU/CSA also favoured an expanded jurisdiction for WAIRC involving the retention of s 51A of the IR Act to allow the WAIRC to make General Orders for public sector discipline matters. That would necessitate the repeal of s 78 of the PSM Act. This submission is a matter upon which the Review currently considers has not been adequately dealt with by all parties and so invites further submissions on the point. It may well be that this and other issues point towards the soundness of the Government establishing a review of the PSM Act, to consider in a holistic way how the PSM Act operates insofar as it regulates the employment conditions of the public sector as a whole. On this point, the Review notes that, although both s 80I(1)(b) and s 78(1) of the PSM Act refer to

government officers (within the meaning of s 80C of the IR Act), section 76(1) of the PSM Act operates to considerably limit those government officers to whom Part 5 of the PSM Act actually applies. This raises the question of whether standardising substandard performance and disciplinary matters in the sector, utilising s 51A of the IR Act or some other means, (as has occurred under the HS Act with respect to all employees of health service providers) warrants consideration.

3.47 Definition of Government Officer – "Employed on the Salaried Staff"

559. As set out earlier, if a person is an employee of a public authority, whether they are a government officer or not for the purposes of the IR Act, depends upon if they can be categorised as being "employed on the **salaried** staff". If not, they are subject to the ordinary jurisdiction of the WAIRC.

560. This creates a level of difference between the regulation of different public sector employees that seems, now at least, to simply create layers of confusion and complexity, and at least potential unfairness. It means that, from time to time, a key issue in an application by a public sector employee or former employee to the WAIRC is whether or not the employee is or was a government officer; depending upon whether or not they are or were employed on the "salaried staff" of a public authority.

561. The term "salaried staff" is not defined in the IR Act. The term is used in the legislation about the public universities in Western Australia[349] but also is not there defined. It is also used in some industrial awards. The meaning of the expression has, not surprisingly, been considered in some Western Australian cases.

562. In *Totalisator Agency Board v Edith Fisher*[350], as explained by Anderson J, the short point at issue for the IAC was "whether the respondent was employed 'on the salaried staff of' the Totalisator Agency Board. If she was, she was entitled to the

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349 *University of Western Australia Act 1911*, the *Curtin University Act 1966*, the *Murdoch University Act 1973* and the *Edith Cowan University Act 1984*.

350 (1997) 77 WAIG 1889.

benefits of the Government Officers' Salaries and Conditions Award. Otherwise she was not covered by that Award." His Honour later said:[351]

> There are many cases in which the meaning of "salary", "wage" and "income" are discussed. Invariably the discussion has taken place in the context of particular legislation…
>
> In my opinion although it can be helpful to see how words have been defined in other cases, the starting point is the ordinary meaning of the words… We were referred to several dictionaries. There is not much difference between them as to what salary in its ordinary sense means.
>
> In the *Macquarie Dictionary* the following meaning is given— "A fixed periodical payment, usually monthly, paid to a person for regular work or services, especially work other than that of a manual, mechanical or menial kind."

563. One of the cases cited by Anderson J was *In re Shine; Ex parte Shine*[352] where the question was the meaning of the word "salary" in the phrase "salary or income" in bankruptcy legislation. Anderson J quoted from the judgments in *re Shine* as follows:[353]

> At 529 Bowen LJ said—
>
> Salary, I think, must mean a definite payment for personal services arising under some contract, and (to borrow an expression of my brother Fry) computed by time." As I have tried to point out the agency commission is anything but a "definite payment for personal services ... computed by time.

564. In that same case Fry LJ said at 531—

> Whenever a sum of money has these four characteristics— first, that it is paid for services rendered; secondly, that it is paid under some contract or appointment; thirdly, that it is computed by time; and fourthly, that it is payable at a fixed time—I am inclined to think that it is a salary, and not the less so because it is liable to determination at the will of the payer, or that it is liable to deductions.

565. Kennedy J, the presiding judge, agreed with the reasons of Anderson J and also said:[354]

> The remuneration to which the respondent was entitled was properly described in the agreement of 12 June 1970 as being "a commission". That commission had three components: (i) an opening fee at an hourly rate, according to the hours that the agency was open to the public as authorised by the Board; (ii) one cent per bet on the net investments; and (iii) commission of specified percentages based on weekly turnover. It is, in my view, unnecessary to go beyond the primary definition of

351 Ibid 1890.
352 [1892] 1 QB 522.
353 Above n 350 1891.
354 Ibid 1889.

> "salary" in A New Oxford English Dictionary, which is as follows: "Fixed payment made periodically to a person as compensation for regular work; now usually restricted to payments made for non-manual or non-mechanical work (as opposed to wages)". The concept of a fixed payment is central to the definition; but it is impossible to identify any fixed payment in the respondent's entitlement to remuneration under her contract. It may be observed in passing that the various levels of remuneration in the Government Officers' Salaries and Conditions Award are clearly salaries within the foregoing definition, being specified "salaries per annum", although payable proportionately at regular intervals.

566. Scott J agreed with the reasons of Anderson J and also said[355]:

> As the reasons of Anderson J reveal, the word "salary" is used in many different statutes and in different contexts. It is not possible to discern a singular meaning of the word which would apply to all of the statutory contexts in which the word appears. The judgment of Fry LJ in In *Re Shine; Ex parte Shine* [1892] 1 QB 522 gives an indication of the criteria that may be looked at in determining whether or not a particular payment is a "salary". The four characteristics to which Fry LJ refers at 531 are a valuable guide in determining whether or not any payment is a "salary" for the purpose of a particular statute.

567. This decision of the IAC has been relied on in decisions of the constituent authorities of the WAIRC in determining if a public sector employee is a government officer. In *The Australian Nursing Federation, Industrial Union of Workers v The Minister for Health,*[356] Kenner C, sitting as the PSA, said this:

> Whether or not a person is paid a "salary" or a "wage" is a matter of fact. Importantly for present purposes, the meaning of "salary" under s 80C(1) of the Act as a matter of interpretation, will involve the ordinary meaning of the words used in the statute: *Vacher and Sons Ltd v London Society of Compositors* [1913] AC 107. Dictionaries define "salary" in various ways as follows. The *Shorter Oxford English Dictionary* defines "salary" as "1. Fixed payment made periodically to a person as compensation for regular work; now usu. for non-manual or non-mechanical work (as op to wages). 2. Remuneration for services rendered;..." The *Macquarie Dictionary* defines "salary" as "A fixed periodical payment, usually monthly, paid to a person for regular work or services, especially work other than that of a manual, mechanical or menial kind.
>
> The issue of whether a payment was a "fixed periodical payment" and therefore a salary was the subject of consideration by the Industrial Appeal Court in *The Totalisator Agency Board v Edith Fisher* (1997) 77 WAIG 1889. In that case, after considering various dictionary definitions and judicial pronouncements on the meaning of "salary", "wage" and "income", the Court came to the conclusion that a person receiving payment by way of a commission payment, was not employed "on the salaried staff of a public authority" for the purposes of s 80C(1) of the Act. In that case, the payment lacked the essential ingredient of a fixed periodical or regular payment. (See also: *Commonwealth Commissioner of Taxation v J Walter Thompson (Australia) Pty Ltd* (1944) 69 CLR 227; *Mutual Acceptance Co Ltd v The*

355 Ibid 1891.

356 (2004) 84 WAIG 2867, [19]-[20].

Commonwealth Commissioner of Taxation (1944) 69 CLR 389; *Re Shine; Ex parte Shine* [1892] 1 QB 522; *Commissioner for Government Transport v Kesby* (1972) 127 CLR 375; *Commissioner of Superannuation v Carpenter* (1983) 77 FLR 224).

568. The Commissioner decided that from the terms of the Nurses (WA - ANF Public Sector) Award 2002, senior registered nurses were "salaried employees".

569. The issue was also considered by the PSAB (Kenner C presiding)/ in *McGinty v Department of Corrective Services* (McGinty).[357] In *McGinty*, the PSAB was required to determine whether a Vocational Support Officer (VSO) at Casuarina Prison was a government officer, on the basis of whether he was employed on the salaried staff of a public authority. The VSO was paid a salary. However, that was not of itself regarded as sufficient to make him a "government officer". The PSAB considered the history of payments made to prison officers, noting that an annualised salary was first introduced in 1994, incorporating overtime, penalty rates, shift allowances and other benefits. The relevant industrial instruments expressed rates of pay as both a weekly rate and an annual rate, and also referred to the payment of "wages". The PSAB said:[358]

> Whilst at first blush it might be said that prison officers are now paid a salary on this basis, the history of the award and agreement shows that they were historically wages employees and that the payment of remuneration annually was a result of administrative changes some years ago. As noted above, the industrial instruments in part, still refer to the payment of "wages". Further s 80C of the Act does not just refer to the payment of a "salary" to a person. The statute refers to a person employed on the "salaried staff" of a public authority. Whilst the distinction between "wages employees" and "salaried staff" in terms of somewhat anachronistic "blue collar" and "white collar" employment may no longer have the connotations it once may have had, nonetheless, the legislature has sought to confine the jurisdiction of the Arbitration to those specific employees in s 80C of the Act. They are generally those in the administrative, technical and professional ranks of the public sector.

570. The PSAB concluded that Mr McGinty was not a "salaried officer". The PSAB also said at [12]:

> One may look to police officers in this State as a point of comparison with prison officers. By their industrial instruments, police officers are employed on a salaried basis but, importantly, are deemed "government officers" for the purposes of s 80C and fall within Par 11A by reason of specific provisions in the Act in s 115 and

357 (2012) 92 WAIG 190.

358 Ibid [11].

> Schedule 3. These were introduced to overcome the uncertainty as to whether at common law, police officers were employees.

571. Most recently in *Capewell v Department of Corrective Services,*[359] the PSAB (Kenner C presiding), said that the question of whether or not someone was employed on the salaried staff of a public authority was a mixed question of fact and law.

572. The jurisdictional issue before the PSAB was decided in this way:[360]

> In this case, it is common ground that Ms Capewell was paid an hourly rate of pay which was a loaded rate, compensating her for the absence of entitlements such as annual leave and sick leave. Furthermore, the evidence was that Ms Capewell did not work fixed regular hours each week, and did not receive remuneration in the form of a "fixed periodical payment" computed by time. Rather, the evidence was that Ms Capewell was paid for the hours she actually worked, as and when required, on an hourly basis. Accordingly, we are not persuaded that the payments made to Ms Capewell during the course of her employment as a Visitor could be regarded as a "salary" in accordance with the authorities. Furthermore, as was the case in *McGinty*, we are also of the view that it could not be said that Ms Capewell, was a member of the "salaried staff" of the Department, in the sense referred to in *McGinty*.
>
> For the foregoing reasons, we are not persuaded that Ms Capewell was at the material time, employed on the salaried staff of a public authority to bring her with in the definition of "government officer" for the purposes of s 80C(1) of the Act. That being so, Ms Capewell's appeal is beyond the jurisdiction of the Appeal Board and must be dismissed.

573. Based on information provided by the Secretariat to the Review it seems that, over time, there has developed some general understanding about those public authority employees who are "on salaried staff" and those who are non-salaried staff public sector employees, but it is a distinction, leading to differing paths within the regulation of public sector employment in WA, that seems unnecessary.

574. None of the submissions to the Review have sought to justify or maintain the distinction. Indeed, the thrust of most of the submissions on point was to the effect that the distinction should, in effect, be abolished. This is the consequence of submissions that all public sector employees ought to be given the right to refer any industrial matter to the WAIRC in its ordinary jurisdiction; including an

359 (2013) 93 WAIG 1454.
360 Ibid, [12]-[13].

"unfair" dismissal under s 23 and s 29(1)(b)(i) of the IR Act. That submission is an adjunct to the position that the constituent authorities ought to be abolished. In the preliminary opinion of the Review it is a supportable point.

3.48 Use of Section 32 and Section 44 of the *Industrial Relations Act*

575. In chapter 2 of the Interim Report, the Review has set out aspects of the jurisdiction exercised by the WAIRC under s 32 and s 44 of the IR Act, including the differences in the exercise of the jurisdiction. In the narrative set out earlier, the Review pointed to the restrictions on public sector employees, or organisations on their behalf, being able to make use of the ordinary jurisdiction of the WAIRC, that includes s 32 and s 44 of the IR Act.

576. The Review understands, based on information from the Secretariat, that in the public sector, s 32 of the IR Act is typically used for applications to make or vary an award, to register an industrial agreement, to seek remedies for an alleged unfair dismissal or denial of contractual benefits, or to seek to cancel or suspend right of entry permits.

577. The Review understands, based on information from the Secretariat, that a s 44 compulsory conference is sought in the public sector for urgent matters (for example, where industrial action is involved); general disputes between employers and unions; and bargaining disputes (but not in lieu of s 42I, which provides for specific processes to resolve some bargaining disputes).

578. A benefit in using s 44 to access the WAIRC is that, although an "industrial matter" is required, as a jurisdictional prerequisite no actual decision needs to have been made. This enables an organisation representing an employee who is a public sector employee (who is not a government officer), to seek the assistance of the WAIRC in relation, for example, to a disciplinary process prior to a decision being made to conclude the process. As reported to the Review, it is the experience of Public Sector Labour Relations Division (PSLR) in DMIRS that in recent years there has been increased use of s 44 by unions for non-urgent matters that could have otherwise been facilitated through s 32. The advantage of s 32 from an agency's

perspective is that it obliges each party to put its claim or response in writing and its timeframes allow for the parties to consider the claims or responses prior to conciliation.

579. Law firm Slater & Gordon, in its submission, pointed out that health services workers who are public sector employees (in accordance with Part 11 Division 4 of the HS Act) are precluded from accessing WAIRC under s 44 of the IR Act for substandard performance and disciplinary matters. They submitted this restriction should be removed. Consistent with what has been said elsewhere, the Review is at present in agreement with this.

580. PSLR has reported to the Review that it is aware that some public sector unions and agencies have used s 44 on matters that fall within the PSAB's jurisdiction. Anecdotally, the Review has heard that the WAIRC does not prevent the matter from proceeding in the ordinary jurisdiction of the WAIRC, despite the prospect that the WAIRC may not have jurisdiction. The Review is not aware whether, if that does occur, it is with the consent of the parties or over the objection of a party. It would be possible for a party to assert at any stage that the WAIRC did not have jurisdiction, as "jurisdiction is always at large".[361]

581. There was a confidential submission to the Review that raised the issue that applicants use the s 44 compulsory conference provisions as an alternative to formal applications on matters that are more appropriately dealt with by an alternative and more specific procedure before the WAIRC, such as in s 46 of the IR Act or in an application to a constituent authority. Whilst the Review agrees with this, the point also underlines the difficulties that can occur when some parts of the "industry" of the public sector, and their employees, have different industrial rights and remedies than others. The problem about misuse of the s 44 jurisdiction in matters where the jurisdiction of a constituent authority ought to have been exercised is overcome if the distinction is done away with.

361 See *The State School Teachers Union of W.A. (Inc) v The Director General, Education* [2017] WAIRC 00737 [6].

3.49 Recruitment and Promotion Decisions and Reviews of the Merits

582. A particular issue for public sector employees and unions is the inability for the Public Sector Commission to overturn a recruitment decision based on grounds of merit.[362] It is also something that cannot generally be reviewed by the WAIRC or a constituent authority.

583. It is something that could open up if the ordinary jurisdiction of the WAIRC was available to all public sector employees. Any consideration of opening up the WAIRC's jurisdiction for redress on these matters, however, requires careful consideration given it would mean that the WAIRC could overturn recruitment decisions of employing authorities. This could result in delays on the implementation of Government reforms relating to employment arrangements within an agency.

584. The PSAB formally had a jurisdiction called the "promotion appeals" jurisdiction, in which an employee could try to challenge the promotion being awarded to another person. From the stakeholder meetings held by the Review, the consensus seemed to be that these types of appeals were largely a waste of time, unhelpful to productivity and sought, inevitably, to pit one co-worker against another. In meetings with the Review, neither union nor employer stakeholders sought a return to this system of promotion appeals, but if that is to be an "industrial matter" to be excluded from the jurisdiction of the WAIRC, then that would need to be specifically legislated for. It is a matter on which the Review will benefit from additional submissions.

362 In contrast to the federal public service where eligible public servants can challenge a promotion decision. A Promotion Review Committee (PRC) established by the Merit Protection Commissioner assesses the relative merit of the person promoted and each person who has validly applied for review of that promotion decision. The PRC makes an independent decision about which person(s) shall be promoted using all information available at the time the PRC convenes. The decision is binding and takes effect four weeks after the agency has been notified, unless another arrangement is reached – http://www.meritprotectioncommission.gov.au/promotion-reviews

3.50 Termination due to Redundancy and *Industrial Relations Act* and *Public Sector Management Act* Inconsistencies

585. As noted previously, the PSM Act provides access to the WAIRC by public sector employees who are aggrieved by a s 94 decision relating to redeployment, retraining and redundancy arrangements for registrable employees.

586. As discussed at [525] in accordance with s 23(2a) of the IR Act, the WAIRC does not have the jurisdiction to enquire into or deal with any matter relating to the procedures for obtaining relief for a breach of public sector standards.

587. Regulation 10 of the PSMRR Regulations provides for the transfer of a registerable employee to another office, post or position in the department or organisation. The transfer of employees is also regulated, however, by the public sector employment standard.

588. Consequently, whilst s 23(2)(a) of the IR Act precludes the WAIRC from dealing with a breach of the employment standard, s 95(2) of the PSM Act provides the WAIRC with the jurisdiction to deal with an employee who is aggrieved by a decision to transfer them under the PSMRR Regulations.

589. In addition, the inability for a public sector employee to refer a decision made under s 95A to terminate their employment to the WAIRC has been controversial with public sector unions for some time. The CPSU/CSA in its submission advocated an expanded jurisdiction for the PSA to include industrial matters relating to decisions involving the redeployment, redundancy and termination of "registered" employees covered by the PSMRR Regulations. The ELC also submitted there should be an expansion of jurisdiction so the WAIRC could hear complaints about the substance of redeployment and redundancy decisions including where the employment of an employee has come to an end.

590. At present, the Review favours the jurisdiction of the WAIRC being enhanced as submitted. The Review is interested, however, in receiving further submissions, in particular from the Government as an employer, as to what the ramifications of this might be.

3.51 Interaction between the *Industrial Relations Act* and the *Health Services Act* – Typographical Error

591. As referred earlier, there appears to be a typographical error in s 80I(1)(c) of the IR Act. If the section is retained in the IR Act, the error should be remedied.

3.52 Limitations on Public Sector Arbitrator and WAIRC to Deal with Matters Related to Public Sector Standards

592. As set out earlier, neither the PSA nor the WAIRC in its ordinary jurisdiction can deal with industrial matters related to the public sector standards except in relation to the discipline standard. A number of submissions to the Review have been critical of this limitation.

593. As set out above, the CPSU/CSA has advocated for a widening of the jurisdiction of the PSA in relation to matters that are currently excluded, including alleged breaches of the public sector standards.[363]

594. The CPSU/CSA submitted that the WAIRC in its ordinary jurisdiction should also be able to determine matters related to the public sector standards. This would involve an amendment of s 23(2a) of the IR Act. It was submitted by the CPSU/CSA that there was a general lack of confidence by public sector workers and unions in relation to the regime currently administered by the Public Sector Commission.

595. The CPSU/CSA submitted an outline of the model draft bill and how the proposed structural changes contained in its submission could be achieved.

596. A confidential submission also argued that industrial matters relating to the public sector standards under section 21 of the PSM Act or the Public Sector Commissioner's instructions under s 22A of the PSM Act should not be excluded from the jurisdiction of the WAIRC.

597. The AMA submitted that the PSA's powers within s 80E are ambiguous and the WAIRC should have the latitude to deal with an industrial issue through

[363] Covered by the *Public Sector Management Act (Redeployment and Redundancy) Regulations 2014*, and IR Act s 80E(7)(a) and (b).

conciliation or arbitration, including in matters involving the public sector standards currently excluded under s 80E(7)(a) of the IR Act.[364]

598. A somewhat different view was put forward by the HSUWA in its submission. The HSUWA preferred that government officers remain within the jurisdiction of the PSA and that matters dealt with by the PSAB under the HS Act be instead dealt with by the PSA. This was largely due to the specialisation that could be obtained by the PSA. However, the HSUWA did not differ from the view otherwise expressed that restrictions on the PSA to hear matters related to public sector standards should be removed. The HSUWA expressed concern about the lack of timely decisions being made on these types of matters. The HSUWA also submitted the potential remedies available to the PSA ought to be broadened to enable a better range of potential outcomes or remedies, and could include "innovative solutions tailored to a particular person, organisation or circumstance".

599. The submission received from the Public Sector Commission (PSC) also addressed the issue of the lack of any jurisdiction within the WAIRC to review breaches of standards matters, other than breaches of the discipline standard. The submission provided a background as to issues relevant to the standards and noted that following the implementation of the *Public Sector Reform Act 2010* (WA) there was an amendment to the BPSS Regulations in 2011 to provide the Public Sector Commissioner with a power to direct relief, of a limited type. It was pointed out in the submission that this development was consistent with the recommendation of the Fielding Review that the then Office of the Public Sector Standards Commissioner be given power to direct a remedy for a breach of the standards, as opposed to the WAIRC being given jurisdiction to determine relief for breach of standards claims.

600. The PSC submitted that creating an additional or possibly competing avenue of relief in the WAIRC for a breach of the standards was not considered to be of overall benefit for the public sector. It was suggested that such a system:

[364] This submission was also supported by CPSU/CSA and solicitors Slater & Gordon.

(a) Would result in employees lodging claims in two jurisdictions, which may delay public sector human resource processes whilst claims are considered.

(b) Risked two independent bodies forming a different view on the same matter, thus creating uncertainty.

(c) May create two sets of requirements as to how employment matters are dealt with.

(d) Would potentially lessen the PSC's capacity to effectively deal with employment matters in the public sector.

601. These submissions, with respect, assume the possibility of a dual system as opposed to all breach of standards issues being able to be referred to the WAIRC and not being dealt with by the PSC.

602. Having said this, the PSC submission made the point that there has been a priority in the current State government to enhance flexibility in the public sector framework and devolve employment powers to CEOs. It was also submitted that the central pillars of the PSM Act contained in s 7 to s 9 continued to provide a solid foundation for good governance, integrity, culture and decision making. It was submitted that these pillars are built upon by the PSC monitoring the extent to which public sector bodies and employees comply with the principles.

603. The submission also pointed to the recently initiated government reviews that could be expected to result in recommendations relating to recruitment practices in the context of public sector renewal. The submission referred to the Service Priority Review and three CEO working groups on public sector efficiency, local service delivery and workforce management. Reference was made to the interim report of the Service Priority Review in August 2017 and, in particular, the need to create a unified sector, to move to a simpler and more effective employment framework and develop a high performance workforce.

604. In the preliminary opinion of the Review, there was nothing contained within the PSC's submission that necessarily detracts from the possibility that all issues

relating to breaches of public sector standards could be referred to the WAIRC in its ordinary jurisdiction.

605. There could be a division between the role of the Public Sector Commissioner in setting standards and instructions and the WAIRC being able to oversee potential breaches of the standards and provide remedies where possible. That is a large issue, however, and again calls into question whether there ought be a review of the PSM Act as a whole.

606. The submission of the PSC provided as an attachment a table of public sector standard breach claims. Over the period 2016-2017 there were a total of 188 claims lodged with the PSC, of which 98 were solved by the agency. Of those that remain with the PSC, none were substantiated. This result can be interpreted in a number of ways. One interpretation is that it shows the effectiveness of the system. An alternative is that the fact that no claims were substantiated calls for a closer investigation of the reasons why this was so. This was referred to in the CPSU/CSA submission. The CPSU/CSA stated, with respect to the same table, the following:

> This table indicates that further inquiry into the PSC's breach claims process is warranted, particularly given the fact that no breaches were substantiated in the 2016 – 2017 financial year, despite 90 claims made overall, and similar numbers leading to substantiated claims in previous years. This suggests a number of possibilities: that the claims process is becoming more difficult for employees to engage with, that there may be more onerous requirements in terms of evidencing claims, and workload issues in terms of the PSC's capacity to process claims expeditiously. All the above indicate that the number of claims is not dropping, however the pressure on the sector to respond to claims would be improved by expanding the jurisdiction of the Commission to hear these appeals.

607. Another alternative is that there were simply no claims worthy of being substantiated.

608. There is, of course, a concern that if claims for breaches of the standards were able to be pursued in the WAIRC's ordinary jurisdiction, there could be a flood of unmeritorious claims, slowing down the work of public sector agencies and taking up unnecessary time at the WAIRC.

609. It is also the present opinion of the Review that, if a flood of matters is initially filed with the WAIRC, this could well level out over time. If the WAIRC is allowed to conciliate all public sector industrial matters referred to it, then it is hoped it could quickly dispose of a matter that was trivial or incapable of being substantiated. A power to summarily dismiss matters that are without merit, as referred in chapter 2, would assist with the process and the manageability of the jurisdiction.

610. Additionally, the methods and "ground rules" applied by the WAIRC in dealing with breach of public sector standards issues are likely to soon become known and acted upon by agencies, unions and individuals in applying the standards and deciding whether to bring an application.

611. These are issues upon which the Review will invite further submissions and upon which the Review will consult with the WAIRC.

3.53 Unfair Dismissal

612. The HSUWA submitted that public sector workers should have the same rights as private sector workers in terms of remedies for unfair dismissal. Accordingly, it was submitted the WAIRC's powers should be extended to allow for the award of financial compensation in lieu of reinstatement for unfair dismissal, where appropriate. Mr Andretich also supported this position.

613. The submission from the ELC also said that public sector workers should have the same rights to make unfair dismissal claims as private sector employees. It was pointed out that there are significant limitations on the circumstances in which an appeal under s 80I(1)(d) of the IR Act can be lodged and the remedies available for an appeal, compared with the unfair dismissal provisions that apply to a private sector employee under s 29, s 23 and s 23A of the IR Act.

614. A confidential submission made the point that there is a lack of uniformity in the sanctions that can be imposed on errant public sector employees.

615. Another confidential submission lamented the problem of non-government officers who are not a member of a union being limited in how they may access the WAIRC; that is the individual can only refer matters themselves that allege an unfair dismissal or denial of contractual benefits.

3.54 Public Sector Employees Referring Matters to the WAIRC

616. The Review has discussed, in chapter 2 of the Interim Report, the issue of whether private individuals ought to be able to refer any industrial matter relating to their employment to the WAIRC. As there set out, that is a large debate and one that is, in the opinion of the Review, outside the Terms of Reference.

617. However, the Review is presently of the opinion that there is some sense to the view expressed by Mr Andretich in his submission as follows: "There are only limited rights under the Act for employees to personally refer industrial matters. These should be extended to cover all industrial matters that concern an outcome that is confined to an employee as opposed to those that have an industry wide application".

618. In the course of making a submission on that issue, however, Mr Andretich set out the different applications that might be made by different employees to different parts of the WAIRC. This only served to highlight the undesirability of the system. Mr Andretich concluded that referrals should be dealt with by the WAIRC constituted by a Commissioner sitting alone at first instance. As set out earlier, in public sector matters, the Review is at present inclined to agree with this submission. Less clear is what the dividing line ought to be, in the public sector, between an organisation referring a matter or instituting an appeal on behalf of a member and an employee doing so themselves. That is a topic on which the Review calls for additional submissions.

3.55 Access to WAIRC for Police Officers under the *Police Act*

619. The WA Police Union made a submission that clause 2(3) to Schedule 3 of the IR Act ought to be removed to allow police officers full access to the WAIRC on matters that are covered by the public sector standards. It was submitted that, as

the Police Commissioner is not bound to apply the public sector standards, the decisions the Police Commissioner makes cannot be tested for reasonableness and compliance. It was submitted that removing clause 2(3) will also provide officers with access to the WAIRC on the same issues as public sector workers and other employees. It was acknowledged that this would also have an impact on the Police Commissioner's prerogative in the *Police Act* relating to the removal of non-commissioned officers, the power to fill a vacancy, the power to remove officers in whom the Commissioner had lost confidence, s 33L *Police Act* appeals and rights of appeal against no confidence notices on the grounds that the decision was harsh, oppressive or unfair.

620. An alternative and less complex option was said to be to expand the scope of the WA Police Appeal Board under Part 2A of the *Police Act*, which is currently limited to appeals in relation to disciplinary offences.

621. Alternatively, again it was submitted that the Schedule could be amended to allow the WAIRC to review a broader range of matters for *Police Act* employees.

622. The Review will invite submissions from the Commissioner of Police before addressing the issue in the final report to be provided to the Minister. The WA Police Union or any other interested organisation, body or individual may of course also make submissions or additional submissions on the point.

623. At present, however, the Review offers these preliminary thoughts. It is understandable that police officers or the WA Police Union (on their behalf) does not have the same right to refer matters to the WAIRC as other public sector employees. This is because of the operational, dynamic and, at some times dangerous, operations the Police Force are engaged in. As an extreme example, if a number of officers were involved in the stake out of an armed robber at a suburban location, and one officer did not like the way in which the operation was being run, it would nevertheless not make sense to permit the officer or the union to try and urgently refer the complaint to the WAIRC. On the other hand, as

stated by Leeming JA in *State of New South Wales v Briggs*:[365] "There are many similarities between police officers and employees in a large organisation or government department." This might be said to be so with respect to the less operational or dynamic matters engaged in by the Police Force, such as location transfers, general working conditions and dismissal. On these matters, there seems to the Review, at this preliminary stage, to be no reason why they ought not be referable to the WAIRC to deal with. The difficulty would seem to be, in the preliminary opinion of the Review, in formulating the appropriate dividing line between what could and could not be referred to the WAIRC. That is a matter upon which the WA Police Union, the Commissioner of Police and any other interested party could provide further submissions for the assistance of the Review.

3.56 Access to WAIRC for Unfair Dismissal Remedies where Employment has been Terminated on the Basis of Negative Working with Children Notice

624. The State School Teachers' Union of WA (SSTUWA) made submissions about the *Working with Children (Criminal Record Checking) Act 2004* (WA) (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 schoolteacher who could not get a certificate 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 failure to get the certificate is an allegation that turns out not to be proved when the matter goes to Court. This is a denial of the teacher's otherwise entitlement to bring a claim to the WAIRC for unfair dismissal and so is within the scope of Term of Reference 2.

365 (2016) 264 IR 309 [54].

The difficulties that are presented for a teacher in the position can be manifest if they are later seeking to be again employed by the Education Department.[366]

625. The issue is no doubt important for the category of public sector employees and the organisations that represent them. However, 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.[367]

626. The Review intends to try to ascertain additional information about the reasons for the embargo, referred to in the previous paragraph, from the Education Department and enforcement authorities before addressing the issue in the Final Report of the Review.

3.57 Restriction on Representation by Legal Practitioners

627. The submission from the Department of Health raised a matter relating to legal representation. Section 31(1) and s 31(4) of the IR Act preclude a legal practitioner from appearing unless a question of law is raised or argued or likely to be raised or argued. The submission referred to a situation where the Acting Director of Health Industrial Relations Service was not able to represent the Department in an assisted bargaining process under s42E of the IR Act as she was legally qualified. It was submitted this proved inefficient and cumbersome. The Review notes that it is hard to take into account submissions about a particular case unless more detail is provided. It should also be noted that the issue of legal representation at proceedings before the WAIRC is something that is addressed in chapter 2 and on which the Review is requesting additional submissions. The issue can then be further reviewed, with respect to both the public and private sectors, before the Final Report of the Review is provided to the Minister.

3.58 Anti-Bullying Jurisdiction

628. There were a number of submissions that favoured the jurisdiction of the WAIRC being expanded to include an anti-bullying regime, similar to the FW Act with

366 See *The State School Teachers Union of W.A. (Inc) v The Director General, Education* [2017] WAIRC 00737.
367 See, for eg, WWC Act s 3.

respect to national system employees. Submissions to this effect came from the CPSU/CSA, the Department of Justice, the ELC, the Equal Opportunity Commission, the Independent Education Union WA Branch (IEU), the HSUWA, Slater & Gordon, WA Prison Officers' Union and United Voice. The WA Prison Officers' Union submission on this issue was one of the more detailed. The submission focused on creating a new anti-bullying jurisdiction within the WAIRC and included a list of recommendations,[368] including an amendment to s 29(1)(b) of the IR Act to provide that any employee who works in any capacity should be able to make a claim seeking an anti-bullying order, that claims be conciliated at first instance, and anti-bullying provisions should apply more broadly to capture any State system person who performs work in any capacity.

629. Under s 789FD(1) of the FW Act, workplace bullying occurs when an individual or a group of individuals repeatedly behave unreasonably towards a worker, or a group of workers of which the worker is a member, at work and that behaviour creates a risk to health and safety. An application may be made by an employee to the FWC seeking an order under s 789FF of the FW Act for the bullying to stop.

630. Initially the Review thought submissions about an anti-bullying jurisdiction for the WAIRC were beyond the Terms of Reference. However, on further consideration, the Review does not believe they are, at least in the public sector context. That is because Term of Reference 2 requires a review of the range of matters for which public sector employees are currently excluded from the WAIRC. Given that many public sector employees cannot get access to the ordinary jurisdiction of the WAIRC, they could not, in that forum, bring forward a claim of bullying and seek an order for it to stop.

631. The submissions to the Review provide evidence that bullying is a real concern at public sector workplaces. The Review, at present, thinks there may be some merit in the WAIRC having a similar jurisdiction to the FW Act with respect to stopping bullying at work.

368 24-25.

632. If, however, the jurisdiction of the WAIRC were to be so expanded, it would seem quite unfair that private sector employees also should not have access to the jurisdiction. Overall, the Review wants to receive further submissions on the topic before deciding if to recommend, and if so what recommendation to make, to the Minister on this issue.

3.59 Proposed Recommendations and Request for Additional Submissions

633. Having regard to all of the above, the Review is at present minded to propose the follow recommendations to the Minister, and seeks further submissions on the following topics relevant to Term of Reference 2.

634. The Review of the State Industrial Relations System proposes the following recommendations in relation to Term of Reference 2:

Proposed Recommendations

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 [25] 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.[369]

Additional Submissions

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.

369 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.

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*

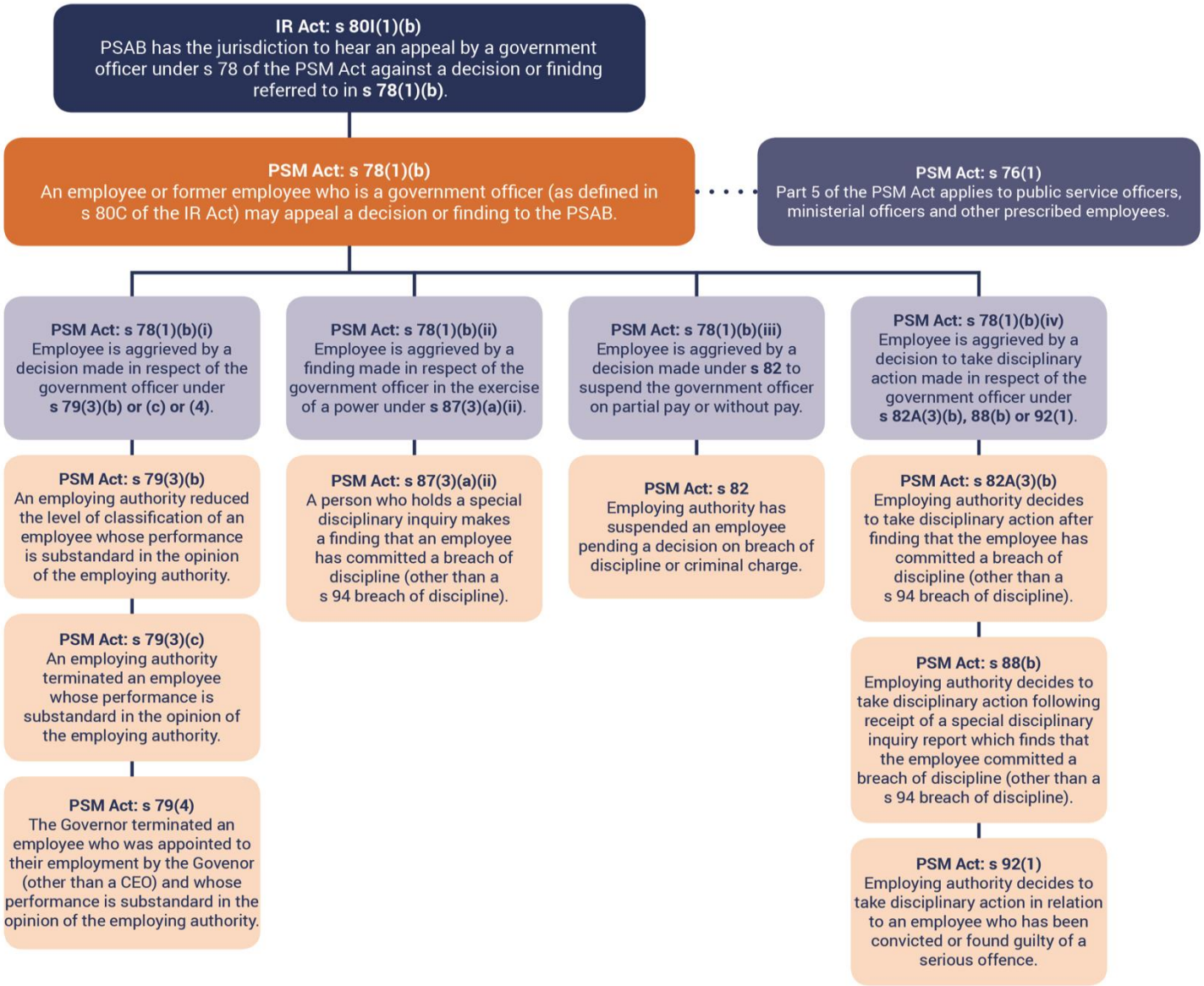


Figure 3A-2. Access to the WAIRC under s 78(2) of the *Public Sector Management Act* by an employee who is not a government officer

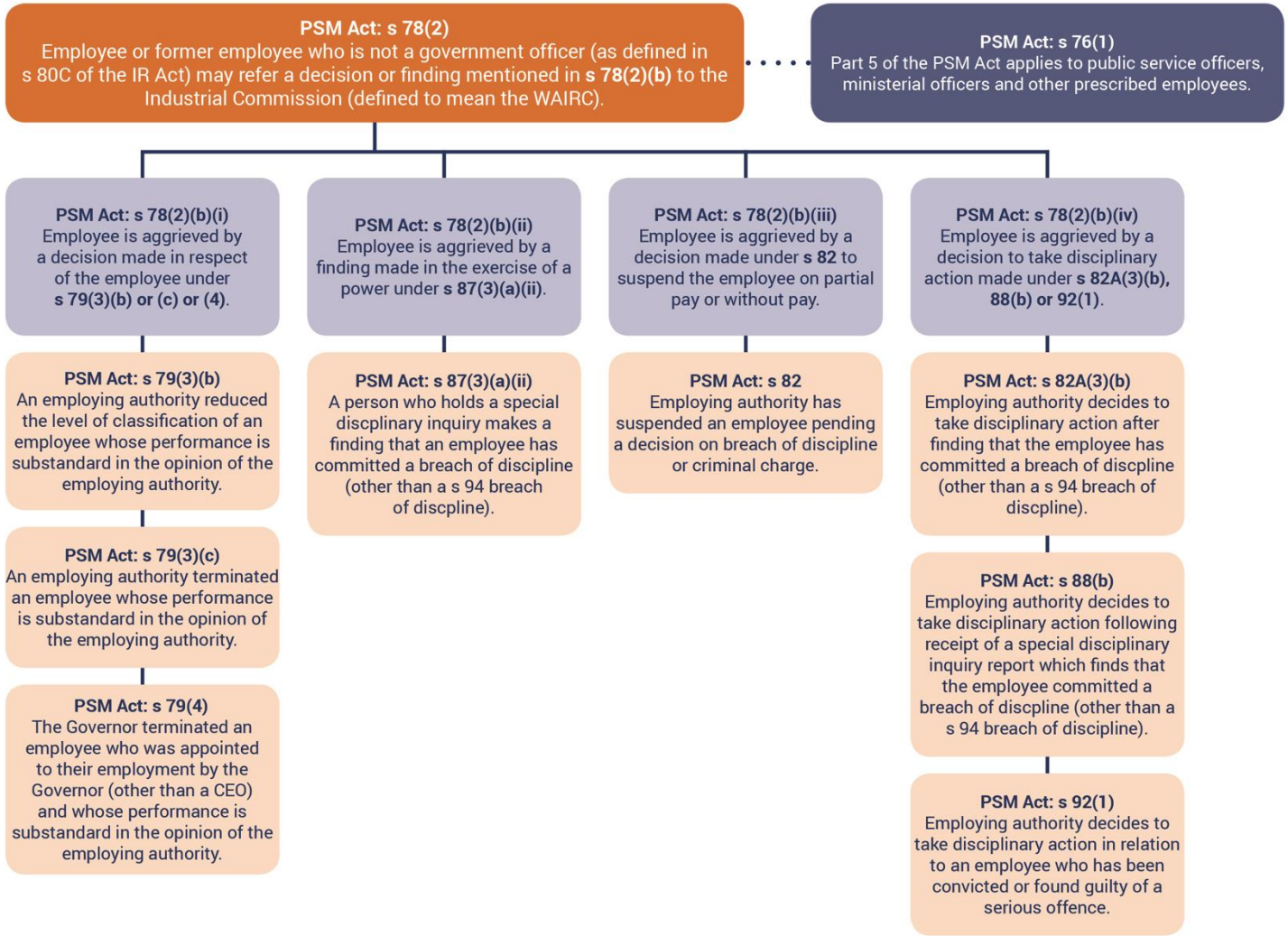


Figure 3A-3. Access to the WAIRC under s 78(3) of the *Public Sector Management Act* by an employee against whom proceedings have been taken for a suspected breach of discipline or disobedience

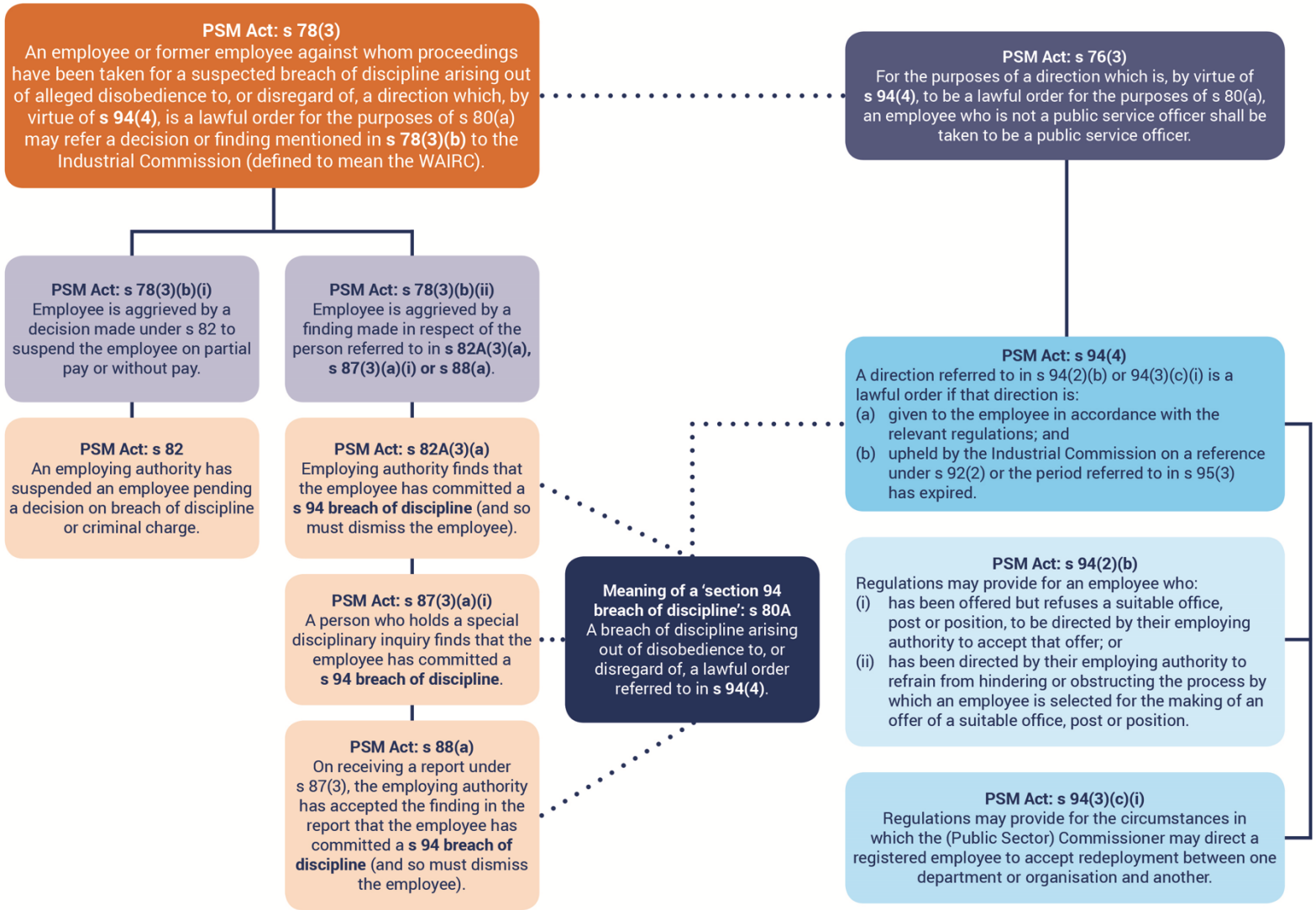


Figure 3A-4. Access to the WAIRC under s 95(2) of the *Public Sector Management Act* by an employee aggrieved by a s 94 decision

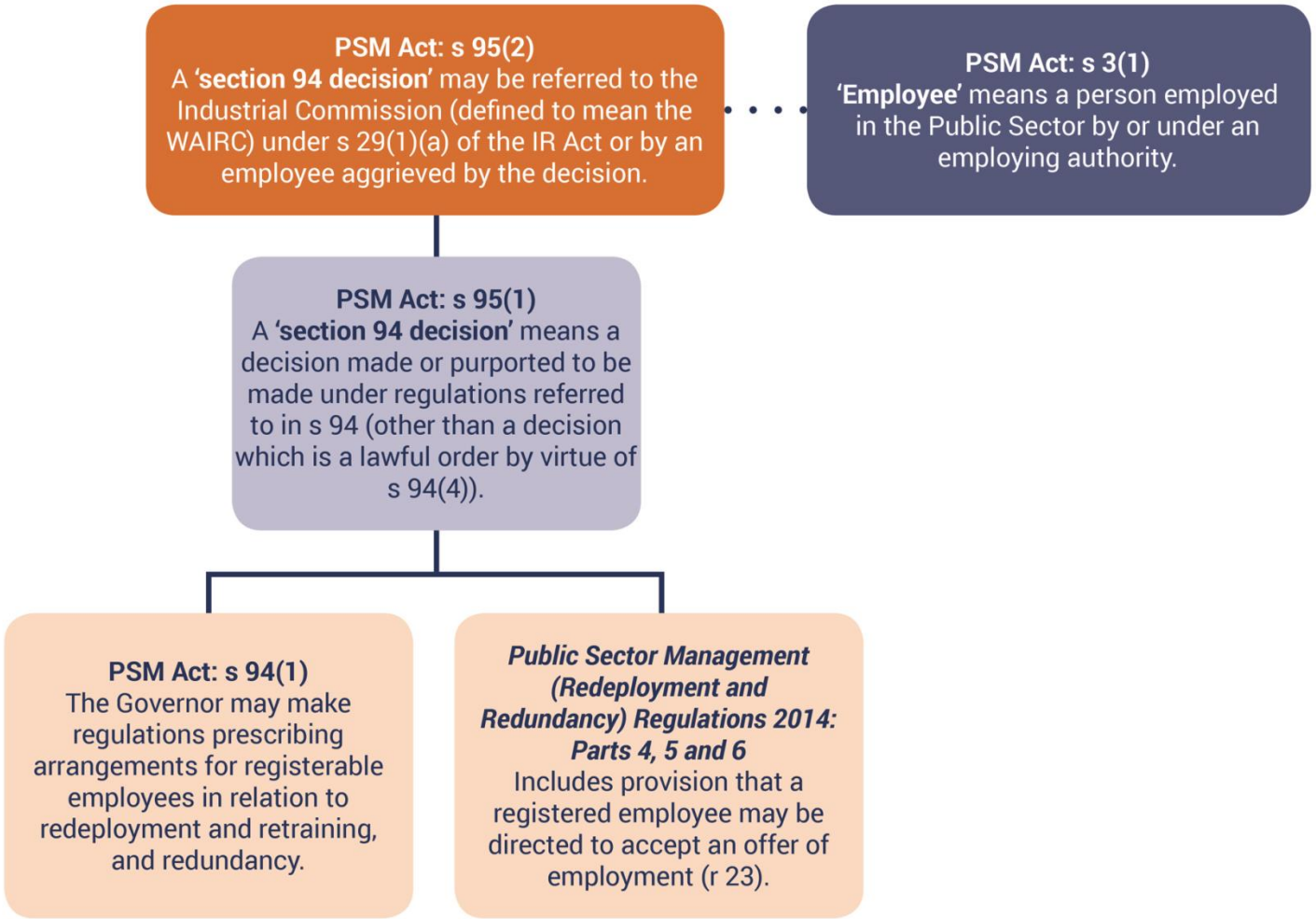
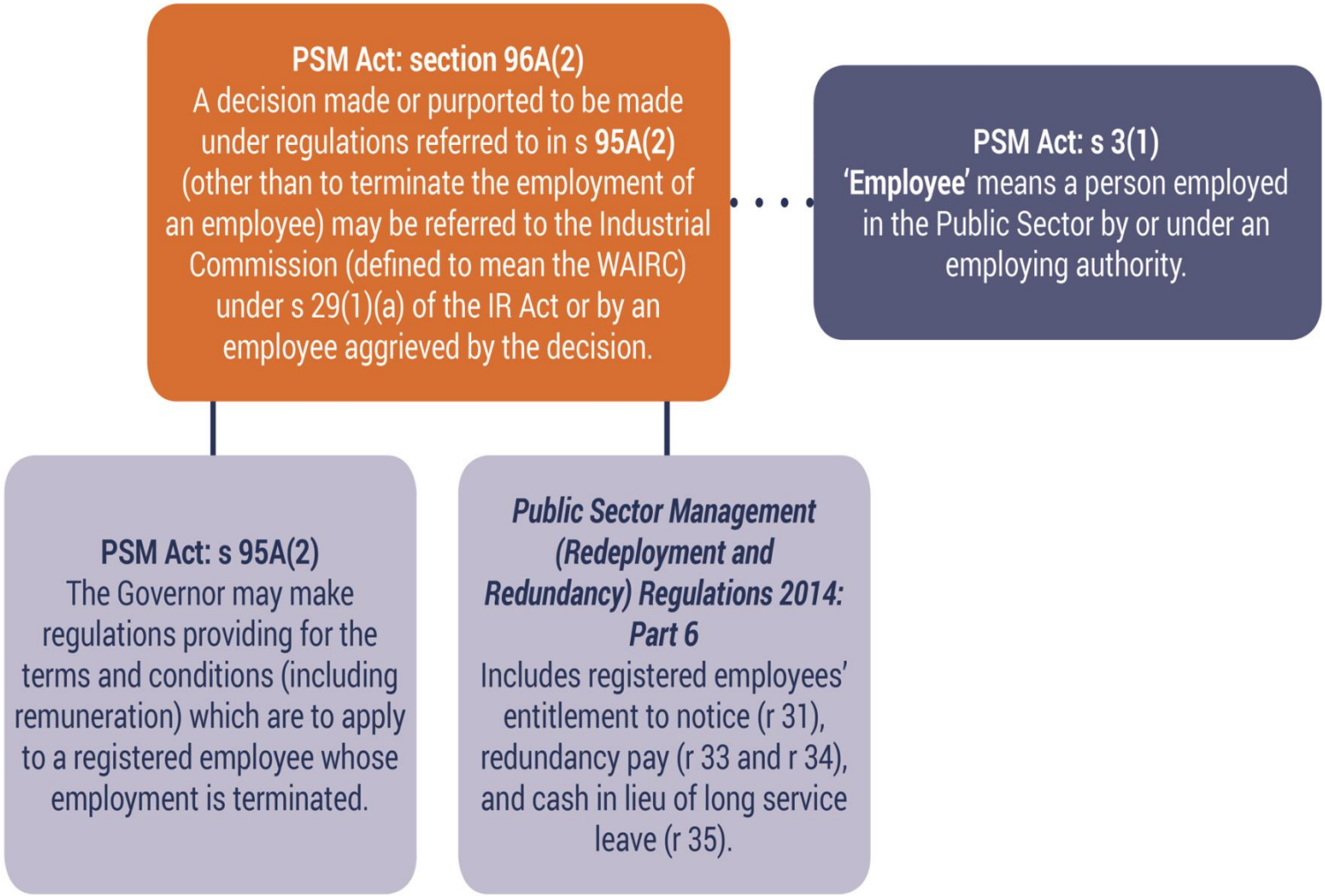


Figure 3A-5. Access under the PSM Act to the WAIRC under s 96A(2) of the *Public Sector Management Act* by an employee aggrieved by a decision made under regulations referred to in s 95A(2)



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*

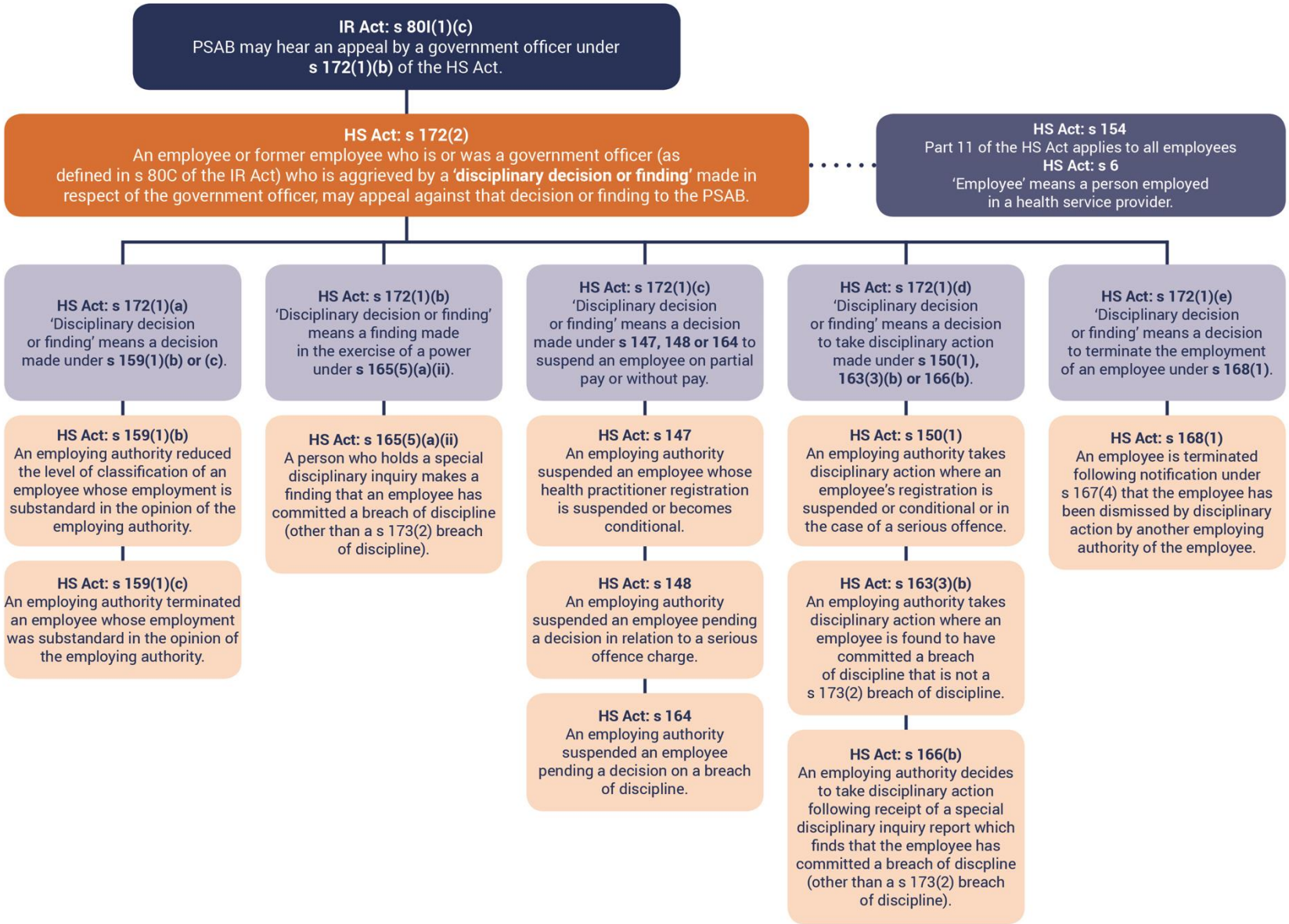


Figure 3B-2. Access to the WAIRC under s 172(4) of the *Health Services Act* by an employee who is not a government officer

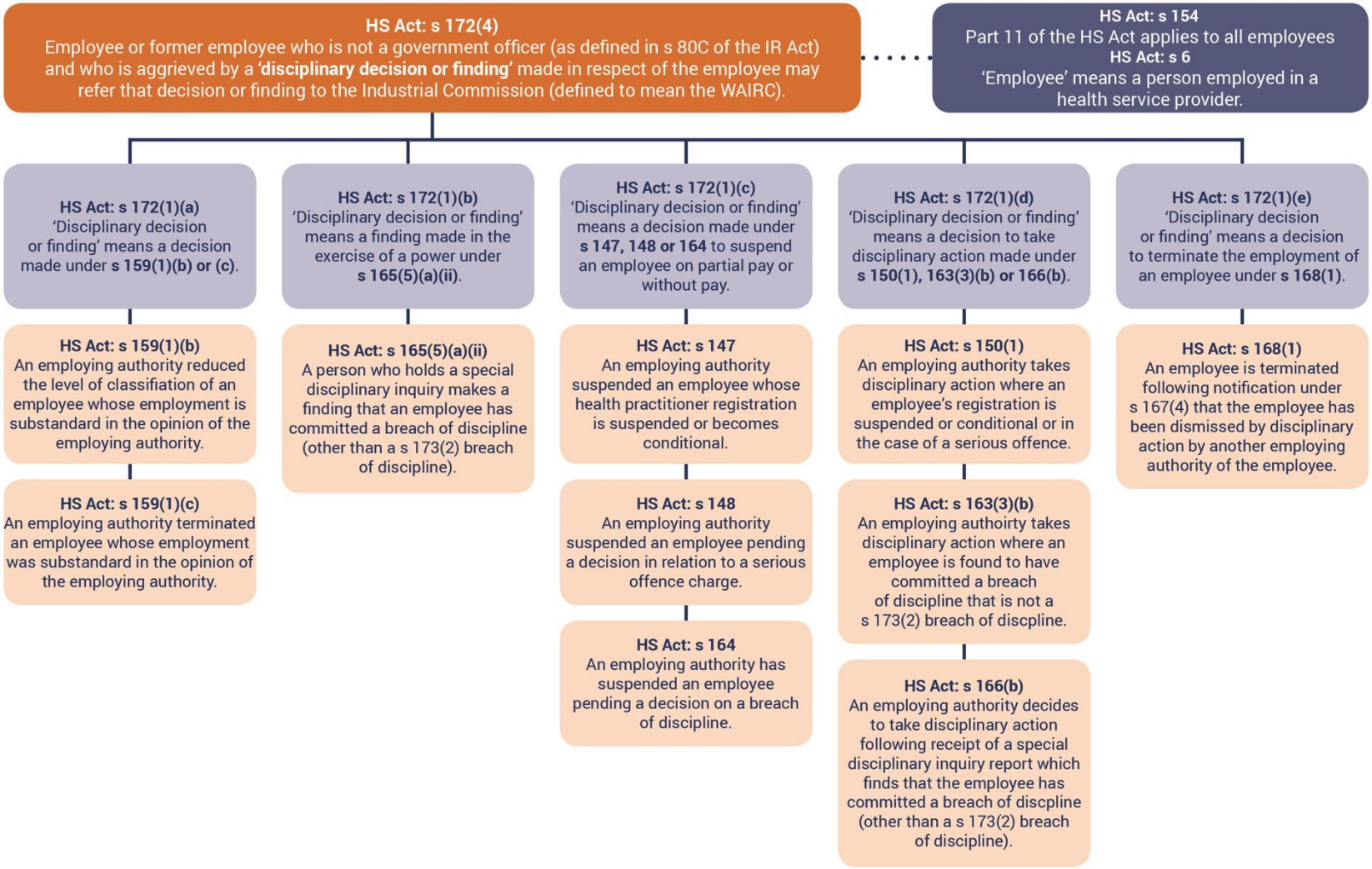
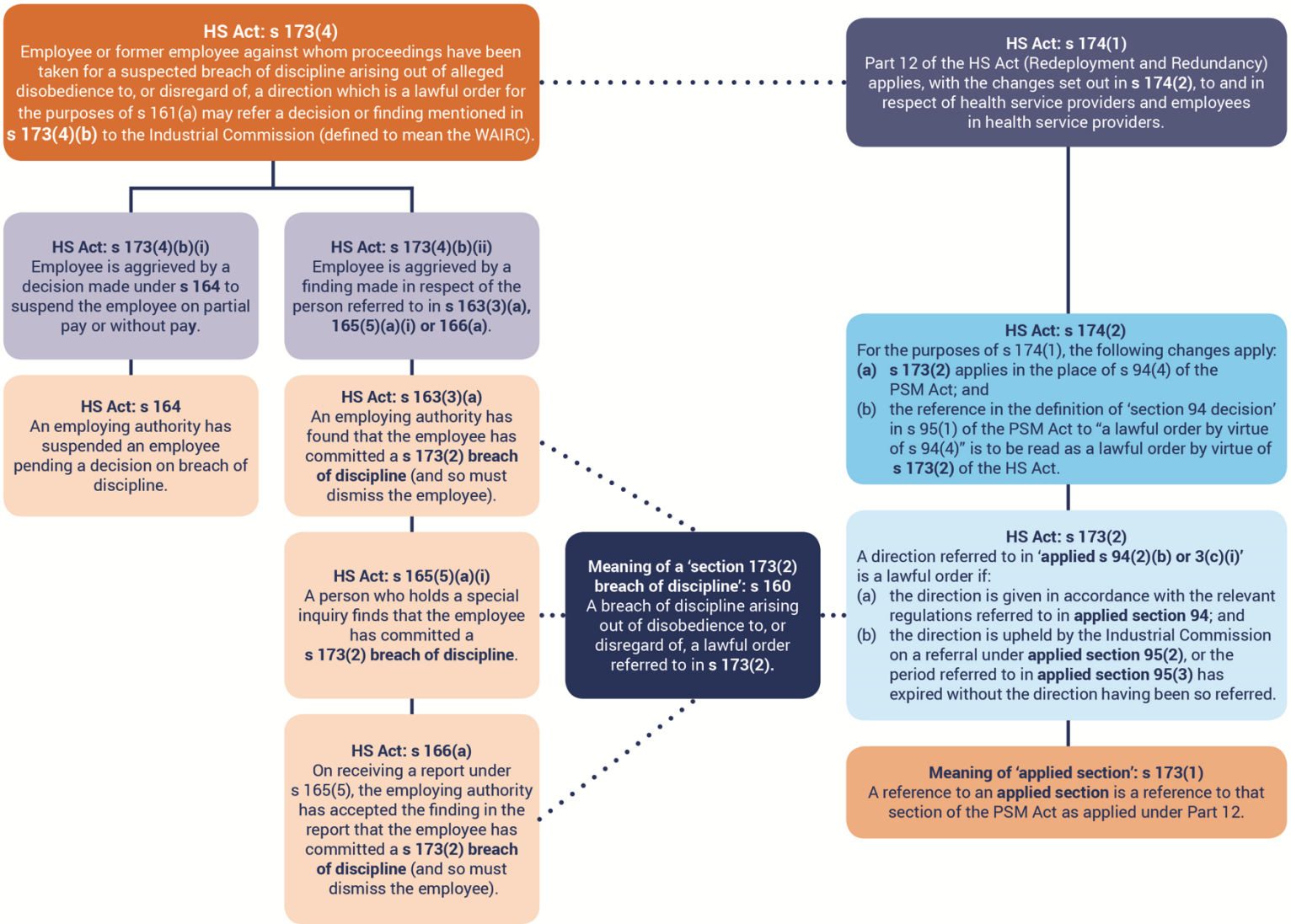


Figure 3B-3. Access to the WAIRC under s 173(4) of the *Health Services Act* by an employee against whom proceedings have been taken for a suspected breach of discipline or disobedience



Chapter 4 Equal Remuneration Provision in the *Industrial Relations Act 1979*

4.1 The Term of Reference

635. 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.

636. The construction of this Term of Reference is relatively straightforward. The Review is 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. The Term of Reference also refers to "other initiatives". The meaning of this phrase in the context of the Term of Reference is somewhat more opaque. At present, the Review is unaware of any other initiatives that could eventuate from the inclusion of an equal remuneration provision in the IR Act.

4.2 The Preliminary Opinion of the Review

637. Overall, the preliminary opinion of the Review is 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. That will, hopefully, have an impact upon the equalisation of remuneration between all genders in Western Australia. The preliminary opinion of the Review is that the provision ought be based upon the model operating in Queensland.

638. The Review's preliminary opinion is there ought to be an equal remuneration provision because of the nature and extent of the gender pay gap in Western Australia, and because to date there have been inadequate procedures, or use of procedures, within the WAIRC to facilitate doing something about it. Additionally, if an equal remuneration provision is included in the IR Act it is likely to increase

awareness of the issue and enhance discussion and the likelihood of a trend towards diminishing the gender pay gap in Western Australia.

639. This preliminary view is supported by the stakeholder submissions made to the Review, which are later summarised.

4.3 Outline of Issues

640. The purpose of having an equal remuneration provision in the IR Act would be to establish the framework and criteria through which equal remuneration cases could be determined by the WAIRC.

641. Key considerations for an equal remuneration provision in the IR Act would include:

(a) Who could make an application.

(b) Whether the WAIRC would have power to issue specific equal remuneration orders and what the criteria for making an equal remuneration order would be.

(c) The interaction of equal remuneration orders with other industrial instruments.

(d) What methodology (if any) should be specified for the WAIRC to assess the possible undervaluation of the work.

4.4 The Gender Pay Gap and an Equal Remuneration Provision

642. The gender pay gap (GPG) is the difference between male and female average weekly full time earnings and is the key measure of pay inequity in Australia. The WA GPG is currently 22.5 per cent. This is significantly higher than the national GPG of 15.2 per cent.[370]

643. **Attachment 4A** provides further information on the GPG in Australia.

370 ABS *Average Weekly Earnings, Australia, November 2017*, (2018) catalogue no. 6302.0 (trend data).

644. A legislative equal remuneration provision has been widely supported as an important strategy to assist in reducing the GPG.[371]

4.5 Current Legislative and Industrial Framework in Western Australia

645. Section 6(ac) of the IR Act says a principal object of the Act is "to promote equal remuneration for men and women for work of equal value*".*

646. Section 50A requires that the WAIRC make a State Wage Order before 1 July each year setting the minimum rates of pay applicable under the MCE Act adjusting wage rates paid under State awards, and setting out a statement of principles (the State Wage Fixing Principles) to be applied and followed in relation to the exercise of jurisdiction under the IR Act to set the rates of pay, allowances and other remuneration of employees. Section 50A(3)(a)(vii) of the IR Act requires the WAIRC to take into consideration the need to "provide equal remuneration for men and women for work of equal or comparable value*".*[372]

647. The current State Wage Fixing Principles applicable from 1 July 2017 is at Schedule 2 of the 2017 State Wage Order.[373]

648. As part of the 2007 State Wage Case, the submissions of the then Trades and Labor Council of WA and the Minister for Employment Protection (the Minister) sought to have a specific equal remuneration principle included in the State Wage Fixing Principles to establish a process and criteria for determining how the WAIRC could assess applications for award variations to provide equal remuneration.[374]

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371 See, Dr Trish Todd and Dr Joan Eveline, Report on the Review of the Gender Pay Gap in Western Australia, (2004); House of Representatives Standing Committee on Employment and Workplace Relations *Making it Fair* 2009; and the Senate Finance and Public Administration References Committee - *Gender segregation in the workplace and its impact on women's economic equality*, 2017; *Equal Pay – An Introductory Guide*, International Labour Organisation chapter 2. See also *Australia's gender pay gap statistics August 2017* Workplace Gender Equality Agency.

372 IR Act s 50A(3)(vii). The term "work of equal or comparable value"is a broader concept than the term "work of equal value". A focus on comparable value allows comparison between work that is different but may have similar characteristics or qualifications. See Explanatory Memorandum for the Fair Work Bill 2008 at [1191]. See also chapter 2 of *Equal remuneration under the Fair Work Act 2009: A report for the Pay Equity Unit of the Fair Work Commission* by Dr Robyn Layton, Dr Meg Smith and Professor Andrew Stewart.

373 2017 WAIRC 00355 2017 State Wage Order. 97 WAIG 714.

374 The Minister's proposed equal remuneration principle is at [59] of the State Wage Case 2007 Reasons for Decision 2007 WAIRC 00517.

649. The Minister's submission in reply stressed the key reason for seeking to introduce an equal remuneration principle into the State Wage Fixing Principles was to address the obligation in s 50A(3)(a)(vii) of the IR Act, cited above.[375]

650. In its reasons for decision, the WAIRC, as constituted by the CCS, expressed the view that the State Wage Fixing Principles should permit an application to be made for equal remuneration for men and women for work of equal or comparable value, and that given that a principal object of the IR Act in s 6(ac) is to promote equal remuneration for men and women for work of equal value, it is fundamental, in the context of the principles, to recognise that such a claim is able to be made.[376]

651. The CCS did not however consider it necessary to create a separate principle for this purpose, stating that such a claim could be brought under the existing Principle 10.[377] Nor did the WAIRC consider it advisable to set out the criteria by which such a claim would be assessed, expressing the view that specific criteria might restrict or confine a particular claim, which may not be appropriate. [378]

652. The following year, in the 2008 State Wage Case, the Minister's submission proposed that Principle 10 be modified to include specific reference to equal remuneration to give parties guidance on the matter.[379]

653. The CCS agreed with the Minister's proposal and Principle 10 was modified to include the statement that it could be used for matters "such as equal remuneration for men and women for work of equal or comparable value".[380]

654. There are limits however to using the Principle for this purpose. An application to vary an award, using Principle 10 or any of the other principles, can only be made by an organisation or association named as a party to the relevant award or an employer bound by the award.[381] That restriction is one reason in favour of establishing a separate equal remuneration provision in the IR Act.

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375 Minister's Submission in Reply to the 2007 State Wage Case [41].
376 State Wage Case 2007 Reasons for Decision 2007 WAIRC 00517 [126].
377 Ibid [127].
378 Ibid.
379 Minister's Submission to the 2008 State Wage Case [87].
380 State Wage Case 2008 Reasons for Decision WAIRC 00347 [69].
381 IR Act s 40.

655. Principle 10 has not yet been used to bring an equal remuneration application in the State jurisdiction.[382] There is therefore no case law criteria currently existing to guide the WAIRC in determining the process or merits of an equal remuneration application, or to guide parties to awards as to whether it is likely an application they are contemplating bringing, may or is likely to succeed, or the materials to provide to the WAIRC to enhance the prospects of success.

4.6 Industrial Relations (Equal Remuneration) Amendment Bill 2011

656. In 2011 Hon. Alison Xamon MLC (Greens WA) introduced the *Industrial Relations (Equal Remuneration) Amendment Bill 2011* (the Bill) into the Legislative Council.

657. In her second reading speech for the Bill, Ms Xamon stated the purpose of the Bill was to ensure that the authority of the WAIRC to hear equal remuneration cases was clarified, with current provisions in the IR Act being, in her view, "inadequate".[383] The Bill sought to amend the IR Act by:

(a) Amending the objects of the IR Act, by replacing the current object of "promote equal remuneration for men and women for work of equal value" with an object of "ensure equal remuneration for men and women employees for work of equal or comparable value".

(b) Giving the WAIRC the power to make "Equal Remuneration Orders". Under the amendment, the WAIRC would be able to issue an equal remuneration order where it considered such an order was appropriate to ensure that employees receive equal remuneration for work of equal or comparable value.

(c) Allowing for an equal remuneration matter to be brought to the WAIRC by an employer or employee, a union or employer association, and by the Commissioner for Equal Opportunity.

658. The Barnett Liberal Government did not support the Bill. The Minister for Commerce, the Hon. Simon O'Brien said during the second reading debate:

382 See 4.17 for information on the 2013 State SACS case.

383 Western Australia, *Parliamentary Debates*, Legislative Council, 20 October 2011 (Alison Xamon) 8425C – 8428a.

> The capacity to deal with equal remuneration issues already exists in the state industrial relations system, and that is important to note. The Industrial Relations Act provides an avenue for taking an equal remuneration case to the WA Industrial Relations Commission and the Commission has the power to issue orders to ensure equal remuneration under awards….
>
> Indeed, these provisions have been in place for a number of years and yet no application for an equal remuneration case has yet been made.[384]

659. The Bill was defeated at the Second Reading stage in the Legislative Council.

4.7 Other Legislative Issues

660. Any equal remuneration provision would be applicable to both the private and the public sector. It may well be however, that the provision is more likely to be used, at least in the short term, by public sector unions to progress equal remuneration cases for female dominated occupations such as dental clinic assistants, education assistants, child protection workers and social trainers.

661. Section 26(2A) of the IR Act was introduced in 2014 by the *Workforce Reform Act 2014*[385] and provides that in making a "public sector decision" the WAIRC must take into consideration:

> (a) any Public Sector Wages Policy Statement that is applicable in relation to negotiations with the public sector entity;
>
> (b) the financial position and fiscal strategy of the State as set out in the following -
>
> (i) the most recent Government Financial Strategy Statement released under the *Government Financial Responsibility Act 2000* section 11(1) and made publicly available under section 9 of that Act;
>
> (ii) the Government Financial Projections Statement;
>
> (iii) any submissions made to the Commission on behalf of the public sector entity or the State government; and
>
> (c) the financial position of the public sector entity as set out in the following –
>
> (i) the part of the most recent budget papers tabled in the Legislative Assembly that deals with the public sector entity under the title "Agency Information in Support of the Estimates" or, if the regulations prescribe another part of those budget papers, that other part;
>
> (ii) any submissions made to the Commission on behalf of the public sector entity or the State government.

384 Western Australia, *Parliamentary Debates*, Legislative Council, 23 August 2012, 5295a

385 s 4.

662. The current Public Sector Wages Policy Statement, issued in May 2017, requires that increases in industrial agreement wages and associated conditions for full time equivalent public sector employees be limited to $1,000 per annum.[386]

663. A "public sector decision" is defined in s 26 (2B) of the IR Act as:

> (a) an order made under section 42G that will be included in an agreement that will extend to and bind a public sector entity or its employing authority (as defined in the *Public Sector Management Act 1994* section 5);
>
> (b) an enterprise order that will extend to and bind a public sector entity or its employing authority (as defined in the *Public Sector Management Act 1994* section 5);
>
> (c) if the matters set out in subsection (2A)(a), (b) and (c) are relevant to the decision, any other decision that will extend to and bind a public sector entity or its employing authority (as defined in the *Public Sector Management Act 1994* section 5).

664. If there was an equal remuneration provision included in the IR Act, and if it was to be subject to s 26(2B), in public sector applications, then the Wages Policy could be a stumbling block to the making of an order, depending on the facts and circumstances of the individual case. A consideration of that complication is however outside of the scope of the Review; but the issue could well be a real one to confront a Government that may, in principle, support equal remuneration. What happens, for example, if the Government sees the merits of an application but it does not think the State could "afford" the pay rises being sought by a particular part of the public sector? Ultimately the issue would be one for the WAIRC to decide, as it is not bound by the Wages Policy, just bound to take it into account.

4.8 Pay Equity Research

665. In the past 20 years there have been two major studies of the GPG undertaken in Western Australia, as well as extensive research into the issue at the national and international level.[387]

666. In 1999, Associate Professor Geoffrey Crockett and Dr Alison Preston from Curtin University were commissioned by the then Department of Productivity and Labour

386 Public Sector Wages Policy Statement 2017 at [2].

387 Associate Professor Geoffrey Crockett and Dr Alison Preston, *Pay Equity for Women in Western Australia Research Report*, (1999)and Dr Trish Todd and Dr Joan Eveline *Report on the Review of the Gender Pay Gap in Western Australia*, (2004).

Relations to undertake a research project to identify and analyse the causes and reasons for the earnings gap between male and female workers in Western Australia, and the gap between WA female workers and their national counterparts, and to identify how these gaps may be significantly reduced.

667. The researchers were able to identify the causes for only one third of the GPG in Western Australia. The remaining two thirds of the gap remained "unexplained".

668. The researchers found one third of the GPG was attributed to:

(a) Productivity effects, that are considered to be acceptable differences resulting from differences in the education and experience of males and females.

(b) Wage structure effects that involve how the market pays for differences in characteristics such as qualifications, occupation and industry of employment.

669. 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 WA.

670. The *Report on the Review of the Gender Pay Gap in Western Australia* (Todd & Eveline Review), tabled in Parliament in November 2004, provided 34 recommendations on strategies to address the GPG.[388]

671. A major theme of the Todd & Eveline Review recommendations was that both voluntary and regulatory strategies should be used to address the GPG. Many of the recommendations of the Todd & Eveline Review were legal strategies, proposing either direct legislative change or actions based upon legislative change.

672. Key recommendations of the Todd & Eveline Review were:

(a) 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.

388 Dr Trish Todd and Dr Joan Eveline, p382.

(b) The inclusion of a requirement for employers to demonstrate that they have taken account of gender issues in relation to remuneration when registering industrial agreements and employer-employee agreements.

(c) Pay equity audits be undertaken, with audits being mandatory for the public sector, and voluntary within the private sector.

(d) The establishment of a Pay Equity Unit for Western Australia with the responsibility for implementing the recommendations of the Review.

673. **Attachment 4B** outlines the recommendations of the Todd & Eveline Review and provides information on the implementation status of the recommendations made by the Review. The attachment shows how the governmental response has been piecemeal at best.

674. The WA Pay Equity Unit (PEU) was established within the then Department of Consumer and Employment Protection in 2006. According to the Secretariat, between 2006 and 2015, the PEU progressed a broad range of strategies to assist employers to reduce barriers to workforce participation and career progression for women and raise community awareness of gender pay issues with the long term aim of reducing the State's GPG. The PEU was closed by the previous Government in 2015.

4.9 Current Federal Framework

675. Under Part 2-7 of the FW Act the FWC can make an equal remuneration order requiring certain employees be provided "equal remuneration for work of equal or comparable value."[389]

676. An application for an equal remuneration order can be made by an affected employee, a union which is entitled to represent an affected employee or the Sex Discrimination Commissioner.[390]

389 FW Act s 302(1).
390 FW Act s 302(3).

677. The FW Act provides that the FWC may make an equal remuneration order only if it is satisfied that, for the employees to whom the order will apply, there is not equal remuneration for work of equal or comparable value.[391]

678. The FW Act also specifies that an equal remuneration order must not provide for a reduction in an employee's rate of remuneration.[392] In deciding whether to make an equal remuneration order, the FWC must take into account orders and determinations made by the FWC in annual wage reviews and the reasons for those orders and determinations.[393]

679. Once an equal remuneration order has been made, it will prevail over a modern award, enterprise agreement, or a FWC order if the equal remuneration order is more beneficial for the employee than these instruments.[394]

4.10 Workplace Gender Equality Agency

680. The Federal Workplace Gender Equality Agency (WGEA) is responsible for promoting improved gender equality in Australian workplaces and working with employers to ensure compliance with the gender equity indicators reporting requirements under the *Workplace Gender Equality Act 2012 (Cth).*[395]

681. The *Workplace Gender Equality Act* requires non-public sector employers with 100 or more employees to submit a yearly report to WGEA against a set of standardised gender equality indicators.[396]

4.11 Federal Parliamentary Inquiries

682. In November 2009, the House of Representatives Standing Committee on Employment and Workplace Relations tabled the report of its inquiry into pay equity and associated issues related to increasing female participation in the workforce, titled *Making it Fair.*

391 FW Act s 302(5).
392 FW Act s 303(2).
393 FW Act s 302(4).
394 FW Act s 306.
395 www.wgea.gov.au.
396 *Workplace Gender Equality Act 2012* (Cth) s 13.

683. The *Making it Fair* report included 63 recommendations focused on actions to close the GPG, including proposed amendments to the FW Act.[397]

684. Recommendations relevant to the equal remuneration provisions in the FW Act included:

(a) The amendment of s 3 of the FW Act to state that equal remuneration for men and women employees for work of equal or comparable value is an explicit object of the Act.[398]

(b) The President of the FWC,[399] by promulgation, enunciate an equal remuneration principle and state how the principle is to be applied in all contexts.[400]

(c) The Government establish a discretionary fund to be administered by the Attorney General for the provision of funding of applications for remuneration orders. [401]

(d) The amendment of s 134 of the FW Act so as to require that an award must provide for equal remuneration for men and women employees for work of equal or comparable value.[402]

685. In June 2017 the Senate Finance and Public Administration References Committee released the *Report of the Inquiry into Gender Segregation in the Workplace and its Impact on Women's Economic Equality.*[403] In relation to the equal remuneration provisions of the FW Act and the progress of equal remuneration cases the Committee noted:

397 House of Representatives Standing Committee on Employment and Workplace Relations *Making it Fair* (2009), xxiv.
398 Ibid recommendation 3, xxiv.
399 Then called Fair Work Australia.
400 Ibid (Eg. work evaluation, comparisons across industries including similar and dissimilar work), recommendation 4.
401 Ibid recommendation 5.
402 Ibid recommendation 10.
403 Report Senate Finance and Public Administration References Committee *Report of the Inquiry into Gender Segregation in the Workplace and its Impact on Women's Economic Equality* (2017).

> Several witnesses and submissions asserted that the adversarial nature of the process for applicants seeking an equal remuneration order under the Fair Work Act is time consuming, costly and slow, and that only one case has been successfully completed before the Commission since 2013.[404]

686. The Committee also noted:

> Various submissions argued that remuneration equity is a national problem and that the current provisions in the Act are unlikely to be effective in addressing the gender pay gap.[405]

687. The Committee recommended reforms to the FW Act and to the FWC to improve the mechanisms by which the undervaluation of female-dominated work can be redressed. Specifically, the Committee recommended the FW Act be amended to improve its capacity to address equal remuneration, including:

(a) Introducing gender pay equity as an overall object of the FW Act.

(b) The provision of guidance for both the FWC and applicant parties on making and applying for orders of equal remuneration.

(c) Specifying that applications could be made for equal remuneration orders and work value claims simultaneously.[406]

688. The Committee recommended that the FWC and applicant parties draw on the equal remuneration principles previously adopted in the NSW and Queensland jurisdictions including:

(a) Requiring that there be reference to historical and contemporary gender-based undervaluation.

(b) Suggesting the steps required by applicants to demonstrate undervaluation was gender based or had a gender-associated cause.

(c) Clarifying that an application could be made without the need for a direct male comparator to establish undervaluation.[407]

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404 Ibid [4.53].
405 Ibid [4.56].
406 Ibid recommendation 2 [6.23].
407 Ibid.

4.12 Queensland

689. A review of the industrial relations framework in Queensland was undertaken in 2015.[408] Subsequently, the *Queensland Industrial Relations Act 2016* (QIR Act) was enacted. As Queensland has referred its industrial relations powers to the Commonwealth for the private sector, the QIR Act applies primarily to the State public sector and local government in Queensland. The QIR Act includes an equal remuneration provision.[409]

690. Under the QIR Act:

(a) When making modern awards the Queensland Industrial Relations Commission (QIRC) is required to ensure the value of work is identified appropriately and equal remuneration for work of equal or comparable value is provided for.[410]

(b) When an application for certification of an agreement, or the making of a bargaining award, is made the application must be accompanied by an affidavit, signed by or for each of the parties, that:

i. Contains the wage-related information for the employees who are or will be covered by the proposed bargaining instrument; and

ii. States the steps taken by the parties to the instrument to provide for equal remuneration of work of equal or comparable value; and

iii. For a provision that allows differential treatment of wages for different groups of employees – the justification for including the provision in the instrument.[411]

691. The QIRC has the power to make equal remuneration orders, on application, to ensure employees receive equal remuneration for work of equal or comparable

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408 A review of the industrial relations framework in Queensland, A report of the Industrial Relations Legislative Reform Reference Group, December 2015.

409 Equal Remuneration of the QIR Act, chapter 5. Also, see the Second Reading Explanatory Speech and the Explanatory Notes for the Queensland Industrial Relations Bill 2016.

410 QIR Act s 248.

411 Ibid s 250.

value.[412] Equal remuneration orders made by the QIRC can cover reclassifying work, establishing new career paths, implementing changes to incremental scales, reassessing definitions and descriptions of work to properly reflect the value of the work as well as increases to wages and allowances.[413]

692. The Queensland equal remuneration framework also includes an Equal Remuneration Principle (Qld ER Principle), issued as a statement of policy by the QIRC. The Qld ER Principle was made in April 2002 by consent following hearings before a Full Bench of the QIRC.[414]

693. The Qld ER Principle applies when the QIRC:

(a) Makes, amends or reviews awards.

(b) Makes equal remuneration orders.

(c) Arbitrates industrial relations disputes about equal remuneration.

(d) Values or assesses the work of employees in "female industries, occupations or callings".[415]

694. Key provisions of the Qld ER Principle include that:

(a) Prior work value assessments or the application of previous wage principles cannot be assumed to have been free of assumptions based on gender.

(b) Gender discrimination is not required to be shown to establish undervaluation of work.

(c) Comparisons within and between occupations and industries are not required in order to establish undervaluation of work on a gender basis.[416]

412 Ibid s 252.
413 Ibid.
414 The Queensland Council of Unions and Others AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others (No. B450 of 2002); *Equal Remuneration Principle* (2002) 114 IR 305.
415 *Equal Remuneration Principle* (2002) 114 IR 305.
416 Ibid.

695. A number of equal remuneration cases were heard by the QIRC using this equal remuneration principle and are discussed below. A grants program was also created to provide funding assistance to organisations involved in pay equity cases under the Principle.[417]

4.13 New South Wales

696. In New South Wales the Industrial Relations Commission (NSWIRC) issued a decision in 2000 which established an equal remuneration principle to redress the historical gender-based undervaluation of women's paid work.[418] The decision followed the 1998 Pay Equity Inquiry in NSW undertaken by Justice Glynn which considered a range of evidence, including the history of equal pay cases, and case studies to enable the assessment of female dominated and male dominated industries.[419]

697. As NSW referred its industrial relations powers to the Commonwealth for the private sector, the Equal Remuneration Principle (NSW ER Principle) now applies only to the State public sector and local government.

698. The NSW ER Principle:[420]

(a) Allows for fresh assessments of the value of work and the rates of pay in an award where the current rate is undervalued on a gender basis.

(b) Does not require applicants to prove discrimination.

(c) Tries to ensure the reassessment of the value of work is gender-neutral.

(d) Does not require comparisons to be made, but where they are used can be made across dissimilar work and across enterprises.

(e) Is limited to awards, although account can be taken of actual rates paid where they reflect the value of work.

(f) Provides a range of measures to remedy gender-related undervaluation.

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417 As referenced in Dr Robyn Layton, Dr Meg Smith and Professor Andrew Stewart *Equal remuneration under the Fair Work Act 2009: A report for the Pay Equity Unit of the Fair Work Commission 2013*.

418 [2000] NSWIRComm 113.

419 As referenced n 417 above.

420 [2000] NSWIRComm 113.

(g) Includes a range of economic safeguards.

4.14 Queensland and NSW Equal Remuneration Cases

699. In the last 15 years there have been a number of significant equal remuneration cases heard by the State tribunals in New South Wales and Queensland.

700. The first case in NSW heard after the NSW ER Principle was adopted was *Crown Librarians, Library Officers and Archivists Award Proceedings – Applications under the Equal Remuneration Principle* (2002).[421] The Full Bench accepted that the work of librarians had been undervalued on a gender basis. This was followed by a case for child care workers in 2006 which was the first contested matter heard under the State's Equal Remuneration Principle.[422]

701. In Queensland in 2003 two equal remuneration cases were lodged, for private sector dental assistants[423] and childcare workers.[424] In both these cases, the QIRC found the female dominated work undertaken was undervalued.

702. In 2008 the Queensland Services Union applied for a new award covering community services and crisis assistance workers in the social and community services sector (SACS sector).

703. The first stage of the application resulted in the creation of the Queensland Community Services and Crisis Assistance Award – State 2008, by consent, in September 2008. The second stage of the application sought increased pay rates under the new award, to correct historical undervaluation, as well as a 1.25 per cent Equal Remuneration Component to maintain ongoing wage parity because of a lack of enterprise bargaining in the sector.[425]

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421 *Crown Librarians, Library Officers and Archivists Award Proceedings – Applications under the Equal Remuneration Principle* (2002) 111 IR 48.

422 *Re Miscellaneous Workers' Kindergartens and Child Care Centres etc (State) Award* (2006) 150 IR 290 (at [63], [84], [128]–[153], [155]).

423 *Liquor Hospitality and Miscellaneous Union (Queensland Branch) v Australian Dental Association (Qld Branch)* (2005) 180 QGIG 187.

424 See *Liquor Hospitality and Miscellaneous Union (Queensland Branch) v Queensland Union of Employers (2006)* 181 QGIG 568 (interim decision); *Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees v Children's Services Employers Association* (2006) 182 QGIG 318 (final decision).

425 *Queensland Services, Industrial Union of Employees v Queensland Chamber of Commerce and Industry Ltd* (2009) 191 QGIG 19, Information on the case referenced from Dr Robyn Layton, Dr Meg Smith and Professor Andrew

704. As in the previous applications under the QLD ER Principle, evidence focused on the features of the industry, indicators of undervaluation, the award history, consideration of work value and comparisons with other occupations and industries.[426]

705. The QIRC concluded that factors which contributed to undervaluation included the "female characterization" of the work and that the nature of the work in the community sector was considered to be an extension of work undertaken by women in the domestic sphere, including the caring and nurturing of dependants.[427]

706. Wage increases between 18 percent and 37 percent were granted to Queensland SACS sector workers in 2009, depending on the level of the employee, under the Award.

707. The Queensland Government made a commitment to fully fund the wage increases arising from the 2009 SACS equal remuneration decision in Queensland, and a total of $414 million extra funding for the sector, over four years, was allocated in the Queensland State Budget.[428]

708. The most recent case in the Queensland jurisdiction is *Australian Workers' Union of Employees, Queensland v Queensland Community Services Employers Association Inc* in 2009.[429]

4.15 Federal Social and Community Services Equal Remuneration Case

709. In November 2009 the Commonwealth Government announced it had reached agreement with the Australian Services Union (ASU) to support the conduct of a major test case on pay equity for SACS sector employees under the FW Act.[430]

Stewart *Equal remuneration under the Fair Work Act 2009: A report for the Pay Equity Unit of the Fair Work Commission 2013* pp 168 – 169.

426 Ibid.

427 Ibid.

428 https://s3.treasury.qld.gov.au/files/bp4-2009-10.pdf p. 8.

429 (2009) 192 QGIG 46.

430 Media statement by Hon. Julia Gillard MP, Minister for Employment and Workplace Relations *Community sector workers to move to Fair Work system and seek national pay equity order*, 4 November 2009.

710. SACS sector workers are employed in the social, community and disability services industry primarily in not-for-profit community organisations that are funded by the Commonwealth Government and relevant State Governments.[431]

711. The application was lodged with (the then) Fair Work Australia (FWA) in 2010 by the ASU and other unions representing workers in the SACS industry. The application sought to mirror the wage increases granted to Queensland SACS sector workers in 2009, referred to above.

712. In May 2011, the FWA issued an interim decision, acknowledging that the predominantly female composition of the sector's workforce had contributed to low wages growth, and that for employees in the SACS industry there was not equal remuneration for men and women workers for work of equal or comparable value by comparison with state and local government employment.[432]

713. In November 2011, then Prime Minister Julia Gillard announced that the Commonwealth Government would commit $2 billion in additional funding to Federally funded community organisations to deliver the pay increase to the SACS workers.[433]

714. In February 2012 the majority[434] of the Full Bench of FWA issued the first and to date only equal remuneration order under the FW Act to increase wages in the SACS sector in recognition of the gender undervaluation of the work performed in this sector.[435]

715. The decision increased wage rates in Levels 2 - 8 under the *Social, Community, Home Care and Disability Services Industry Award 2010* and granted an additional 4 per cent loading to recognise the lack of bargaining in the SACS sector. The wage increases are being phased in over nine equal instalments between 2012 and 2020.

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431 [2012] FWAFB 1000.

432 Information on the case referenced from n 417 above, 63-76.

433 Ibid, page 69.

434 In a dissenting judgment, Vice President Watson found that the applicants had not made out a case for granting pay increases of the magnitude sought, 2012 FWAFB 1000 at [83].

435 [2012] FWAFB 1000.

716. As part of the 2011-12 State Budget, additional funding of $600 million over four years was provided by the State Government to support a sustainable not-for-profit sector. This funding was able to be used by SACS sector organisations to meet increases in pay rates resulting from SACS sector pay increases.[436]

4.16 Federal Child Care Equal Remuneration Cases

717. In 2013 United Voice and the Australian Education Union made an application to the FWC for an equal remuneration order pursuant to s 302(3)(b) of the FW Act for employees covered by the *Children's Services Award 2010* in the children's services and early childhood education industry.[437]

718. A separate application was subsequently made by the Independent Education Union of Australia in relation to the *Educational Services (Teachers) Award 2010*.[438]

719. In November 2015 the FWC issued a preliminary decision in relation to the United Voice and Australian Education Union application dealing with the proper construction of Part 2–7, Equal Remuneration of the FW Act and addressing a number of legal and conceptual issues. [439]

720. The FWC Full Bench found that, in order for the jurisdictional prerequisite for the making of an equal remuneration order in s 302(5) of the FW Act to be met, a comparator occupation is required. That is, the FWC must be satisfied that an employee or group of employees of a particular gender to whom the order would apply do not enjoy remuneration equal to that of another employee or group of employees of the opposite gender who perform work of equal or comparable value. The Full Bench did not accept that s 302(5) of the FW Act could be satisfied on the basis of gender-based undervaluation without the need for a comparator.[440]

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436 2011-12 State Budget Fact Sheet: *Sustainable Funding and Contracting with the Not-for Profit Sector* www.ourstatebudget.wa.gov.au

437 Matter C2013/5139.

438 Matter C2013/6333.

439 2015 FWCFB 8200.

440 2015 FWCFB 8200.

721. In 2016 the applicant unions identified a proposed male comparator,[441] and, in a decision of 6 July 2017, the FWC Full Bench established a preliminary question to be answered which was:

> Can the Commission be satisfied conclusively that the work performed by employees under the C5 and C10 classifications in the Manufacturing and Associated Industries and Occupations Award 2010 is of equal or comparable value to the work of employees under the Diploma Level and Certificate III classifications in the Children's Services Award 2010 respectively solely on the basis of the decision of the Australian Industrial Relations Commission Full Bench decision of 13 January 2005 (Print PR954938) and the subsequent alignment in award rates for the respective classifications?

722. On 6 February 2018 the FWC Full Bench dismissed the United Voice and Australian Education Union equal remuneration application on the basis that the answer to the preliminary question was a negative.[442] The Full Bench found that the 2005 Australian Industrial Relations Commission case was insufficient, in the absence of contemporary evidence, to establish that work under the C5 and C10 classifications of the *Manufacturing and Associated and Industries and Occupations Award 2010* is of equal or comparable value to the work of employees under the *Children's Services Award 2010.* The Full Bench determined that the 2005 decision "cannot by itself support the positive answer to the preliminary question sought" by the unions.[443]

723. The FWC Full Bench made a number of observations regarding the evidence provided and approach taken by the applicant unions to respond to potential concerns, saying the observations were made "lest it be said that in light of this outcome the system for the achievement of equal remuneration established by the FW Act is ineffective".[444]

724. The FWC Full Bench also observed that it is open to the applicant unions to lodge a fresh application to present alternative evidence that the work of child care workers is undervalued on the basis of gender.[445]

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441 The Diploma level (Level 4.1) and Certificate III level (Level 3.1) classifications under the *Children's Services Award 2010* applied to work of equal or comparable value to that performed under the C5 and C10 classifications respectively in the *Manufacturing and Associated Industries and Occupations Award 2010*.

442 2018 FWCFB 177.

443 Ibid [36].

444 Ibid [55].

445 2018 FWCFB 177, [59].

725. The Independent Education Union of Australia application in relation to early childhood teachers is listed for hearing later in 2018.

4.17 The State Social and Community Services Case

726. In 2011, the WAIRC made two new State awards, the *Social and Community Services (Western Australia) Interim Award 2011*, and the *Crisis Assistance, Supported Housing Industry Western Australian Interim Award 2011* to cover State-jurisdiction SACS sector employees. These awards were replicas of the two Federal pre-modern awards that previously applied to SACS workers but which ceased to apply to employers which were not constitutional corporations on 26 March 2011.

727. In 2012 the Western Australian Municipal, Administrative, Clerical and Services Union of Employees (WASU) lodged an application in the WAIRC to vary the two new SACS awards to increase wage rates to a level equivalent to the pay rates granted in the Federal SACS equal remuneration case.

728. The two major employer groups in the SACS sector, Community Employers WA and the Western Australian Council of Social Service (WACOSS), both provided in-principle support for the WASU application from the outset, contingent upon additional funding being made available to employing organisations.

729. On 18 June 2013, the then Federal Minister for Employment and Workplace Relations, the Hon. Bill Shorten, and the then Federal Minister for Community Services, the Hon. Julie Collins, wrote to the WAIRC stating that "the Australian Government is committed to fund its share of any wage increases should the ASU's application before the Commission be successful."[446]

730. The Western Australian Government provided funding to the not-for-profit sector as part of the 2011-12 State Budget of $600 million over four years which was able to be used by SACS sector organisations to meet increases in pay rates resulting from SACS sector pay increases.[447]

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446 Reasons for Decision State SACS Case 2013 WAIRC 00795 at [18].

447 2011-12 State Budget Fact Sheet *Sustainable Funding and Contracting with the Not-for Profit Sector www.ourstatebudget.wa.gov.au.*

731. In August 2013 the WAIRC granted the applications to vary the two State SACS awards.[448] All participating parties had reached agreement on the terms of the proposed orders, and the application was a consent application for award variation.

732. The WAIRC determined that the application could be granted under State Wage Fixing Principle 10, i.e. as an application made on grounds other than those covered in the other wage fixing principles. Significantly, the WAIRC emphasised that the application was **not** made on grounds of equal remuneration for men and women, but rather to rectify the inequity between SACS workers in the State and Federal jurisdictions and create a level playing field for wages in the industry.[449]

4.18 Submissions to the Review

733. Submissions were provided by the following people and institutions about this Term of Reference: the Liberal Democrats Western Australia, the Equal Opportunity Commission, Community Employers WA, Professor Alison Preston (UWA Business School), the Plumbing and Pipe Trades Employees Union, the Australian Council of Trade Unions (ACTU), Hon. Alison Xamon MLC (Greens WA), the WASU, Australian Mines and Metals Association (AMMA), Community Legal Centres Association (WA), the CPSU/CSA, the ELC, the Australian Nursing Federation Industrial Union of Workers Perth (ANF IUWP), the HSUWA, United Voice, the CCI, the Shop, Distributive and Allied Employees' Association of Western Australia (SDA), the IEU, UnionsWA and WACOSS.

734. The preponderance of these submissions were in support of a provision favouring applications being able to be made to the WAIRC for equal remuneration for men and women for work of equal value.

735. There were some exceptions to this including the submissions from the Liberal Democrats Western Australia which submitted that equal pay laws should not be

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448 Application 17 of 2012 *Western Australian Municipal, Administrative, Clerical and Services Union of Employees v Aboriginal Alcohol and Drugs Service and Others* (Application to vary the Crisis Assistance Supported Housing Industry - Western Australian Interim Award 2011) and Appl 18 of 2012 *Western Australian Municipal, Administrative, Clerical and Services Union of Employees v Marra Worra Aboriginal Corporation and Others* (Application to vary the Social and Community Services (Western Australia) Interim Award.

449 2013 WAIRC 00795 Reasons for Decision issued 6 September 2013. 2013 WAIRC 00775 and 2013 WAIRC 00776 Final Orders.

introduced because they do not help women workers achieve higher wages and conditions. Whilst the Review respects this viewpoint, it is not supported by the research papers and previous studies in Western Australia, nor others making submissions. In particular, the Review notes that the Equal Opportunity Commission submitted that if a provision was enacted the WAIRC would have the scope to address inequities that underpin the GPG.

736. Professor Preston, in her submission, repeated the importance of including an equal remuneration provision in the IR Act as being consistent with the recommendations of the 2004 Todd & Eveline Pay Equity Review. Professor Preston's submission was that the recommendation remains valuable today.

737. The unions who provided submissions on the issue were supportive of the inclusion of an equal remuneration provision in the IR Act. So too was Ms Xamon who also emphasised that the Government would need to ensure the WAIRC was properly resourced and empowered to be able to hear pay equity cases and make enforceable equal remuneration orders where work had been undertaken of equal or comparable value.

738. The ELC opined that the Western Australia approach towards gender based equal remuneration needed improvement. The submission noted s 6(ac) and s 50A(3)(a)(vii) of the IR Act, referred to earlier, but argued these sections do not go far enough to give the WAIRC the clear authority to conduct equal remuneration cases and make equal remuneration orders, or to give employees in the State system an effective mechanism by which to achieve equal remuneration.

739. The United Voice submission provided detailed and helpful information on the GPG, the reasons supporting an equal remuneration provision and workforce gender segregation issues generally. In particular, United Voice submitted that the Australian industrial relations system is failing to achieve equal pay for working women in Australia. The submission said that unequal pay outcomes between women and men is a stark indicator of the different ways women and men engage with the workforce and how they are valued for it. It was submitted that two thirds of United Voice's members are women and a significant proportion of them are in

highly gender segregated sectors such as early childhood education and care, aged care, disability care and health care. It was submitted that from its experience as the union representing workers in a number of historically gender based and low paid industries, United Voice was in a position to make a strong submission that the provision under consideration was a necessary addition to the State industrial relations system in order to progress pay equity in Western Australia.

740. CCI, in principle, supported the desire and the commitment of the Government to improve pay equity in Western Australia. However, it had concerns about whether equal remuneration could be effectively realised through the facilitation of equal remuneration cases and other activities in the WAIRC. CCI was understandably concerned that such cases could impose additional costs on business and across the system but would be unlikely to achieve pay equality. It submitted that business could achieve more effective pay and equity outcomes through company driven changes rather than imposed outcomes. Whilst the Review notes this comment, the efforts that have been made by the business community in the past and present[450] need statutory supplementation in the preliminary opinion of the Review. This preliminary opinion is consistent with the position taken in the reports prepared on the topic for Western Australia, as set out earlier in this chapter, and is consistent with the FW Act having an equal remuneration provision.

741. CCI recommended, overall, that the State should refer its industrial relations legislative powers to the Commonwealth, so that more Western Australian enterprises would have access to Federal pay equity mechanisms. This submission was associated with other submissions about initiatives that might be taken by the State Government. The Review notes that it is beyond the Terms of Reference to consider whether there ought to be a referral to the Commonwealth of the type mentioned. The Minister has been clear that the Government is not contemplating that. It is noted however, that as CCI has intimated, it is difficult to foresee that an equal remuneration provision in the IR Act would, on its own, have a significant impact on the GPG in Western Australia in the private sector. This is because of the

[450] See for eg R Cassell, and A Duncan, 2008 - *Gender Equity Insights 2018: Inside Australia's Gender Pay Gap,* 7 March 2018, BankWest Curtin Economics Centre.

relatively small section of the private workforce in the State system to which any provision would apply. It was submitted that even the highest female employment industries in retail, hospitality and perhaps other areas, do not have enough State coverage to effect macro-level change. As a counter, however, the provision could supplement Commonwealth legislative and industrial powers and measures. Additionally, and as set out earlier it is most likely that the impact of an equal remuneration provision will be in the public sector in Western Australia. The concerns of CCI do not seem to be directed, understandably given its constituency, to that area of operation of the provision.

742. UnionsWA was strongly supportive of the submission made by United Voice as an affiliate member. UnionsWA noted that effective measures for pay equity should be at the heart of any modern industrial relations system. Adopting an equal remuneration principle, making equal remuneration orders and closing the gender pay gap should be explicit priorities of the State industrial relations system. The Review, provisionally, accepts this submission.

743. As to the form of an equal remuneration provision, where such a submission was made for an equal remuneration provision, most submissions to the Review favoured the adoption of the Queensland model, over the Commonwealth or NSW models. This position was adopted by the WASU, the ACTU, United Voice, the SDA and UnionsWA. There was some support, albeit lesser, for the Federal system. On a provisional basis the Review accepts that the Queensland model has worked within that State whereas the Commonwealth model has had the problems as earlier identified.

744. This view is supported by the ELC which asserted Queensland's approach to equal remuneration was regarded as one of the most advanced within Australia and overcomes some of the problems identified in relation to the FW Act. In particular, the ELC argued that adopting the Queensland model would avoid the difficulty of identifying a group of male employees doing work of equal or comparable value who are receiving higher remuneration in order to make an equal remuneration order for the benefit of female employees. The CPSU/CSA supported this position and said

also that the Queensland model was superior as it provided greater scope for the making of equal remuneration orders due to the greater number of parties who could make an application; as well as the WAIRC not being constrained by annual wage reviews, as is the case with the FW Act model.

745. Some of the submissions also considered whether awards and agreements should provide for equal remuneration. It is noted that the QIR Act includes a requirement for equal remuneration provisions in its awards and agreement making. If the Queensland model is adopted by the State, then these aspects of the model should also be imported.

746. Irrespective of this, and even if not legislated for, an equal remuneration provision is something that is likely to be taken on board by the WAIRC in the process of development of the new awards that it is recommended be undertaken in chapter 7 of the Interim Report dealing with awards in the private sector. With respect to the public sector, assessment of the issue can probably await further consideration pending the response of the Government to the other recommendations that might be made by the Review. If stakeholders think otherwise, then submissions on the issue can be further made in response to the publication of the Interim Report.

747. There were also submissions that argued there were other measures that needed to be taken to support pay equity. UnionsWA for example argued that the State Government should require its agencies to audit their organisations for compliance with pay equity principles, formulate pay equity plans to address areas where these organisations fail to comply with the principles, and set targets for pay equity outcomes as reportable to Parliament. It was also submitted that the State could require pay equity plans from companies and non-government organisations with which the State Government has procurement and tender arrangements and service delivery contracts. UnionsWA also submitted the State Government should actively support pay equity cases being taken to the WAIRC. That support should include a commitment to fully fund the wage outcomes from the cases. That is a matter, in the Review's preliminary opinion, that would need to be considered by the State Government on a case by case basis. If a case before the WAIRC led to orders being

made, involving the public sector, then they would of course have to be followed by the State as being an order from the WAIRC. WACOSS made the point that providing for the advancement of gender equity through the facilitation of State equal remuneration orders was crucial, but the Government needed to recognise it had a continued role after the orders were made. It was submitted that the members of WACOSS had difficult choices in balancing their commitment to delivering the best possible services and support to the vulnerable and disadvantaged members of the community, and their commitment to treat the workers fairly and provide a safe and fulfilling working environment. WACOSS submitted there would be difficulties created if the organisations were forced to cut services and staff as they were unable to afford to pay a fair and just wage as a result of Government contracting and funding decisions. On that basis it was submitted the Western Australian community would be left significantly poorer. These submissions highlight some of the concerns of CCI. They are real economic considerations which, in the Review's preliminary opinion, must be taken into account by the State Government in moving forward.

748. With respect to the public sector, AMMA made the point that the State Government did not need the approval or involvement of the WAIRC to implement equal remuneration principles that it might consider appropriate. Whilst that is true, the submission ignores, with respect, the prospect that employees may wish to argue before the WAIRC, that equal remuneration principles were not being observed by the State Government. The Review considers that to be an important matter.

749. Submissions were also made more generally about the wage fixing principles and the current ability to bring an equal remuneration matter within the State system. That is noted and is one of the reasons why the Review, at this point, favours the introduction of the provision under consideration.

750. Other issues were raised by the CPSU/CSA in its submissions about classification systems used in the public sector to determine pay scales, are, in the opinion of the Review, beyond the Terms of Reference.

4.19 Proposed Recommendations

751. Having regard to the above, the Review is of the preliminary opinion to propose the following recommendations to the Minister.

752. As with all other proposed recommendations however, the Review would welcome any submissions which may either endorse, challenge or disagree with these proposed recommendations.

Proposed Recommendations

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.

Attachment 4A - Pay Equity and the Gender Pay Gap Further Information

1. The *Equal Opportunity Act 1984* (WA) and the *Sex Discrimination Act 1984* (Cth) both prohibit employers from discriminating against workers on the basis of gender. It is illegal to pay men and women different rates of pay for the same job.

2. However, Australia still has a GPG – a significant difference in average earnings for men and women. The WA GPG is currently 22.5 per cent - significantly higher than the national GPG of 15.2 per cent.[451]

3. Gender pay equity is achieved when men and women receive equal pay for work of equal or comparable value. At the workplace level, employer strategies to improve gender and pay equity include ensuring that:

   (a) Men and women performing the same work are paid the same amount.

   (b) Men and women performing different work of equal value are paid the same amount.

   (c) The wages and conditions of jobs are assessed in a non-discriminatory way. This is done by valuing skills, responsibilities and working conditions in each job or job type (even where the work itself is different) and then remunerating employees accordingly.

   (d) The workplace's organisational structures and processes do not impede female employees' access to work-based training, promotions or flexible working arrangements.[452]

What is the Gender Pay Gap?

4. The GPG is a statistical measure which is recognised internationally as the standard measure of inequality between male and female remuneration.[453]

5. The GPG in Australia is calculated using the Australian Bureau of Statistics (ABS) survey of Average Weekly Earnings which is released biannually.[454]

6. When calculating the GPG, the amount of female weekly ordinary time earnings is first divided by the amount of male weekly ordinary time earnings.

7. The formula below is used for calculating the GPG:
   GPG = 1 minus (female ordinary time earnings /male ordinary time earnings) x 100

Why Does the Gender Pay Gap Exist?

8. Many social, historical and labour market factors have contributed to the GPG. The main factors influencing the GPG are:

   (a) Discrimination and bias in hiring and pay decisions.

   (b) Women and men working in different industries and different jobs, with female-dominated industries and jobs attracting lower wages.

   (c) Women's disproportionate share of unpaid caring and domestic work.

   (d) Lack of workplace flexibility to accommodate caring and other responsibilities, especially in senior roles.

   (e) Women's greater time out of the workplace impacting career progression and opportunities.[455]

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451 ABS (2018) *Average Weekly Earnings, November 2017*, catalogue no. 6302.0 (trend data).

452 Fair Work Ombudsman, *Best Practice Guide - Gender Pay Equity*.

453 International Labour Organization, *Equal Pay – An Introductory Guide*, see also Workplace Gender Equality Agency *Australia's gender pay gap statistics August 2017*.

454 ABS *Average Weekly Earnings,* catalogue no. 6302.0.

455 Workplace Gender Equality Agency *Australia's gender pay gap statistics August 2017,* p 2.

9. Australia has a sex-segregated workforce, as shown in Table 4A-1 below, which contributes to the GPG.

Table 4A-1: Australia's Sex Segregated Workforce by Industry November 2017[456]

Industry	Female employees (%)	Gender dominance
Health care and social assistance	78.7	Female-dominated
Education and training	71.3	Female-dominated
Accommodation and food services	56.3	Mixed
Retail trade	56.2	Mixed
Rental, hiring and real estate services	52.8	Mixed
Administrative and support services	52.5	Mixed
Financial and insurance services	50.3	Mixed
Arts and recreation services	46.4	Mixed
Public administration and safety	44.9	Mixed
Professional, scientific and technical services	44.9	Mixed
Other services	44.6	Mixed
Information media and telecommunications	44.2	Mixed
Wholesale trade	30.8	Male-dominated
Agriculture, forestry and fishing	30.6	Male-dominated
Manufacturing	26.2	Male-dominated
Transport, postal and warehousing	21.7	Male-dominated
Electricity, gas, water and waste services	21.4	Male-dominated
Mining	16.1	Male-dominated
Construction	10.6	Male-dominated
Total	46.9	Mixed

10. Women's work has traditionally been undervalued because of:

(a) The absence of appropriate classification structures.

(b) Poor recognition of qualifications.

(c) The absence of previous and detailed assessments of their work.

(d) Gendered characterisations of the work undertaken by women.

(e) Inadequate application of previous equal pay measures.[457]

Why is the Gender Pay Gap High in Western Australia?

11. The GPG in WA is significantly higher than the national average. Currently WA's GPG is 22.5 per cent compared to 15.2 per cent nationally.[458]

12. Previous skills shortages in mining-related sectors have resulted in higher than average earnings over a long period of time. As men are more likely to work in these industries, male average earnings are now significantly higher than those for women in WA.

13. Research by the ABS has estimated that one in five WA employees work in either the mining industry or an industry that supports or services the mining industry.[459]

14. As of November 2017, men in WA earn on average $422.00 per week more than women ($1,879.70 per week compared to $1,457.70 per week).[460] Average earnings for men in WA are $217.00 more than male earnings nationally ($1,879.70 per week compared to $1,662.70 per week). In pay gap

456 ABS, *Labour Force Australia, November 2017*, cat no. 6291.0.55.003, Table 06.

457 See above n 371.

458 ABS, *Average Weekly Earnings, Australia, November 2017*, cat. no. 6302.0.

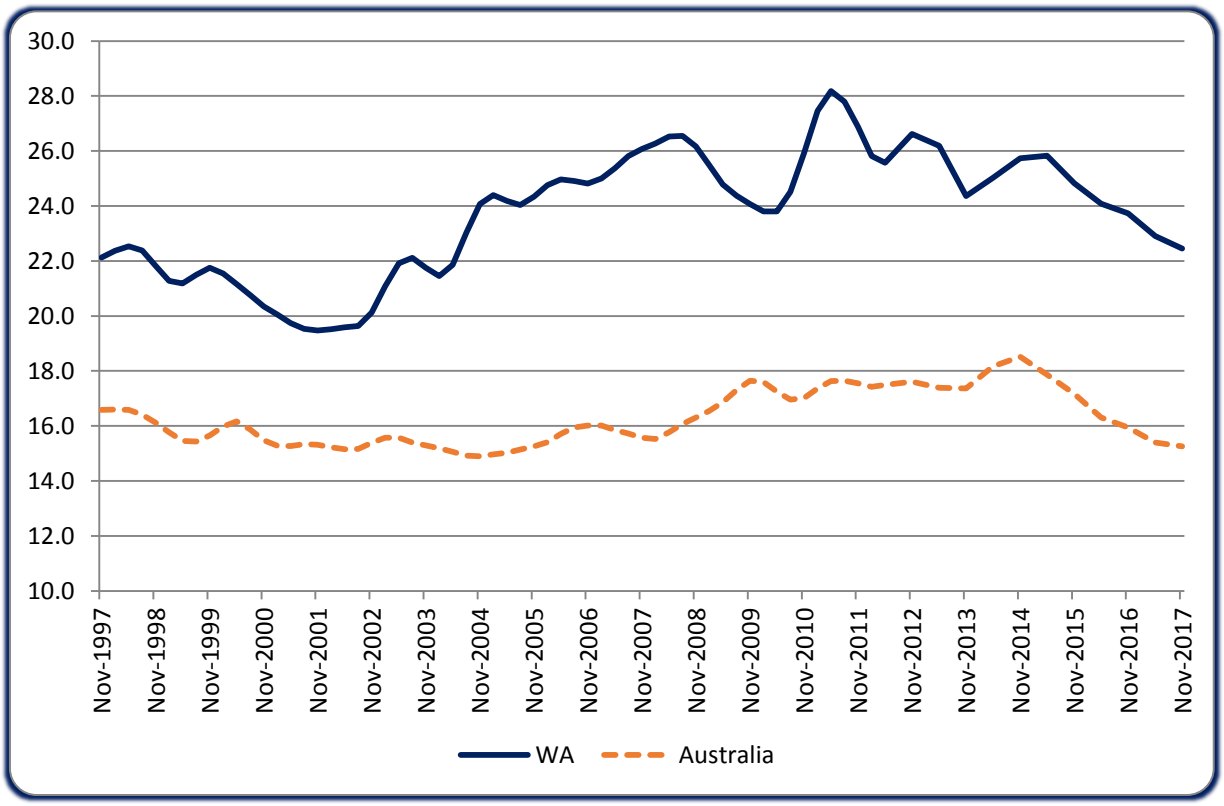
459 ABS, *Workforce Participation and Workplace Flexibility, Western Australia 2011*, cat. no. 6210.5.

460 ABS, *Average Weekly Earnings, Australia, November 2017*, catalogue no. 6302.0, Tables 1 and 11E.

terms, men in WA earn on average 11.5 per cent more than men nationally, while women in WA on average earn 3.4 per cent more than women nationally.[461]

15. As viewed in Figure 4A-1 the GPG in WA has gradually declined over the last two years, however rather than reflecting improved pay equity; this decline reflects the wage growth stagnation for men due to the end of the resources boom compared to moderate wage growth for women.

Figure 4A-1: Gender pay gap, WA and Australia, 1997 to 2017[462]



[461] Analysis by the Secretariat of ABS data.

[462] Ibid.

Attachment 4B - Todd & Eveline (2004) The Review of the Gender Pay Gap in Western Australia Recommendations

Report Recommendations		Implementation
1	That the WA Government take a gender mainstreaming approach to policy and practices in its commitment to closing the gender pay gap by applying a systematic process of 'gender analysis' to existing policies and policy proposals to identify any differential impact the policy would have on each gender.	**Partially implemented.**
Voluntary Strategies		
2	That a combination of voluntary and regulatory strategies be adopted to address the gender pay gap.	**Partially implemented.** No regulatory measures were implemented, only voluntary strategies.
3 (i)	That employers conduct gender pay equity audits, based on the model of the Equal Pay Review process developed by the Equal Opportunity Commission in the United Kingdom, and that this be mandatory within the public sector and voluntary within the private sector. Where gender pay gaps are identified, employers should then produce action plans to close them. That this requirement to complete mandatory gender pay equity audits be extended to contractors for public services.	**Partially implemented.** Between 2006 and 2015 the Western Australia Pay Equity Unit (PEU) promoted and assisted public and private sector organisations to undertake pay equity audits on a voluntary basis. The WA Pay Equity Audit Toolkit was developed to provide a process for employers to gather data and develop strategies to improve workplace gender equality.
3 (ii)	That these audits become part of the annual reporting process in the public sector while employers in the private sector should be encouraged to include the results in their annual reports.	**Not implemented.**
3 (iii)	That the proposed Pay Equity Unit (see Recommendation 34) be responsible for developing a model and detailed explanatory materials on how to conduct a gender pay equity audit.	**Implemented.** The PEU developed the WA Pay Equity Audit Toolkit as a basis for conducting audits. The Toolkit included resources to support organisation undertake and audit and develop workplace strategies.
3 (iv)	That the Office of EEO be resourced to work with public sector organizations to build their capacity for conducting gender pay equity audits efficiently and effectively.	**Partially implemented.** It was determined that the PEU rather than the Office of EEO should take the lead on promoting pay equity audits.
3 (v)	That the government urge employer associations and professional bodies to encourage and assist employers to conduct gender pay equity audits.	**Partially implemented.** The PEU encouraged and assisted all employers to conduct gender pay equity audits and worked with employer associations as appropriate.
4	That the government urge UnionsWA to take the lead in encouraging trade unions to place gender pay equity as a priority on the bargaining agenda.	**Partially implemented.** As part of the community awareness strategy of the PEU, information sessions were held with a number of trade unions.

Report Recommendations		Implementation
Wage Fixing Principles		
5 (i)	That the IR Act 1979 be amended to establish a new Equal Remuneration Part that would ensure the following: • with the making and amending of awards and orders, including enterprise orders, that the Commission has addressed gender pay equity; • with the registering of industrial agreements and employer-employee agreements that the Commission is able to be satisfied that the parties have addressed gender pay equity; • the ability of the parties and the Commission on its own motion to bring applications to achieve gender pay equity in awards.	**Not implemented.**
5 (ii)	That the proposed Equal Remuneration Part in the IR Act 1979 provide that for any matter involving pay equity or equal remuneration, "remuneration" bears the meaning of ILO Convention 100 Article 1(a).	**Not implemented.**
5 (iii)	That the proposed Equal Remuneration Part in the IR Act 1979 include provisions • acknowledging that the previous application of wage fixing principles cannot be assumed to have been free of assumptions based on gender, and • ensuring that the use of the Part is not restricted by the operation of the Wage Fixing Principles.	**Not implemented.**
5 (iv)	That the proposed WA Equal Remuneration Part in the IR Act 1979 include the option to phase in any resultant increases in specified stages.	**Not implemented.**
6	That the government fund s 50 parties and any other industrial organisations who press or respond to pay equity cases, to a maximum determined by government and subject to an agreed case plan demonstrating commitment to the achievement of improved gender pay equity within their occupation and/or industry.	**Not implemented.**
7	That the Chief Commissioner be urged to ensure that equal remuneration cases only be determined by Commission members who have completed the requisite training on matters relating to gender pay equity.	**Not implemented.**
The Industrial Relations Act 1979		
8 (i)	That section 6(ac) of the IR Act 1979 be amended to read "to promote equal remuneration for men and women for work of equal ***or comparable*** value".	**Not implemented.**
8 (ii)	That section 6 of the IR Act 1979 be amended to include the following two additional objects: • to promote gender pay equity. • to promote employment and workplace practices that will enable employees to achieve a satisfactory balance between their paid work and family responsibilities.	**Not implemented.**
9	That s40B(1) of the IR Act 1979 have the following clause added to it empowering the Commission to vary an award "to ensure that undervaluation of work is addressed".	**Not implemented.**
10	That further analysis of individual and collective agreements registered in WA (that is, industrial agreements and employer-employee agreements) be undertaken to: (i) compare complete outcomes by gender of wages and	**Not implemented.**

Report Recommendations		Implementation
	non-wage benefits; and (ii) better understand what factors are resulting in the gender wages gap in these streams of wage determination. (p.66)	
11	That s41A(1)(c) of the IR Act 1979 be amended to read "includes an estimate of the number of employees *by gender and employment type, ie full-time, part-time and casual*, who will be bound by the agreement upon registration."	**Not implemented.**
12	That the IR Act 1979 be amended to require employers to demonstrate that they have taken account of gender equity issues in relation to remuneration when registering industrial agreements and employer-employee agreements.	**Not implemented.**
Minimum Conditions of Employment Act 1993		
13	That the Government encourage the Commission in setting minimum weekly rates of pay to take account of the impact of their decision on the gender pay gap.	**Implemented.** In its submission to the annual State Wage Case, the State Government continues to encourage the WAIRC in setting minimum weekly rates of pay to take account of the impact of equal remuneration issues. Equal remuneration is one of the criteria which the Commission is required to consider when determining pay rates under section 50(3)(a) of the IR Act.
14	i. That the Government set as a goal the introduction of paid parental leave within both the public and private sectors in WA in accordance with the ILO standard of 14 weeks. ii. That the Government liaise closely with its federal and other state government counterparts in support of a nationwide strategy to introduce paid parental leave. iii. That the government increase paid parental leave for public sector employees to the ILO standard of 14 weeks. iv. That the Government promote the benefits of paid parental leave to employers in the private sector. v. (v) That the Government establish a public database of all public and private sector employers offering paid parental leave to their employees, including details of eligibility and how much paid parental leave is available.	**Partially Implemented.** Paid Parental Leave (PPL) has been extended to 14 weeks for public sector employers in Western Australia. In the private sector, the *Paid Parental Leave Act 2010* (Cth) provides for eligible employees to receive parental leave payments at the rate of the national minimum wage for a period of 18 weeks.
15	i. That the Government amend the *Minimum Conditions of Employment Act 1993* to entitle employees to request an additional four weeks purchased leave per annum and to take a reduced salary – 48/52 – spread over the 52 weeks of the year. ii. That employers not refuse such requests unreasonably. iii. That employers give priority access to those employees with carer responsibilities, when considering such requests. iv. That purchased leave if not taken would be reimbursed and would not be able to be accrued.	**Not implemented.** Purchased leave is available to most WA public sector employees.
16	That the Government amend the *Minimum Conditions of Employment Act 1993* to include the right for employees to request to change their employment status to part-time within their substantive or an equivalent position for a stipulated period of time. Where that stipulated period of	**Implemented.** The MCE Act was amended by the *Labour Relations Legislation Amendment Act 2006* as follows: • Section 38 was amended to

Report Recommendations		Implementation
	time does not exceed 12 months, this should also include the right for such an employee to revert to full-time status. Where the stipulated period of time extends beyond 12 months, the legislation should allow the employee to apply to revert to full-time status in their substantive or an equivalent position. That employers not refuse such requests unreasonably.	include additional subsections providing that after returning to work following parental leave, an employee may request permission to work on a modified basis (on different days or at different times, or on fewer days or for fewer hours, or both), and may subsequently request permission to resume working on the same basis as they worked immediately before starting parental leave. • Section 38B was inserted to provide that an employer is to agree to such requests unless there are grounds to refuse relating to the adverse effect that agreeing to the request would have on the conduct of the operations or business of the employer and those grounds would satisfy a reasonable person.
17	That the Government amend the *Minimum Conditions of Employment Act 1993* to extend the entitlement to unpaid parental leave to long-term casual employees who have been engaged on a regular and systematic basis for at least 12 months with the employer and who have a reasonable expectation of on-going employment on that basis.	**Implemented.** The MCE Act was amended by the *Labour Relations Legislation Amendment Act 2006* to include this provision.
18	That the Government conduct research into the earnings penalty incurred by casual employees in WA relative to permanent employees and its specific impact on the gender pay gap, given that casualisation is increasing and is concentrated amongst women.	**Not implemented.**
19	That the government fund the Department of Consumer and Employment Protection (DOCEP) to develop a targeted plan to increase their monitoring of compliance by employers in their wages payments to casual employees.	**Not implemented.**
20	That DOCEP apply gender analysis to the issue of increasing casualisation of the workforce so as to take account of the impact of casualisation upon gender pay equity.	**Partially implemented.**
The Western Australian Public Sector		
21	The Government place greater emphasis on the achievement of its priority within the Equity and Diversity Plan to increase the proportion of women employed at senior levels.	**Partially implemented.** Increasing women in leadership in the public sector is an ongoing strategy.
22	That the Government apply gender analysis to all policies and practices in relation to the public sector so as to identify gendered employment and pay outcomes.	**Not implemented.**
23	That the government ensure that all employees at all levels of the public sector may access work/family provisions by implementing the following strategies: • the provision of training for public sector supervisors and managers to increase knowledge and understanding of the following issues: employee entitlements; implications of managing part-time employees; creation of part-time employment opportunities at all levels of the organization; how to develop a public sector culture in which employees	**Partially implemented**

Report Recommendations		Implementation
	feel comfortable accessing family friendly entitlements. • the recording of data on accessing paid parental leave, requests for conversion to part-time, purchased leave, • analysis of this data to assess utilization of these provisions.	
24	That the government conduct research into the work value assessment process and outcomes within the public service.	**Not implemented.**
Training		
25	That the Department of Education and Training apply Australian National Training Authority's recent initiative focusing on women's issues in training to Western Australia and, in the process, take account of the specified groups of women identified in previous research as being less likely to receive training.	
26	That the Department of Education and Training investigate the implementation of a training credits scheme for employers who invest in training strategies for women in these particular groups that have been identified as being less likely to receive training.	**Not directly implemented.**
27	That the Department of Education and Training target training and development opportunities for part-time and casual workers which will enable them to move into better paid jobs.	**Not directly implemented**
28	That the government encourage employers to conduct gender analysis of their provision of training to assess • whether male and female employees are being given equal opportunities to access training to increase their skills and enhance their opportunities for promotion; • whether male and female employees are accessing training opportunities equally.	**Not directly implemented**
29	That the government encourage employers to develop strategies to improve the participation of their part-time employees in training and development opportunities.	**Partially implemented.** The PEU pay equity resource material included information on this issue.
30 (i)	That the Office of EEO or Office of Women's Policy be funded to develop training modules on gender pay equity.	**Partially implemented.** The PEU within the then Department of Commerce provided a variety of training on gender pay equity.
30 (ii)	That the government act as an exemplar employer by implementing training for public sector supervisors and managers to increase knowledge and understanding of matters related to gender pay equity.	**Not directly implemented.**
30 (iii)	That the Chief Commissioner of the WAIRC be encouraged to be responsible for ensuring that the members of the Commission become well informed on issues impacting on gender pay equity, including gender-neutral language to describe tasks and skills, the scope of the term "remuneration" with regard to gender equity in pay and employment, and gender-based undervaluation of work and skills.	**Not directly implemented.**
30 (iv)	That employer associations and other professional bodies be encouraged to implement training for employers on matters related to gender pay equity, including gender-neutral language to describe tasks and skills, the scope of the term "remuneration" with regard to gender equity in pay and employment, and the issues of gender-based undervaluation.	**Not directly implemented.**

Report Recommendations		Implementation
30 (v)	That UnionsWA be encouraged to implement training for union officials on issues impacting on gender pay equity, including gender-neutral language to describe tasks and skills, the scope of the term "remuneration" with regard to gender equity in pay and employment, and the issues of gender-based undervaluation.	**Not directly implemented.**
30 (vi)	That the government provide a funding scheme to assist employer associations, professional bodies and UnionsWA with the implementation of gender pay equity training.	**Not implemented.**
31	That the government liaise with management education and training bodies such as universities, TAFE colleges and the Australian Institute of Management to encourage the inclusion of components on gender equity, gender mainstreaming and pay equity in their curriculum for management education.	**Not implemented.**
32	That the proposed Pay Equity Unit (see Recommendation 34) be responsible for implementing a broad community awareness campaign on the gender pay gap and related issues in Western Australia, including an evaluation strategy.	**Implemented** One of the key activities of the PEU was raising awareness on the issue of pay equity. The PEU promoted community awareness via information on the Department's website, presenting at seminars and forums and working directly with employers and employer groups to address pay equity issues. A suite of information materials on pay equity was developed and was widely circulated by the PEU.
33	That the Commission in conjunction with the Equal Opportunity Commissioner and the s 50 parties conduct an equal remuneration case study involving a female-dominated occupation as a learning exercise.	**Not implemented.**
Implementation of Recommendations		
34 (i)	That the Government form a Pay Equity Unit with responsibility and resources for implementing the recommendations of the report as directed by the government. That the Pay Equity unit be located within one of the following: the Department of Premier and Cabinet, the Equal Opportunity Commission or DOCEP. That the Pay Equity Unit be established for a 3-year term initially.	**Implemented.** The PEU was established in 2006 within the Labour Relations Division of the then DOCEP and operated within the Department of Commerce until June 2015.
34 (ii)	That a high level Steering Committee be established drawing on expertise from DOCEP, the Department of Premier and Cabinet, the Equal Opportunity Commission, the Office of Equal Employment Opportunity and on the expertise of union and employer bodies.	**Not implemented.**
34 (iv)	That the Steering Committee develop and oversee the implementation plan with the Pay Equity Unit, including identification of who is responsible for the implementation of each recommendation and the time frame associated with it.	**Not implemented.**

Chapter 5 Definition of Employee

5.1 Term of Reference

753. 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. 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.

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.

5.2 Statutory Definitions of Employee in Western Australia

757. The Term of Reference requires the Review to first examine the definitions of employee in the IR Act and the MCE Act. The excluded employees under those Acts are not identical. That is at least curious. This curiosity is heightened when one considers there is a differentiation in the meaning of "employee" in other State Acts that, broadly, provide rights and protections for people who are engaged in doing work for others. Falling into this category are the OSH Act, the LSL Act and the *Workers' Compensation and Injury Management Act 1981* (WA) (WCIM Act). There is also a different definition of employee in the FW Act. For ease of reference and comparative purposes, each of these definitions is set out in Table 5A below.

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.

Act	Definition
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.
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.

5.3 Outline of Legislative Framework

758. As stated, both the IR Act and the MCE Act currently exclude categories of workers from their definitions of employee.

759. Section 7 of the IR Act defines "employee" to exclude 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.

760. The exclusion for domestic workers extends to the MCE Act, as s 3 defines employee as "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."

761. As can be seen from Table 5A above, Schedule 1 of the MCE Regulations prescribes "Persons who are not employees for the purposes of the Act" to include persons paid wholly by commission, piece workers, persons with disabilities in supported employment, volunteers and wardens at the National Trust of Australia (WA).

5.4 The International Implications of Exclusions under State Industrial Relations Legislation

5.4(a) Western Australian Participation in International Labour Organization Processes

762. The exclusion of certain categories of workers under State industrial relations legislation has been recently brought into sharp focus.

763. The Minister has noted that the exclusions under the IR Act and MCE Act mean that Western Australia does not comply with the International Labour Organization (ILO) Protocol of 2014 to the *Forced Labour Convention, 1930* (the Protocol), which requires that relevant labour laws apply to all workers and all sectors of the economy.[463]

764. The Minister has pointed out the exclusions in the Western Australian legislation present a barrier to the Commonwealth Government's ratification of the Protocol at the national level, and has outlined this as being one reason for the present review of the definition of employee.[464] The Review thinks it important to consider the background to and detail of the Protocol, as follows.

765. The ILO is a specialised agency of the United Nations. Australia is an ILO member state.

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463 ILO, P029 - Protocol of 2014 to the *Forced Labour Convention, 1930* available at www.ilo.org.

464 *No secrets or alarm bells - WA needs IR update,* (Hon. Bill Johnston MLA), published on www.thewest.com.au on 6 October 2017; Western Australian Parliamentary Debates, Legislative Assembly, 18 October 2017, PQ number 545, p 27.

766. The objectives of the ILO are pursued through the adoption of international labour standards which are set out in Conventions, Recommendations, Protocols and Declarations. Conventions and Protocols have treaty status and are therefore, within the limits of international law, legally binding on ratifying countries.

767. Only nation States can ratify treaties. The Secretariat has provided the following information on the Australian practice for doing so. In Australia, the ultimate decision to ratify is made by the Commonwealth Government, but there are agreed protocols for consulting with the States and Territories. Generally, Australia will not become a party to a treaty unless law and practice in all Australian jurisdictions enable it to meet its obligations under the treaty and all State and Territory governments formally agree to ratification.

768. The Commonwealth requests comprehensive Law and Practice Reports from States and Territories to determine compliance with any instrument under consideration and to inform the Commonwealth's subsequent decision to ratify the instrument. Each jurisdiction assesses its compliance with the instrument in law and practice and provides a report to the Commonwealth.

769. In Western Australia, the matter of whether the State will support ratification of a particular Convention or Protocol is a decision for the State Government. Co-ordination and reporting on ILO matters is the responsibility of the PSD of DMIRS.

5.4(b) Protocol of 2014 to the Forced Labour Convention, 1930

770. Delegates at the 2014 ILO International Labour Conference voted in favour of adopting a new Protocol to the *Forced Labour Convention, 1930.*

771. The intention of the Protocol was to give new impetus to the global fight against forced labour, including trafficking in persons and slavery-like practices.

772. While the existing *Forced Labour Convention, 1930* (the 1930 Convention) requires those states which have ratified it to criminalise and prosecute forced labour, the

new Protocol aims to make clear that they must also take effective measures to prevent forced labour and provide victims with protection and access to remedies.

773. The Protocol supplements the 1930 Convention by providing specific guidance on effective measures to be taken to eliminate all forms of forced labour. Measures covered by the Protocol relate to education, compliance, protection and remedies for victims and sanctions for perpetrators.

5.4(c) Support for Ratification of the Protocol

774. Issues around forced labour and wage exploitation currently have a high profile in the community.

775. Australian delegates to the June 2014 International Labour Conference, including government, worker and employer representatives, all voted in favour of its adoption in recognition of the ongoing significance of forced labour as an international issue, particularly in the Asia Pacific region.

776. The issue of modern slavery was recently examined by a Federal Parliamentary inquiry and the *Hidden in Plain Sight* report was published in December 2017.[465] The concept of modern slavery includes forced labour and wage exploitation as well as involuntary servitude, debt bondage, human trafficking and forced marriage. On 16 August 2017 the Commonwealth Government announced it would introduce legislation that will make it a requirement for large businesses to report annually on their actions to address modern slavery.

777. Progressing consideration of ratification of the Protocol is an "action item" under the Federal Government's "National Action Plan to Combat Human Trafficking and Slavery 2015-19".

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465 Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Hidden in Plain Sight An inquiry into establishing a Modern Slavery Act in Australia,* (2017).

5.4(d) Barriers to Ratification of the Protocol in Western Australian Legislation

778. Article 2(c)(i) of the Protocol requires that coverage and enforcement of legislation concerning forced labour, including labour law as appropriate, applies to all workers and all sectors of the economy.

779. The exclusions of domestic service workers under the IR Act and MCE Act and the exclusions under the MCE Regulations have been identified by the PSD of DMIRS as obstacles to Western Australia's compliance with the Protocol.

780. This is a problem unique to Western Australia as Western Australia is the only State which has not referred its private sector industrial relations jurisdiction to the Commonwealth. In the national jurisdiction, the categories of workers excluded from the definition of employee in the IR Act and MCE Act are covered by the FW Act.

781. The Minister has publicly said that Western Australia's non-compliance with the Protocol was a reason for the present review of the definition of employee, in an opinion piece published on *The West Australian* website on 6 October 2017 and in his response to a Parliamentary Question in the Legislative Assembly on 18 October 2017.

5.5 The Exclusion of Domestic Service Workers

782. Domestic service workers have been specifically excluded from Western Australian industrial relations legislation since the *Industrial Arbitration Act 1912.*

783. The merits of the exclusion have been debated for many decades. There have been minor changes to the scope of the exclusion over the years and failed attempts to remove it altogether. **Attachment 5A** details the legislative history and relevant comments and proceedings in Parliament.

784. Debate prior to the introduction of the LSL Act in 1958 typifies the historical attitudes towards workers in domestic service. The Long Service Leave Bill provided that an employee, as defined, included a person engaged in domestic service.

Liberal Party opposition members sought to amend the Long Service Leave Bill so that the definition of employee was in line with the definition in the [then] *Industrial Arbitration Act 1912*. The Hon. Sir Charles Court MLA, Member for Nedlands, argued:

> Most of these [domestic] workers enjoy privileges which virtually make them members of a household. Usually, the question of long service leave does not enter their heads, because the privileges that they enjoy within that family household far outweigh any benefits that they might get from this legislation.[466]

785. Sir Charles also said:

> [Domestic workers] are more concerned with getting the benefits of home life and living in a family, than with any remuneration which they may receive. It is hard to define what they do. If we were to try to measure their activities in monetary values it would be impossible.[467]

786. The Hon. George Roberts MLA, the Liberal Party Member for Bunbury, argued that including domestic workers within the scope of the legislation would require time and wages records to be kept for a period of 20 years and stated:

> I say that it is literally impossible for the records required under this Bill to be kept by the average housewife; and we, as legislators, should keep an open mind and see that what goes on our statute book is practicable.[468]

787. It is not readily apparent to the Review why the "average housewife" (if there was or is such a person) could not perform this task, either when Mr Roberts made his speech, or more assuredly, now.

788. Opposition members also expressed concerns that including domestic workers within the definition of an employee would potentially give industrial inspectors the right to enter private homes.[469]

789. In 1979 the definition of employee in the *Industrial Arbitration Act 1979* contained four exclusions: domestic servants, railway officers, Government school teachers and education officers, and the academic staff of post-secondary education institutions.

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466 Western Australian, *Parliamentary Debates*, Legislative Assembly, 30 September 1958, 1177.
467 Ibid 1179.
468 Ibid 1180.
469 Ibid 1177.

In 1984 the definition was amended so that domestic workers were the only remaining exclusion.[470]

790. During debates for the Industrial Arbitration Bill 1979, the Labor Opposition expressed a view that the exclusion for domestic workers should not be continued as it could lead to the exploitation of workers. No amendments were proposed however and the exclusion remained in the Bill as passed.[471]

791. In 1987 the definition of employee in the IR Act was amended again to ensure that contract cleaners and other providers of domestic services employed by someone other than the owner or occupier of a private home were covered.[472] At the time, the Minister reassured the Parliament that:

> The Act will still not apply to persons actually engaged to perform private domestic service by way of an arrangement with the householder himself [sic]. Care has also been taken to ensure that while the definition of employee has been extended to cover externally employed domestics union representatives will not have rights to enter private homes in the same way they can get permission to enter business premises. The sanctity of the owner's premises will continue to be preserved.[473]

792. A Member of the Opposition said:

> If a private householder engages the services of an employment agency, or a firm that undertakes work of a nature that is sought by a private householder, that person is deemed to be an employee. We see nothing wrong with that situation but we would vigorously defend an individual's right to be able to employ a casual person on a one-to-one basis.[474]

793. The Opposition also queried whether the intent of the legislation was to enable the WAIRC to set awards for "domestic help", but was reassured by the Government that such an outcome was not anticipated.[475]

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470 *Acts Amendment and Repeal (Industrial Relations) Act (No. 2) 1984* Pt. II.

471 Western Australia, *Parliamentary Debates,* Legislative Assembly, 31 October 1979, 4229-4235.

472 *Industrial Relations Amendment Act (No 4) 1987.*

473 Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 November 1987, 5797. The *Industrial Relations Amendment Act (No 4) 1987* also amended s 23 of the IR Act so the Industrial Relations Commission did not have authority to make an award or order empowering a representative of an organisation to enter "any part of a private home in which a person engaged in domestic service is employed by an employer, who is not the owner or occupier of that private home, but who provides that owner or occupier with the services of the person so engaged." The prohibition relating to "the premises of an employer, the principal use of which premises is for habitation by the employer and his household" was already present. See also Attachment 5A.

474 Western Australia, *Parliamentary Debates*, Legislative Assembly, 10 December 1987, 7746 (Ian Thompson).

475 Western Australia, *Parliamentary Debates*, Legislative Council, 16 December 1987, 8165-8166.

794. These debates illustrate that the exclusion of domestic service workers from the definition of employee was intended to exempt individual householders from the responsibilities of being an employer if they engaged someone for "housekeeping services".

795. Times have changed since those debates. The recent advent of Government funded programs enable recipients to directly employ aged carers and disability support staff in their homes. This means that a broader range of workers providing services in the home is excluded from coverage under the IR Act and the MCE Act than was originally contemplated. If the domestic service workers exclusion remains in place, the employment of a growing group of workers could be outside the regulation of the State industrial relations system.

796. Expanding the coverage of the IR Act and MCE Act to domestic service workers would have the effect of extending minimum rates of pay and other basic entitlements to a number of potentially vulnerable workers. It is noted that domestic service workers are already entitled to long service leave and unpaid parental leave. This is, firstly, because the definition of employee in s 4 of the LSL Act does not exclude domestic service workers. Secondly, the unpaid parental leave provisions in the FW Act are extended to employees in the State industrial relations system (and other non-national system employees) by Part 6-3, Division 2 of the FW Act. Section 742 specifies that in this Part of the FW Act, "employee" has its ordinary meaning. As set out earlier, the ordinary meaning of employee is defined in s 15 of the FW Act and does not exclude domestic service workers.

797. Workers now typically engaged in domestic service include cleaners, disability support workers and carers for children and the aged. Axiomatically, these workers are not covered by any existing award in the State industrial relations system where services are provided in a private home and the worker is engaged directly by the owner or occupier of the home.

798. If domestic workers were covered by State industrial legislation there would be a burden upon employers of domestic service workers who would need to consider,

and comply with, amongst other things minimum wage requirements, leave entitlements, reasonable hours of work, public holidays and record-keeping requirements, including the need to retain records for seven years. As well, employees would have access to the unfair dismissal provisions of the IR Act.[476]

799. The imposition of employment obligations on householders who employ someone in a private domestic capacity, even for a brief period, may attract criticism. The 1995 Fielding Review rejected a proposal to remove the domestic service workers exclusion from the IR Act on the grounds that it would result in "considerable public outcry",[477] but did not cite any evidence to support the assertion.

800. Rather, the claim appears to be based on the author's experience, general information, and to a degree and with respect, speculation. The Fielding Review said labour laws in Western Australia and elsewhere had excluded certain persons "for social reasons".[478] The Fielding Review later said:

> In my view, that exclusion ought to remain. Were it otherwise, people employed on a casual or part-time basis to do cleaning and ironing in the domestic home would be subject to the industrial relations laws, which is not now the case.[479]

801. As noted above, the range of domestic services procured directly by households has expanded considerably since the Fielding Review, particularly in the fields of aged care and disability support services.

802. As stated already, if householders employ domestic workers in other Australian states that are covered by the national industrial relations jurisdiction, then they have obligations under the FW Act.

803. The Fair Work Ombudsman (FWO) advises that in the national jurisdiction, 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*

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476 Note that domestic service workers are already 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. This is because the ordinary meaning of employee is defined in s 15 of the FW Act and does not exclude domestic service workers.

477 Fielding, above n 118, 27-32.

478 Ibid 27.

479 Ibid 31.

Disability Services Industry Award 2010.[480] Child minders employed directly by private households appear to have no modern award coverage but are covered by the NES in the FW Act.[481]

804. There are also no exclusions for domestic workers in the OSH Act or the WCIM Act, although a 2014 review did recommend the latter Act be amended to exclude employers of domestic workers from workers' compensation liability and insurance requirements.[482]

805. If the exclusion of domestic service workers was removed from the definition of employee in the IR Act (and consequently in the MCE Act), both pieces of legislation would still apply only to employment relationships. That is, for the legislation to apply to a person providing domestic services, it would need to be established that the person was an employee and not a contractor or involved in some other legal arrangement with the home-owner. The Review is informed by the Secretariat, for example, that many cleaners provide their services as independent contractors rather than as employees.

806. Consideration would also need to be given to the issue of union and industrial inspector access to domestic homes to investigate any potential breaches of employment entitlements.

5.5(a) Industrial Relations Act Provisions Pertaining to Access to Employers' Premises

807. Under s 98(1) of the IR Act an industrial inspector may enter any building, structure, conveyance or place of any kind whatsoever in respect of which there are reasonable grounds to suspect that any industry or work has been or is being done for the purpose of ascertaining whether the provisions of the IR Act or an instrument (being an award, industrial agreement, order of the WAIRC, employer-employee agreement or contract of employment) have been or are being observed.

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480 FWO, Award coverage for attendant carers employed in private homes www.fairwork.gov.au/library/k600582_award-coverage-for-attendant-carers-employed-in-private-homes

481 FWO April 2016 newsletter 'Consider nannies and au pairs: Is my babysitter actually an employee?'.

482 WorkCover WA, *Review of the Workers' Compensation and Injury Management Act 1981: Final Report* (2014).

808. There is no provision preventing an inspector from entering premises, or a part thereof, that are used for residential purposes.

809. Under ss 49H and 49I of the IR Act, an authorised representative (being a union official who holds an authority issued by the Registrar under s 49J) may enter any premises for the purposes of holding discussions with an employee, or investigating a suspected breach of the IR Act, the MCE Act, the LSL Act, the OSH Act, the MSI Act, awards, agreements, or orders.

810. However, as per s 49K, 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.

5.5(b) Fair Work Act Provisions Pertaining to Access to Employers' Premises

811. Under s 708 of the FW Act an inspector may enter premises if they reasonably believe that the FW Act or a fair work instrument (being a modern award, enterprise agreement, workplace determination or FWC order) applies or applied to work being performed on the premises. An inspector must not, however, enter a part of the premises that is used for residential purposes unless the inspector reasonably believes that the work is being performed on that part of the premises.

812. Under ss 483A and 484 of the FW Act, a permit holder (being a person who holds an entry permit issued by the FWC under s 512) may enter premises for the purposes of investigating a suspected contravention of the FW Act or a fair work instrument, or holding discussions with employees. The permit holder must not, however, enter any part of premises that is used mainly for residential purposes.[483]

5.5(c) Submissions to the Review on Exclusion for Domestic Workers

813. Submissions on the issue of whether the exclusion of domestic service workers from coverage under the IR Act and the MCE Act ought to continue were provided by CCI, the ELC, the Salvation Army, the SDA, the Small Business Development Corporation

[483] FW Act, s 493.

(SBDC), UnionsWA, United Voice and WACOSS. The ACTU also provided a submission that was supportive of the submission of UnionsWA and said, generally, there ought to be an expanded definition of an employee that was more broadly based.

814. CCI submitted that the inclusion of domestic service workers in the legislation would add a serious burden to households, many of whom would not have training or advice as to how to meet their obligations as employers. It was submitted that it would also be time consuming and costly for the State to police whether households were complying with obligations. CCI was also concerned at the prospect that inspectors or unions could enter private homes that were also places of work. For these reasons, CCI recommended that domestic workers not be included as employees. CCI noted in this context that domestic workers have the option of seeking employment through a specialised agency if they choose to do so. In that way, they would be able to obtain the benefit of industrial relations laws regulating their employment.

815. In contrast, the ELC submitted it was highly problematic that domestic workers in private homes in Western Australia are generally not treated as employees and therefore do not have the same basic employment protections as other employees. The submission noted research conducted by the ILO that indicated that domestic work is one of the industries in which forced labour is more likely to be present world-wide. It was submitted that any attempt to tackle "modern slavery and human trafficking" in Australia "must include efforts to protect domestic workers". The ELC could not see any justification for continuing to exclude domestic service workers from the definition of employee in the IR Act and the MCE Act. It recommended an amendment of the definitions.

816. The Salvation Army concurred with this submission. It submitted 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".

817. The SDA agreed that the domestic worker exclusion should be removed. So too did UnionsWA. The issue was expanded upon in the submission of United Voice. The United Voice submission said that it "defied belief" that the exclusion still operated in Western Australia. It was further submitted that as "the consumer directed care model rolls out in both the disability and aged care sectors, it is becoming increasingly common for people with disabilities, or their representatives, to enter into direct employment relationships with workers to provide direct care and support in the home". It was submitted that the exclusion of domestic workers under the IR Act was contrary to several ILO instruments. United Voice also advocated "the creation of an industry award for domestic service workers".[484]

818. WACOSS referred to similar points as United Voice and said the "roll out" of the National Disability Insurance Scheme meant it is imperative that the industrial relations system is able to adequately protect workers and disadvantaged service users who may not appreciate their responsibilities as employers. WACOSS also said it was of significant concern that, as a result of the domestic service workers exclusion, Australia has been unable to ratify or comply with international conventions relating to domestic workers and forced labour. It was submitted that it was incumbent upon the State Government to take whatever steps are necessary to enable ratification of the relevant conventions.

819. Significantly, the SBDC was generally supportive of the intent to cover domestic service workers within the definition of employee. It was submitted that the challenge would be to capture the non-monetary remuneration that is often

[484] That is something that can be considered, if the exclusion is removed, by the WAIRC as part of the award rejuvenation program referred to in chapter 7 of the Interim Report, if that is proceeded with.

provided for these workers such as accommodation and food and utilities, particularly for workers such as au pairs who may live in a family home. Whilst that may be so, it is not something that means the MCE Act and the IR Act should not regulate their work. It was submitted that whilst au pairs and nannies are not covered by an award in the Fair Work system "they are entitled to the national minimum wage and the national employment standards". The SBDC sees this as a "common sense approach which could be adopted in WA". It was also submitted that there were challenges facing regulators if the exclusion were removed such as when a family home becomes a business.

5.5(d) Domestic Service Workers Exclusion – Preliminary Opinion of the Review

820. In the preliminary opinion of the Review, the time has come to end the exclusion of domestic service workers from coverage under the IR Act and the MCE Act.

821. The principal reasons for this are:

(a) There is no exclusion of domestic service workers from being an employee under the FW Act or, consequently, in any other State of Australia.

(b) 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 the domestic service workers exclusion as one such barrier.

(c) Research conducted by the ILO, referred to in the ELC submission, supports the removal of the exclusion so as to limit the prospect of forced work and slavery within domestic households.

(d) It is apparent that employment relationships have changed considerably since the 1950s or even the 1980s when the issue was debated by the State Parliament. The exclusion no longer applies to only people who might be regarded as traditional domestic service workers, such as au pairs or nannies.

There is an increased likelihood of domestic service workers including, as a category, people engaged in the family home in aged care or disability work.

(e) There is no principled reason why domestic service workers ought to be excluded from having minimum conditions of employment cover their employment.

(f) Furthermore, there is no reason why these employees should be denied the opportunity to be covered by an industrial award or agreement or otherwise access the provisions of the IR Act in relation to their industrial matters; either through a registered organisation or, where permitted, individually.

(g) The concerns about trade unions and inspectors entering into domestic homes can be managed. The issue is managed in the Federal jurisdiction, and hence in all other States of Australia.

(h) Whilst there are regulatory burdens to be imposed on households if there were coverage of domestic service workers, in the opinion of the Review this is less burdensome on the community than the prospect that a class of employees is not covered by the MCE Act and the IR Act, to the extent that it prevents Australia from becoming a signatory to an international convention of note.

822. Given the concerns expressed by CCI and others about transition to the new system, the Review would recommend that the Government put in place a program providing assistance to householders who would become employers under amendments to the legislation. The program should allow for access to information at DMIRS and online to assist them with their responsibilities.

5.6 Exclusions from the Definition of Employee in the *Minimum Conditions of Employment Act* – General

823. As set out above, Schedule 1 of the MCE Regulations prescribes persons who are not employees for the purposes of the MCE Act, in addition to the exclusion of domestic service workers.

824. Provision for the exclusions from the MCE Act by regulation occurred after the consultation process for the legislation. The responsible Minister in the Court Liberal Government, the Hon. Graham Kierath MLA, informed Parliament:

> I have listened to the various views and finally conceded that the simplest and fairest way is to include everyone and then exclude people by regulation. The legislation does that. If a group of people currently on piecework and commission work are to be included under the minimum conditions Bill, this procedure will ensure that. If we try to define a group, we will always have another group which could escape the Bill. On advice, I accepted the safest and surest way of accommodating the people who wish to be exempt without opening a major loophole to allow other people to avoid the conditions. The regulation is the simplest and most efficient way.[485]

825. Mr Kierath also told the Parliament:

> My intention was to have the minimum conditions apply to people on commission and piece work rates. It was difficult. In some areas it simply would not mesh. There is no equality, because basically a person operating on commission is not an employee. People in the real estate industry work on commission. They are not employees. During the process of consultation we discovered others … I received a letter from the National Trust which identified a group of workers who had the task of looking after heritage buildings … We were told that if they were subject to the minimum wage, the National Trust would go broke. It would not be able to afford to maintain the heritage buildings … A number of people have approached us, after we sought their views. They have considered the Bill and have pointed out the likely ramifications for certain organisations. I have not provided an exhaustive list; I have indicated the types of people. Additional groups of people with disabilities have pointed out the difficulties.[486]

826. The Amendola Report recommended the definition of employee in the MCE Act be reviewed as part of a proposed consolidation of industrial relations legislation in Western Australia. The Amendola Report said:

> Whatever the definition is, it should be the applicable definition for that one Act, unless the Act states that a provision does not apply to a class or type of employee. For example, section 123 of the *Fair Work Act 2009* limits the application of redundancy entitlements to certain types of employees. Thus, to use Schedule 1 of the *Minimum Conditions of Employment Regulations 1993* as an example, whilst the minimum wage provisions should not apply to persons with disabilities in supported employment as the remuneration of those employees is assessed utilising a wage assessment tools which are generally a percentage of the minimum wage, there is no reason why the other parts of the State Employment Standards should not apply to such an employee.[487]

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485 Western Australia, *Parliamentary Debates,* Legislative Assembly, 19 August 1993, 3070 (Graham Kierath).

486 Ibid 3069-3071.

487 Amendola Report, above n 13 [351]-[355]; and see also [257].

827. The 2012 Green Bill would have repealed the MCE Act and incorporated statutory minimum conditions of employment into the IR Act. The existing MCE Regulations would have been repealed, but an exclusion for National Trust wardens was to have been continued in the applicable regulations.

828. The intention was that persons remunerated wholly by commission or piece rates, and persons with disabilities in supported employment, would be covered by statutory minimum conditions of employment. The draft Explanatory Memorandum for the Green Bill noted that coverage of these persons was in line with the FW Act and the LSL Act which do not exclude them.[488]

829. It was not intended that volunteers would be covered by the new statutory minima. Rather, the draft Explanatory Memorandum for the Green Bill noted, "Volunteering arrangements, by their very nature, generally do not meet the necessary legal requirements to establish an employment relationship."[489]

5.7 *Minimum Conditions of Employment Act 1993* Exclusions – Commission-Based and Piece Workers

830. The Secretariat has informed the Review that the removal of the exclusion for "piece workers" from the MCE Regulations would establish basic entitlements for piece rate workers in the agricultural and horticultural sectors, for whom State award coverage is presently complex and incomplete.

831. There is presently no State award coverage for dairy farm workers, flower pickers and market garden workers (if not planting, picking or packing fruit).[490] This means that piece workers employed by a State system employer in these industries effectively have no minimum entitlements.

832. Recent media reports and government inquiries in other States have highlighted the vulnerability of workers in these sectors to exploitation. In the national industrial relations jurisdiction, these workers have modern award coverage.

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488 Draft Explanatory Memorandum, Labour Relations Legislation Amendment and Repeal Bill 2012 (WA) at [597].

489 Ibid [597].

490 See chapter 7.

833. Removal of the exclusions for "piece workers" and "persons paid wholly by commission" would also aid Western Australia's ability to demonstrate compliance with the ILO Protocol of 2014 to the *Forced Labour Convention, 1930*.[491]

834. In a consultation undertaken by the previous State Government, the Real Estate Employers Federation of WA argued that extending coverage of the MCE Act to commission-only employees would create significant impediments to the retention of performance-based pay systems. However, it is estimated that fewer than 8 per cent of real estate agents in Western Australia are covered by the State industrial relations jurisdiction.[492]

835. The ELC made a submission to the present Review advocating the removal of the exclusions for piece workers and commission-only employees, while the Salvation Army and UnionsWA supported removal of the exclusion for piece workers, and the CoSBA indicated support for elements of the former Government's Green Bill, which would have meant "certain employees [are] no longer excluded from minimum leave entitlements".

836. No-one made a specific submission to the present Review against the abolition of these exclusions.

837. The preliminary opinion of the Review is that they should be removed.

5.8 *Minimum Conditions of Employment Act* Exclusions – Persons with Disabilities in Supported Employment

838. Regulation 3 of the MCE Regulations currently excludes certain workers with a disability from the definition of "employee" in the MCE Act. The exclusion applies to persons —

(a) who receive a disability support pension under the *Social Security Act 1991* of the Commonwealth; and

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491 Western Australia, *Parliamentary Debates*, Legislative Assembly, 18 October 2017, PQ number 545, 27 (Bill Johnston).

492 Based on estimate provided by the Real Estate Employers Federation of WA in its submission on the *Labour Relations Legislation Amendment and Repeal Bill 2012*, 2.

(b) whose employment is supported by "supported employment services" within the meaning of the *Disability Services Act 1986* of the Commonwealth.

5.8(a) Disabled Employees in the National Industrial Relations System

839. In the national industrial relations system, the NES set out in Part 2-2 of the FW Act apply to all national system employees.[493]

840. Section 294(3)(c) of the FW Act excludes employees with a disability from the coverage of the national minimum wage.

841. Section 294(1)(b)(iii) of the FW Act requires the FWC to set a special national minimum wage for employees with a disability as part of its annual national minimum wage order.

842. Section 295(4) of the FW Act stipulates that a special national minimum wage applies to the employees to whom it is expressed in the national minimum wage order to apply, and these employees must conform to one of the categories specified, which include "all employees with a disability who are award/agreement free employees, or a specified class of those employees".

843. In the 2017 National Minimum Wage Order,[494] as in previous years, the FWC set two special national minimum wages for employees with a disability – one which applies to an award/agreement free employee with a disability whose disability does not affect their productivity (Special national minimum wage 1), and one which applies to an award/agreement free employee with a disability who is:

(a) unable to perform the range of duties to the competence level required of an employee within the class of work for which the employee is engaged because of the effects of a disability on their productive capacity; and

(b) who meets the impairment criteria for receipt of the Disability Support Pension (Special national minimum wage 2).

493 FW Act s 60.

494 FWC, National Minimum Wage Order, (26 June 2017), PR593544.

844. The FW Act itself does not address the extent to which an employee's capacity might be affected by their disability or distinguish between different categories of employees with a disability. In s 12 of the FW Act, "employee with a disability" is defined to mean "a national system employee who is qualified for a disability support pension as set out in s 94 or s 95 of the *Social Security Act 1991*, or who would be so qualified but for s 94(1)(e) or s 95(1)(c) of that Act".

845. In a preliminary decision issued prior to the 2017 National Minimum Wage Order, the FWC noted that the ACTU and Australian Council of Social Service (ACOSS) had contended that it was inappropriate to have a separate minimum wage for employees with a disability that did not affect their productive capacity. The decision went on to state that:

> We consider that as a result of the combined effect of s.294(3)(c) and the relevant definition in s.12 of the Act, it is necessary for the Panel to provide a minimum wage for all employees with a disability including those whose disability does not affect their productive capacity.
>
> We also consider that there is some force in the proposition advanced by ACOSS and the ACTU regarding whether such an approach should be required. However, this is a matter for the Parliament.[495]

846. Special national minimum wage 1 is set for adults, juniors, apprentices and trainees at the same rates as the minimum wages for employees in those classes of employees who do not have a disability.[496]

847. Special national minimum wage 2 (SNMW2) rates, for employees whose productive capacity is affected by their disability, are calculated in accordance with Schedule A of the National Minimum Wage Order.[497]

848. Schedule A stipulates that SNMW2 rates are to be calculated as a percentage of the national minimum wage which is based on an assessment of the employee's productive capacity, provided that the minimum amount payable is not less than $84.00 per week.[498]

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495 [2017] FWCFB 1931, 7 April 2017.
496 FWC, National Minimum Wage Order, (26 June 2017), PR593544.
497 Ibid.
498 Ibid.

849. The assessment of the employee's productive capacity must be conducted in accordance with the Commonwealth Government Supported Wage System (SWS) by an approved assessor.[499] All SWS wage assessment agreements, including the applicable percentage of the national minimum wage to be paid to the employee, must be lodged by the employer with the FWC.

850. Schedule A further requires that the assessment of the applicable percentage should be subject to annual or more frequent review on the basis of a reasonable request for such a review, and that an employer wishing to employ a person under the provisions of SNMW2 must take reasonable steps to make changes in the workplace to enhance the employee's capacity to do the job.

851. The FW Act also makes provision for modern awards and enterprise agreements to prescribe minimum rates specifically for employees with a disability.[500]

852. Many, though not all,[501] modern awards, contain a schedule which allows employment within the Supported Wage System in terms similar to those expressed in the National Minimum Wage Order. Employees with a disability who are covered by a modern award can only be paid less than the standard minimum award rates for each classification if such provision is made in the award.

5.8(b) 2012 Proposals for Reform in the State Industrial Relations System

853. The 2012 Green Bill would have repealed the MCE Act and incorporated statutory minimum conditions of employment in the IR Act. The existing MCE Regulations were to have been repealed, ending the exclusion of persons with disabilities from coverage by the MCE Act.

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499 Ibid. Further information about the Supported Wage System can be obtained from the current (July 2017) Supported Wage System Handbook, available at https://www.jobaccess.gov.au/sites/default/files/documents/08_2017/supported_wage_system_handbook_july_2017.pdf

500 FW Act s 139, s 153(3)(b) and s 195(3)(b).

501 During the 2009 Federal award modernisation process, the then Australian Industrial Relations Commission (AIRC) reported that it had received some submissions suggesting that the Supported Wage System schedule should not be included in all awards because conditions in some industries are not conducive to the employment of persons with a disability. The AIRC accepted that "there should be some limits based on safety considerations and the nature of the work the award covers" [2009] AIRCFB 345.

854. The intention was that persons with disabilities would be covered by the statutory minimum conditions of employment in the State industrial relations system, consistent with the FW Act.[502]

855. The Green Bill included two mechanisms to allow the payment of special wage rates to certain employees with a disability in line with their assessed productive capacity:

(a) in accordance with "supported wage provisions"; and

(b) in accordance with the SWS where there were no supported wage provisions.

856. "Employee with a disability" was to have been defined in s 7(1) of the IR Act to mean an employee whose productive capacity:

(a) has been assessed under either the SWS or supported wage provisions; and

(b) is assessed as being reduced because of a disability.[503]

857. The term "supported wage provisions" was to have been defined in s 7(1) of the IR Act to mean provisions in an industrial instrument that enable the assessment of whether, and the extent to which, a person's productive capacity is reduced because of a disability.[504] The purpose of this provision was to allow for the use of a particular wage assessment tool that had been endorsed by the parties to an award or agreement.[505]

858. The Green Bill would therefore have allowed payment of special wage rates to employees with a disability in line with the SWS, as well as alternative systems of assessing an employee's productive capacity. The view at the time was that if the

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502 Draft Explanatory Memorandum, Labour Relations Legislation Amendment and Repeal Bill 2012 [597].

503 Ibid [607].

504 Ibid [609].

505 For examples of assessment tools other than SWS, see the Federal Department of Social Services' 'Analysis of Wage Assessment Tools used by Business Services', available at: www.dss.gov.au/our-responsibilities/disability-and-carers/publications-articles/policy-research/analysis-of-wage-assessment-tools-used-by-business-services-0. The Secretariat is unable to ascertain whether tools other than SWS are currently being used in Western Australia.

parties to an award or agreement agreed to a particular wage assessment tool, this could be taken as sufficient evidence of its legitimacy.[506]

859. The Explanatory Memorandum for the Green Bill stated:

> The SWS will be the default wage tool for calculating the minimum wage for an employee with a disability where there is no wage tool contained in an industrial instrument that applies to the employee (the wage tool in an industrial instrument could, incidentally, be the SWS).[507]

860. The Green Bill would have created a new s 119 of the IR Act to provide that a person may be employed under the provisions of the SWS. The Green Bill defined the SWS in s 7(1) of the IR Act to mean the scheme established by the Commonwealth Government to enable the assessment of whether, and the extent to which, a person's productive capacity is reduced because of a disability.

861. The Explanatory Memorandum for the Green Bill stated:

> In accordance with the SWS Handbook, published by the federal Department of Education, Employment and Workplace Relations [March 2010 edition], before a person with a disability can be employed under the SWS, the job under consideration must be covered by an industrial instrument or legislative provision that permits employment under the SWS provisions. Section 119 will serve this purpose.[508]

862. The Green Bill would also have created a new s 129 in the IR Act establishing the minimum weekly amount payable to employees with a disability. This section incorporated the provisions of the SWS that enable the calculation of a minimum rate of pay for an employee with a disability based on the employee's assessed productive capacity. The percentage of an employee's assessed productive capacity would determine the percentage of the minimum (adult) rate of pay to which they would be entitled. The new s 129 would also have required an employee to be paid a minimum weekly amount regardless of the determined percentage of the minimum adult wage.[509]

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506 This issue may be worth revisiting given the recent exclusion of certain assessment tools from industrial instruments in the national jurisdiction. See, for eg, [2017] FWCFB 5073.

507 Draft Explanatory Memorandum, Labour Relations Legislation Amendment and Repeal Bill 2012 [610].

508 Ibid [606].

509 Ibid [597].

863. The minimum weekly amount was initially set at $76, based on the Special National Minimum Wage 2 that was applicable in the national jurisdiction at the time, as set out in the 2012 National Minimum Wage Order. New s 124(4) and 124(5) of the IR Act would have provided that employees with a disability would be entitled to this minimum amount regardless of the amount of hours actually worked.

864. It was intended that once the Green Bill was enacted, the WAIRC would set minimum weekly rates of pay for employees with a disability.

865. The Green Bill would have created new ss 50B(1A)(c) and 50C(1B) of the IR Act to require the Commission to set or adjust the minimum weekly amount payable to employees with a disability in s 129(3).

866. The Explanatory Memorandum stated:

> It is not intended that the Commission be either required to or prevented from adjusting [the minimum weekly amount for employees with a disability] amount in accordance with the National Wage order. The Commission will, however, be required under new section 50A(3) to take into consideration the most recent National Wage order made under the FW Act when making the State Wage order, which will include a consideration of special national minimum wage 2.[510]

867. The Green Bill would also have abolished current "under-rate employee provisions" in State awards which allow payment of lower rates to employees who by reason of old age or infirmity are unable to earn the minimum wage. The Bill provided for transitional arrangements to phase out these arrangements and to ensure that "under-rate" employees were assessed in accordance with a supported wage provision or the SWS within six months of the relevant section of the Amendment Act commencing.[511]

5.8(c) Preliminary Opinion of the Review on the Present Exclusions of Persons with a Disability from the Minimum Conditions of Employment Act

868. There is no apparent reason for persons with disabilities to be excluded from coverage by the minimum conditions of employment in the State industrial relations system. Rather, it is considered appropriate for persons with disabilities to be

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510 Draft Explanatory Memorandum Labour Relations Legislation Amendment and Repeal Bill 2012 at [396].

511 Ibid at [611]-[614].

covered by the minimum conditions of employment, and to make provision for payment of special wage rates to those employees with a disability whose productive capacity has been assessed as being reduced by means of an appropriate assessment method.

5.9 Minimum Conditions of Employment Act Exclusions – Volunteers

869. This exclusion applies to persons who are not entitled to be paid for work but who receive some benefit or entitlement in relation to the work.

870. The Review considers that there is some difficulty with this exclusion. That is because if a person does work for another person as an employee, that relationship status may entitle them to be paid for the work done under the applicable legislative or industrial framework. The mere fact that the parties contract or agree that the "employee" is not to be paid does not circumvent the terms of any applicable legislation, industrial agreement or award.

871. It is sometimes said that whether or not somebody is a volunteer or an employee depends upon the terms of the arrangement between the putative employer and employee. This is because if there is no agreement to create legal relations, then one of the pre-conditions of a contract is not existent. With respect, the Review considers that to be a relatively simplistic view and one that is open to exploitation in particular circumstances. The Review is of the opinion that ordinarily, if there is an arrangement between two parties whereby one is to be employed and rewarded in some way for work done for another, that reward ought to comply with minimum conditions of employment of legislation or award or industrial agreement that otherwise covers and applies to the employment.

872. As this exclusion was not however the subject of specific submissions by stakeholders, the Review will call for further submissions on the exclusion before making recommendations to the Minister.

5.10 *Minimum Conditions of Employment Act* Exclusions – Employees of the National Trust of Australia (WA)

873. This 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 that is managed, maintained, preserved, or protected, whether solely or jointly, by the National Trust of Australia (WA)." Some of the background to the exclusion is contained in the statement quoted earlier to Parliament by the Hon. Mr Kierath.

874. In full, s 22 of the *National Trust of Australia (WA) Act* provides:

> **Appointment of officers**
>
> (1) The Trust may —
>
> (a) appoint such employees as may be necessary for the efficient carrying out of the functions of The Trust under this Act;
>
> (b) engage and remunerate for their services such professional persons or agents as The Trust considers may be necessary for carrying out the objects of The Trust.
>
> (2) Notwithstanding anything in subsection (1), to the extent that there is in the case of a person who is appointed under that subsection to be an employee of The Trust and who is a member of the Senior Executive Service within the meaning of the Public Sector Management Act 1984 an inconsistency between this Act and that Act that Act shall prevail.

875. The Review has sought information from the National Trust of Australia (WA) (National Trust) about whether it still thinks the exclusion is required. The National Trust made a confidential submission. It is therefore difficult for the Review to comment on the submission, or the issue, in any fulsome way. The National Trust has authorised the Review to say that without the exemption it would have difficulty in providing for wardens at National Trust places, especially in regional areas in Western Australia.

876. The exclusion only applies to the "employees"of the National Trust. This is because the exclusion expressly refers to s 22(1) of the *National Trust of Australia (WA) Act* and that subsection only mentions the appointment of "employees". The Review has insufficient information before it to assess whether the wardens are employees or not. The Review assumes however based on the information from the National Trust that can be published that it must be of the view that it has, or there is a risk

that as a matter of law it could be found that it has, appointed "employees" under s 22(1) of the Act, to act as wardens. The publishable information from the National Trust seems to imply that it may not be able to afford to pay wardens as employees if the MCE Act applied to them.

877. The Review understands the National Trust's desire to have wardens at country and metropolitan locations. It is also understandable that the National Trust seeks to operate within its budget. What is, on its face, less understandable is if people are engaged as employees and not paid as such. The exclusion, for the benefit of the Trust runs counter to the reasons for having a MCE Act, and minimum wage; even if the National Trust largely operates for the public good.

878. The Review would welcome any additional submissions from the National Trust, as to the way forward. As things stand the Review is not convinced that the exclusion should remain. This view is consistent with the general reasoning set out earlier as to the desirability of minimum conditions of employment in the State applying to employees without discrimination.

879. Further consideration will need to be given to the issue before providing a recommendation on the exclusion in the final report of the Review.

5.11 Other Employees – People Working without or Contrary to the Terms of their Visa

5.11(a)The Migration Act 1958

880. Under the *Migration Act 1958* (Cth) (Migration Act) a non-citizen is a person who is not an Australian citizen.[512] A non-citizen in Australia may be either lawful or non lawful. A lawful non-citizen is one who holds a visa; an unlawful non-citizen is a non-citizen who does not.[513]

881. People who travel to Australia on visas will usually have a condition as to whether they can work. If they can work, the condition may specify the occupation or even

[512] Section 5(1).
[513] Sections 13, 14.

the employer for whom they may work. The visa and/or the condition may expire after a specified period of time.

882. There are employment law issues that arise if a person works in Australia when they do not have a visa, if they work in Australia after their visa has expired or if they work contrary to the conditions of their visa.

883. In the present context the issue is whether any of these categories of people is an "employee" for the purposes of the IR Act or the MCE Act. If they are not, then, even if they are (for example) paid less than the amounts otherwise payable to employees in accordance with the MCE Act, or an award that would otherwise be applicable to the person and employer, enforcement will not be possible in the IMC. This is because the entitlements and hence enforcement actions are dependent upon the person being, at law, an employee.

884. The Migration Act has created offences for people who are non-citizens and engage in work in Australia.

885. Section 235(1) provides that if a non-citizen holds a temporary visa that is subject to a prescribed condition restricting the work the non-citizen may do in Australia, and contravenes that condition the non-citizen commits an offence. An offence is committed whether the condition prohibits the non-citizen from doing any work, work other than specified work, or specified work.[514]

886. Section 235(3) provides that an unlawful non-citizen who performs work in Australia "whether for reward or otherwise" commits an offence.

887. The maximum penalty for each of these two offences is a fine not exceeding 100 penalty units,[515] which equates to $21,000.[516]

888. Each of these sub-sections contains a note that provides: "Subdivision C of this Division also contains offences relating to work by an unlawful non-citizen".

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514 Section 235(2).
515 Section 235(5).
516 Sections 235(5). "Officer" is defined in Migration Act s 5.

889. As set out in s 245AA(1) of the Migration Act, the subdivision creates offences and provides for civil penalties to deal with situations where a person allows an unlawful non-citizen to work or refers them for work, or where a person allows an unlawful non-citizen to work or refers them for work in breach of the non-citizen's visa conditions. Accordingly, there are sanctions under the Migration Act for both a non-citizen who engages in work when they do not have a visa that permits them to do so and also for the person who engages them in or refers them for the work. The Explanatory Memorandum to the Migration Amendment (Employer Sanctions) Bill 2006, which lead to the passing of the Migration Act to include Subdivision C, described the background to the Bill, as follows:

> The incidence of illegal work in Australia is a significant problem that denies Australians the opportunity to gain employment and can result in the exploitation of non-citizens. It is also a concern to the Government because of its close association with cash economy industries, which are characterised by abuses of Australia's tax, employment and welfare laws. The absence of effective penalties for employers of illegal workers also encourages people smuggling and trafficking activities for the purpose of illegal work. Victims of trafficking may be forced to work illegally in conditions of forced labour, sexual servitude or slavery…The proposed new offences will: deter employers and labour suppliers from employing illegal workers or referring them for work; and encourage employers and labour suppliers to verify the work entitlements of potential employees when there is a substantial risk that they may be illegal workers. The offences will supplement existing measures in relation to illegal workers and provide a holistic approach to combating illegal work in Australia.

890. This detail is provided as an understanding to the genesis of at least some of the laws that were introduced to combat "illegal work" in Australia. It has some relevance to the present question of whether someone can be an employee for the purposes of the MCE Act, for example, even if they are working illegally under the Migration Act.

891. The issue of whether a person who is working without a visa or contrary to the terms of their visa has a valid employment contract, and so is an "employee" as defined by the IR Act, the MCE Act and the LSL Act, has not been tested in Western Australia. Therefore, there is no direct case law on point. Further to the extent that the issue has been considered federally and in other State courts there are conflicting decisions. The Western Australian legislature could enact, for the purposes of the MCE Act and the IR Act and any awards or industrial instruments made thereunder, that a person who is employed in contravention of the Migration Act is to be

regarded as an employee, at law, for some purposes; for example, enforcement proceedings against their "employer", but there is a question-mark as to whether that would be constitutional, having regard to s 235 of the Migration Act and s 109 of the *Constitution*. It could be argued that the Commonwealth had "covered the field" on the topic of illegal non-citizen workers in the Migration Act and so any State Act on the subject was inoperable. This issue is taken up again below.

892. A summary of relevant cases follows.

893. In *Gnych v Polish Club Ltd* (*Gnych*)[517] the High Court decided that an agreement may be unenforceable for statutory illegality if it falls within one of the following three categories:

(a) The making of the agreement or doing of an act essential to its formation is expressly prohibited by statute absolutely or conditionally.

(b) The making of the agreement is impliedly prohibited by a statute. A particular case of an implied prohibition arises where the agreement is to do an act the doing of which is prohibited by statute.

(c) The agreement is not expressly or impliedly prohibited by statute but is treated by the courts as unenforceable because it is a contract associated with, or in the furtherance of an illegal purpose.

894. Although it is not entirely clear, even if a type of contract is expressly or impliedly prohibited by statute, it does not automatically follow that the prohibited contract will be void and unenforceable for all purposes.[518] The *Gnych* decision suggests that an action to enforce should only be denied where the statute concerned is construed to intend that result or the court concludes on public policy grounds that to allow the claim in question would undermine the relevant legislative scheme. The latter is a real prospect in the present context.

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517 (2015) 255 CLR 414, 425.

518 See for example *Phillipa v Carmel* [1996] IRCA 451.

5.11(b)Legality and Enforceability of an Unauthorised Worker's Employment Contract

5.11(b)(i) Employment Contracts Formed with Unlawful Non-citizens

895. The following cases have considered issues relating to the validity and enforceability of employment contracts or entitlements in relation to non-citizens who do not hold visas.

896. In, *Viliami v National Springs,*[519] the Compensation Court of New South Wales held that, although the worker was subject to a penalty for entering into an employment contract when this was not permitted by his visitor's visa, his employment contract was not illegal. This decision, however, pre-dated the introduction of s 235 and s 245 of the Migration Act.

897. In, *The WorkCover Corporation (San Remo Macaroni Co Pty Ltd) v Liang Da Ping,*[520] the Full Court of the Supreme Court of South Australia held that the Migration Act disclosed an intention to prohibit the performance of work by illegal entrants in the public interest. By implication, therefore an employment contract was prohibited and void and consequently, the person was not engaged under a valid contract of service.

898. In, *Nonferral (NSW) Pty Ltd v Taufia,*[521] Stein JA and Cole JA held, despite the *Da Ping* decision, the Migration Act did not render the relevant contract illegal and unenforceable. However, that decision is of limited contemporary relevance as it pre-dated the introduction of s 235 and s 245 of the Migration Act.

899. In, *Australia Meat Holdings Pty Ltd v Kazi* (*Kazi*)[522] which was decided, importantly, since the introduction of s 235 and s 245 of the Migration Act, a majority of the Queensland Court of Appeal held that, if it is in the national interest to prohibit unlawful citizens from performing work, it must also be in the public interest to prohibit an unlawful citizen from obtaining rights under a contract to perform work. The person's employee contract was therefore held to be void.

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519 (1993) 9 NSWCCR 453.
520 (1994) 175 LSJS 469; BC9400555.
521 (1998) 43 NSWLR 312.
522 [2004] 2 Qd R 458; [2004] QCA 147.

900. In, *Hussein v Secretary, Department of Immigration and Multicultural Affairs (No 2),*[523] the Federal Court held that, as s 235(5) of the Migration Act is a strict liability offence, any contract the person had with the Department (for service rendered whilst in detention) was void for illegality and unenforceable.[524]

901. In, *Yong Fu Zhang v Mei Hu t/as Eden Furniture and the WorkCover Authority of New South Wales,*[525] the New South Wales Workers Compensation Commission relied on the *Kazi* decision and decided the employment contract of an unlawful non-citizen was void.

5.11(b)(ii) Employment Contracts Formed with Lawful Non-Citizens Working in Contravention of Visa Conditions

902. The validity of an employment contract made with a non-citizen working in contravention of a visa condition could depend upon the nature of the breach. If the visa provides that the non-citizen may work a maximum of 20 hours per week, it is arguable that the employment contract is not rendered wholly invalid if the non-citizen merely exceeds the permitted hours, on occasions. If, however, the visa provides that the non-citizen must not perform any work, there may be a stronger argument that the contract is invalid.

903. The following cases have considered the validity and enforceability of employment contracts or entitlements in relation to visa holders who were working in contravention of their visa conditions.

904. In *Fair Work Ombudsman v Bosen Pty Ltd,*[526] the Magistrates Court of Victoria (Industrial Division) ordered the back payment of underpaid minimum wages to the workers. The court did not however expressly consider the enforceability of the employment contract. In the present context that is a major deficiency in the decision as a precedent.

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523 (2006) 155 FCR 304; [2006] FCA 1263.

524 Migration Act s 235(4B). A note to the section refers to the definition of "strict liability" in the Commonwealth Criminal Code s 6.1.

525 [2006] NSWWCCPD 15.

526 Unreported, Magistrates Court of Victoria, Industrial Division, 21 April 2011.

905. Likewise in *Fair Work Ombudsman v Shafi Investments,*[527] the Federal Magistrates Court ordered the back payment of underpaid minimum wages to the employee and imposed penalties on the employer. Again however there was no analysis of the legal issues presently under consideration.

906. In, *Smallwood v Ergo Asia Pty Ltd,*[528] the FWC cited *Kazi* and said than an employment contract between the applicant and a person other than her sponsor was void and unenforceable.

907. In its *Workplace Relations Framework, Final Report November 2015*,[529] the Productivity Commission observed that there is confusion and inaccurate information about whether the FW Act applies to migrant workers working in breach of their visa conditions.

908. It cited *Smallwood v Ergo Asia Pty Ltd* (*Smallwood*)[530] and argued the decision suggests employment contracts for migrants who are in breach of their visas are void and unenforceable.

909. Given the confusion about the coverage of the FW Act, the Productivity Commission recommended that the Australian Government clarify in the FW Act that a migrant's employment contract is valid despite working in breach of the Migration Act and that the FW Act applies. It was argued that would provide migrants (and agents acting on their behalf) with greater certainty about their workplace rights. It would encourage migrant workers to report exploitation, and increase the effective penalty for exploitative employers.[531] This has not as yet occurred.

910. The FWO has expressed the view that the FW Act applies to all migrant workers. It therefore initiates enforcement proceedings regarding contraventions of the FW Act regardless of whether a migrant worker is working in breach of the Migration Act.

527 [2012] FMCA 1150 and [2013] FMCA 168.
528 [2014] FWC 964.
529 Productivity Commission, *Workplace Relations Framework*, *Final Report*, (2015) Canberra, 929-931.
530 Above, n 528, 930.
531 Ibid 931.

911. In its submission[532] to the Productivity Commission on the draft *Workplace Relations Framework Report*, the FWO cited *Fair Work Ombudsman v Bosen Pty Ltd* (*Bosen*)[533] and *Fair Work Ombudsman v Shafi Investments* (*Shafi Investments*)[534] as instances where the courts have enforced the FW Act for migrants working in breach of their visa conditions. The FWO also cited *Fair Work Ombudsman v Haider Enterprises Pty Ltd (in liq) & Anor*[535] and *Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor*.[536]

912. In the opinion of the Review, the lack of a proper consideration of the relevant legal issues gives these precedents a soft underbelly, rather than solid bedrock, from which to argue support for enforcement being legally possible.

5.11(c) Constitutional Validity of Possible Legislative Amendment

913. The WCIM Act addresses this type of uncertainty directly in s 192, which provides that illegal contracts of employment may be treated as valid for the purposes of that Act.

914. As set out above however there is a question of whether any amendment to State industrial relations legislation could validly operate if in indirect conflict with the Migration Act.

915. The Review will seek further submissions on the issue, and in particular the constitutional issue, before making any proposed recommendations.

5.12 Persons Employed in Western Australia by a Foreign State or Consulate

916. There is a possible gap in the regulation of employment in Western Australia in that the IR Act and the MCE Act do not cover persons who are employed in Western Australia by a foreign state or consulate.

917. It is a situation that is unique to Western Australia, amongst the Australian States.

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532 FWO submission to Productivity Commission regarding *Draft Report on the Workplace Relations Framework, September 201*5, 3 available at www.pc.gov.au.

533 Above n 526.

534 [2013] FMCA 168.

535 [2015] FCCA 2113.

536 [2012] FMCA 258.

918. The coverage of foreign states as employers under the FW Act is not completely clear. However, it has been held that a foreign state employing a person in NSW was subject to the FW Act.[537] The basis was that the foreign state can be a national system employer on either (or both) of two possible definitions of national system employer:

(a) Pursuant to s 14(1)(f) of the FW Act – the employer is a "person" and the person carries on an activity (including of a governmental or other nature) in a Territory in Australia and employs an individual in connection with the activity carried on in the Territory.[538]

(b) Pursuant to the extended definition of "national system employer" with respect to a referring State – the foreign state is a person in a State that is a referring State that employs an individual.

919. It is not clear from the reasons for decision which of these two possibilities was applied. Nevertheless, it seems that in any other State or Territory, relevant employees of an embassy/foreign state will be covered by the FW Act, subject to the *Foreign States Immunities Act 1985* (Cth).

920. However, in Western Australia, a foreign state would appear not to fall within the definition of "employer" in s 7 of the IR Act as they are not included in the definition of "person" in the *Interpretation Act 1984* (WA) (a body politic is not a person under that definition in contrast to the Commonwealth definition) nor within any of the other entities defined as an "employer" in s 7.

921. Arguably, the FW Act could apply to a foreign state employing in Western Australia on the basis of s 14(1)(f) of the FW Act if an individual is employed *in connection with an activity carried on in a Territory of Australia* (i.e. arguable if there is an embassy/High Commission in the ACT and the Western Australian activities are in connection with the activity carried on in the Territory). However, this is fairly

537 *Kassis v Republic of Lebanon* [2014] FCCA 155 [8].

538 It is important to note that the *Acts Interpretation Act 1901* (Cth) includes, in the definition of "person" a "body politic" which appears to encompass a foreign state.

tenuous and may depend on the nature of the role each individual in an embassy is employed in and each role's connection with the activity of the foreign state's embassy or High Commission in the ACT. It is likely there would not be general coverage of relevant employees in a Perth consulate under this section.

922. It would appear to be sensible to ensure that these employees are not excluded from the coverage of the IR Act or the MCE Act conditions of employment. As the issue is novel however the Review seeks further submissions and will seek additional information on whether there are any potential foreign affairs complications if the IR Act were amended to cover these employees.

5.13 Other Employees – Sex Industry Workers

923. The IR Act and MCE Act do not presently address the question of whether workers in the sex industry are considered to be employees.

924. In *Phillipa v Carmel*,[539] the applicant, a sex industry worker, claimed that her employment had been unlawfully terminated by the madam of the brothel where she was engaged in her work. The Industrial Relations Court of Australia decided the applicant was an employee for the purposes of the *Industrial Relations Act 1988* (Cth) despite evidence that both the applicant and respondent, by virtue of their relationship, had contravened s 76F and s 76G of the *Police Act 1892*.[540]

925. The Court received evidence that under the so-called "containment policy" then operating in Western Australia, the activities of particular prostitutes and brothels were not prosecuted and were in effect condoned by the Police Force. It was also noted that a "succession of parliaments have not intermeddled with this policy."[541]

539 *Phillipa v Carmel* [1996] IRCA 451.

540 Sections 76F and 76G of the *Police Act 1892* were repealed in 2004 and replaced by the current s 190 of the *Criminal Code*, which specifies a range of offences relating to premises which are used for the purposes of prostitution.

541 Above n 539.

926. The containment policy was "officially" abandoned on 1 August 2000 by the then-Police Commissioner.[542] Despite this, it appears that some form of the containment policy remains in effect. A 2010 report stated:

> … evidence from the empirical research in the present study suggests that "abandonment" did not mean adhering to the formal provisions of the law. Rather, it appears to refer to a laissez-faire policy approach to brothels in which there was a low level of law enforcement and some tolerance of both containment brothels (i.e. those approved under the former policy) and noncontainment- brothels.[543]

927. A 2017 report noted the low number of recent prosecutions under s 190 of the Criminal Code and suggested:

> Given that brothel keeping continues to be illegal throughout this period the low number of prosecutions may be related to the variations of the containment policy enacted since 2000.[544]

928. There are likely to be ongoing complexities with determining the legal status of a sex worker if the issue were to be raised in a case before the WAIRC. The Review would welcome any submissions on whether there ought to be any legislative amendment.

5.14 The Gig Economy

5.14(a)The Gig Economy Issue

929. During a Legislative Assembly Estimates Committee Hearing on 21 September 2017, the Minister described the gig economy as being "a major concern for everybody in the industrial relations system" and said he anticipated the Ministerial Review would consider the definition of employee in relation to workers in the gig economy.[545]

930. The term "gig economy" generally refers to the practice of obtaining labour by using a "digital platform". The work is performed "on demand" and is compensated for on the basis of the completion of a particular task. Workers often supply their own

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542 Western Australia, *Parliamentary Debates,* Legislative Assembly, 14 November 2000, 2978b-2979a.

543 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, 34.

544 Selvey et al. *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, (2017), 45.

545 Western Australia, *Parliamentary Debates,* Legislative Assembly Estimates Committee A, Thursday, 21 September 2017, E442.

tools and equipment.[546] There is a tripartite arrangement with a consumer, a worker and a facilitator. The facilitator provides the digital platform and "introduces" the consumer to the worker; the facilitator pays the worker, and receives payment for them from the consumer. The facilitator also deducts a fee for their services.

931. There are consumer benefits from the system. Digital platforms make it possible to obtain a range of services more quickly and easily than has been possible in the past. Consumers value the simplicity, convenience and prices offered by digital platforms; for example, being able to order a cheap ride home via a mobile phone application (app) or having food delivered promptly to the door. For the workers, as an ideal at least, the gig economy offers flexible hours and earning potential for those who may be excluded from the mainstream labour market.

932. There are however growing concerns about working conditions and remuneration in the gig economy. Gig economy workers typically lack standard employment entitlements, with platform operators arguing that people obtaining work through their sites are independent contractors rather than employees.[547]

933. The Minister's concern about the rapidly developing gig economy and the rights of workers is, with respect, well placed. It seems to the Review that the gig economy has, at least initially, flourished in a consumer driven community, excited at the prospect of on demand services being available more cheaply and quickly than "traditional" services. The "Uber" versus "taxi" debate in Western Australia has been well publicised and led to legislative, industrial and market-place change. Initially, at least, the promotion of the system also seemed rosy for the workers. More recently, however, at least in some sectors of the gig economy there have been legitimate concerns. Questions have emerged about whether, in truth, what is involved is a deregulated underbelly of the labour market without minimum standards of employment conditions. A concern is whether a consumer driven society is causing a competitive "dive to the bottom" involving competing workers

546 De Stefano, V. *The rise of the "just-in-time workforce" : on-demand work, crowdwork and labour protection in the "gig-economy"*, International Labour Office, Conditions of work and employment series; (2016) No. 71.

547 Stanford, J. 'The resurgence of gig work: Historical and theoretical perspectives', *The Economic and Labour Relations Review* (2017).

offering services for the cheapest rates in an attempt to pick up work in the recently poor labour market and economic conditions in the State.

934. These concerns have some stakeholder as well as academic support. A number of unions and other parties submitted to the Review that the definition of employee be broadened to capture gig economy workers. Several of these suggested this could be achieved by adopting the definition of "worker" in the WCIM Act. United Voice submitted that:

> The Western Australian Industrial Relations Commission should work with stakeholders to develop clear indicators of employment for gig economy workers in recognition of the fact that people doing work using digital platforms deserve the same protections and rights as other workers.

935. There is a question however as to whether the State of Western Australia can be legislatively involved in the regulation of the gig economy, by an amendment to the definition of the word "employee" in industrial relations legislation. This issue is anterior to the important question of whether it should, at least at this time, get involved. The submission received from CCI, for example, emphasised, understandably given their constituents, that the State should not over regulate a developing market and stifle the development of business opportunities. The submission from AMMA said there was "no demonstrated reason why the definition [of employee] needs to be altered".

5.14(b)The Gig Economy – Problems with State Involvement

936. The Review sees two problems with the issue of whether the State can become involved in the regulation of the gig economy via industrial relations legislation. The first, fundamentally, is constitutional coverage. Uber, for example is incorporated in Australia and hence a constitutional corporation. If it has employees, the FW Act, at least with respect to the applicable terms and conditions, governs the employment relationship. Consequently, Western Australia may not enter the field and legislate with any operational effect. If the relationship between Uber and driver is one of an independent contractor (as to which see below), then the Commonwealth has also,

seemingly, covered that field by the *Independent Contractors Act 2006* (Cth) (IC Act). Hence the field again would be closed to Western Australian legislative involvement.

937. Section 7 of the IC Act specifically precludes State and Territory Governments from deeming contractors to be employees for workplace relations purposes or conferring rights or imposing obligations on contractors that would normally be considered workplace relations matters, though there are exemptions for certain State and Territory laws which existed at the time of the enactment, and further exemptions can be specified by regulation.

938. Current exemptions in the *Independent Contractors Regulation 2016* (Cth) include the *Construction Contracts Act 2004* (WA), which provides for adjudication of payment disputes in the building industry (but specifically excludes employees seeking to resolve wage or salary disputes), and the OD Act which regulates the relationship between owner-drivers within the road freight transport industry and the parties that hire them, including matters pertaining to bargaining and negotiations.[548]

939. The State Government could consider the development of similar legislation to extend employment protections to independent contractors in the gig economy, but any legislation would require cooperation from the Commonwealth Government. It could only be operative if the Commonwealth Government, by regulation, permitted application.

940. That may leave, as a potential legislative focus, the other part of the tripartite arrangement, the relationship between the consumer and worker. This could be looked at, regarding "Airtasker" type services, for example. In that arrangement the platform puts consumers in touch with suppliers of services. This includes a potentially limitless group of lawful service providers, including things like building IKEA furniture, covering school books, arranging a birthday party and brick paving to name a few. However, this part of the arrangement is close to, if not identical with, the old fashioned selection of a "tradie" who advertises in the weekend papers. If a

[548] See further in chapter 2.

one-off relationship results, and, for example, a consumer chooses a worker to repair their garden wall, should the State become involved in regulating the terms and conditions of that engagement?

941. In 2017 UnionsNSW released a report on Airtasker. It noted the Airtasker platform describes itself as "a trusted community marketplace for people and businesses to outsource tasks, find local services or hire flexible staff in minutes."[549] The analysis in the report found that recommended hourly rates of pay for the most common job categories on Airtasker were below the relevant award minimum.[550]

942. UnionsNSW subsequently worked with Airtasker to identify the minimum award rates of pay for the platform's most common industries and classifications. The site no longer includes any recommended rates below the National Minimum Wage and notifies people posting jobs on the site of the minimum award rates of pay for 10 key categories of work.[551]

943. The rates posted on the Airtasker site remain recommendations only however, and UnionsNSW continues to support further regulation of work in the gig economy:

> Initiatives like the Airtasker–Unions NSW agreement cannot single-handedly eliminate the risks of exploitation and the downward bidding of labour standards in platform businesses. The recommended minimum rates of pay included in the agreement now match or exceed minimum award rates; however, they are still not compulsory and cannot be enforced. Airtasker's job-bidding system will still encourage workers to undercut the legal minimums in order to attain more work (Kaine, 2017). For these reasons, in the longer term, Airtasker workers (and others in the gig economy) need the full, formal protection that can only be provided by the complete set of labour standards available to other workers. This protection will need to be formalised through legislation and regulation which defines and guarantees normal minimum labour standards of all workers, even in cases where they do not meet the legal criteria to be defined as 'employees'.[552]

944. UnionsNSW has also previously noted Airtasker's activities in providing a platform for businesses to hire workers and suggested:

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549 Airtasker website: www.airtasker.com.

550 UnionsNSW, 2017, *Innovation or Exploitation? Busting the Airtasker Myth;* (2017) and K Minter 'Negotiating labour standards in the gig economy: Airtasker and Unions New South Wales', *The Economic and Labour Relations Review*, (2017), 9.

551 K Minter, 'Negotiating labour standards in the gig economy: Airtasker and Unions New South Wales', *The Economic and Labour Relations Review* (2017) 12.

552 Ibid.

> There is strong evidence to suggest Airtasker is acting as a labour hire agency when it connects individuals with businesses for the performance of paid work. As such, Airtasker should be required to comply with the regulations and legislation that govern labour hire firms including the classification of these workers as employees of Airtasker.[553]

5.14(c) Are Uber Drivers Employees?

945. The question of whether an Uber driver was an employee for the purposes of the FW Act was decided by Gostencnik DP in *Kaseris v Rasier Pacific V.O.F.* (Kaseris).[554] The context was an application by Mr Kaseris under s 394 of the FW Act for an unfair dismissal remedy. Mr Kaseris had entered into a services agreement, including a service fee addenda, with the respondent. As explained by Gostencnik DP at [1], the respondent "provides a software platform which essentially allows motor vehicle drivers to connect with members of the public requiring transportation services. The software type is commonly known as Uber". The respondent argued the application ought to be dismissed as the applicant was engaged as an independent contractor, and as he was not an employee he was not therefore a person protected from unfair dismissal by the FW Act. Gostencnik DP concluded the applicant was not an employee and dismissed the substantive application. In his reasons for decision Gostencnik DP discussed the operation of Uber at some length under the headings of The Uber Brand, Riders, Drivers, The Services Agreement and The Service Fee Addenda, Rider Requests, Trips, Relationship between Drivers and Riders, Relationship between Drivers and The Respondent, Driver Use of the "Partner App", Payments by Riders to Drivers, Payments to Drivers to the Respondent, Services Standards, Equipment Use by Drivers, Uniform and Branding, Insurance and Termination of the Services Agreement.

946. Gostencnik DP then discussed the relationship between the applicant and the respondent in the context of the legislative framework. Gostencnik DP set out[555] the summary of the general law approach to distinguishing between employees and contractors provided by the Full Bench of the FWA in *Jiang Shen Cai trading as*

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553 UnionsNSW, above n 550, 10.
554 [2017] FWC 6610.
555 Ibid [53].

French Accent v Michael Anthony Do Rozario (Do Rozario).[556] As the Full Bench summarised in a passage quoted by Gostencnik DP:

> In determining whether a worker is an employee or an independent contractor the ultimate question is whether the worker is the servant of another in that other's business, or whether the worker carries on a trade or business of his or her own behalf: that is, whether, viewed as a practical matter, the putative worker could be said to be conducting a business of his or her own of which the work in question forms part? This question is concerned with the objective character of the relationship. It is answered by considering the terms of the contract and the totality of the relationship.[557]

947. As also stated by the Full Bench in *Do Rozario* and quoted by Gostencnik DP in *Kaseris*, the terms and terminology of the contract are always important, however the parties cannot alter the true nature of their relationship by putting a particular label on it. That is:

> … an express term that the worker is an independent contractor cannot take effect according to its terms if it contradicts the effect of the terms of the contract as a whole: the parties cannot deem the relationship between themselves to be something it is not. Similarly, subsequent conduct of the parties may demonstrate that relationship has a character contrary to the terms of the contract.[558]

948. The Full Bench in *Do Rozario*, as quoted by Gostencnik DP in *Kaseris*, then referred to the methodology of the determination of whether a worker is an employee or an independent contract, as set out by the High Court in *Stevens v Brodribb Sawmilling Co Pty Ltd (Brodribb).* [559] That is, whether, having regard to a number of indicia, is the relationship one of employment or otherwise. As set out in *Brodribb* and *Do Rozario* and applied by Gostencnik DP in *Kaseris* the indicia include:

(a) Whether the putative employer exercises, or has the right to exercise, control over the manner in which work is performed, the place of work, hours of work and the like.

(b) Whether the worker performs work for others (or has a genuine and practical entitlement to do so).

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556 [2011] FW Act FB 8307.
557 Ibid at [30](1).
558 Ibid at [30](3).
559 (1986) 160 CLR 16.

(c) Whether the worker has a separate place of work and/or advertises his or her services to the world at large.

(d) Whether the worker provides and maintains significant tools or equipment.

(e) Whether the worker can delegate or subcontract the work.

(f) Whether the putative employer has the right to suspend or dismiss the person engaged.

(g) Whether the putative employer presents the worker to the world at large as an emanation of their business.

(h) Whether income tax is deducted from the remuneration paid to the worker.

(i) Whether the worker is remunerated by a periodic wage or salary or by reference to the completion of tasks.

(j) Whether the worker is provided with paid holidays or sick leave.

(k) Whether the work involves a profession, trade or distinct calling on the part of the person engaged.

(l) Whether the worker creates goodwill or saleable assets in the course of their work.

(m) Whether the worker spends a significant portion of their remuneration on business expenses.

949. As then summarised by the Full Bench and quoted by Gostencnik DP in *Kaseris*:

> … a consideration of the indicia is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture of the relationship from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another… If, having

> approached the matter in that way, the relationship remains ambiguous, such that the ultimate question cannot be answered with satisfaction one way or the other, then the parties can remove that ambiguity [by] a term that declares the relationship to have one character or the other.[560]

950. In *Kaseris*, Gostencnik DP then looked at the evidence relevant to each of these indicia. His Honour also addressed a submission from the applicant that he should take into account the recent United Kingdom decision of *Aslam and others v Uber B.V. and others* (Aslam).[561] In *Aslam* the Employment Tribunal of the United Kingdom concluded that an Uber driver was a worker for the purpose of the *Employment Rights Act 1996* (UK). However, as Gostencnik DP pointed out, although the Uber operations in the United Kingdom and Australia are similar, the legislation at issue in *Aslam* was materially different to the FW Act. In particular, *Aslam* was decided on the basis of an expanded definition of a "worker" which was broader than the definition of an "employee" and encapsulates some independent contractors. Gostencnik DP said the decision in *Aslam* was of no assistance to the applicant.[562]

951. Gostencnik DP concluded[563] that the relevant indicators of an employment relationship were absent. The overwhelming weight of the relevant indicia pointed to Mr Kaseris being an independent contractor. Accordingly, the application was dismissed.

952. Significantly, however, Gostencnik DP at [66] said:

> The notion that the work-wages bargain is the minimum mutual obligation necessary for an employment relationship to exist, as well as the multi-factorial approach to distinguishing an employee from an independent contractor, developed and evolved at a time before the new "gig" or "sharing" economy. It may be that these notions are outmoded in some senses and are no longer reflective of our current economic circumstances. These notions take little or no account of revenue generation and revenue sharing as between participants, relative bargaining power, or the extent to which parties are captive of each other, in the sense of possessing realistic alternative pursuits or engaging in competition. Perhaps the law of employment will evolve to catch pace with the evolving nature of the digital economy. Perhaps the legislature will develop laws to refine traditional notions of employment or broaden protection to

560 Above, n 556 [30](5).
561 [2017] IRLR 4 (ET).
562 At [64].
563 At [67].

participants in the digital economy. But until then, the traditional available tests of employment will continue to be applied.

953. Despite the "Uber decision", legal scholars maintain that determinations will vary from platform to platform, and that it is possible some platform-based workers could be found to be employees.[564] The FWO has previously said, for example, that it has an active matter relating to the food delivery platform Deliveroo.[565]

5.14(d)The Gig Economy – Better Definitions Required?

954. It has been proposed that redefining the distinction between independent contractors and employees in legislation would assist workers in the gig economy to determine their employment status. The Taylor Review of Modern Working Practices in the United Kingdom recently recommended that the British Government consider updating legislation to reflect common law principles.[566] Similar proposals have been advocated in Australia.[567]

955. Some commentators identify the flexibility of the current common law as a strength rather than a weakness. A recent report for the Grattan Institute argued that the current multi-factor test for employment status "is flexible enough to allow courts to consider new factors relevant to a platform/worker relationship, such as the extent of control over the work that platforms exercise."[568]

956. The 2015 Productivity Commission Inquiry Report into the Workplace Relations Framework argued that it would be difficult to develop a legislative definition of employment which captured all the nuances that may currently be considered by a court, and concluded that "while a statutory definition is superficially attractive,

564 Stewart & J Stanford "Regulating work in the gig economy: what are the options?", *The Economic and Labour Relations Review* (2017). See also *Workplace Express* articles "Sham contracting test case to challenge disrupters' and 'Uber's UK court setback sure to have Australian sequel".

565 ABC News, "TripAdvisor teams up with Deliveroo, while Fair Work investigation into gig economy continues", 12 July 2017.

566 See chapter 5, *Good Work: Taylor Review of Modern Working Practices*, July 2017.

567 See again Stewart, A. & Stanford, J. (2017) "Regulating work in the gig economy: what are the options?", *The Economic and Labour Relations Review*; Young Workers Centre (2017) Submission to Senate Inquiry into Corporate Avoidance of the *Fair Work Act 2009*; See also Roles, C. & Stewart, A. (2012) "The reach of labour regulation: Tackling sham contracting", *Australian Journal of Labour Law*.

568 Minifie, J.& Wiltshire, T, *Peer-to-peer pressure: policy for the sharing economy*, Grattan Institute (2016), chapter 4.

there would be considerable difficulties and risks associated with a policy shift involving the rigid adherence to such a definition".[569]

957. An alternative was proposed in a recent Senate inquiry which recommended that where the legal status of a worker is in dispute, the party asserting that the worker is an independent contractor be required to establish this by demonstrating that the worker is operating a business and not working under that employer's control.[570]

958. Even if a definition of the distinction between employment and contracting was implemented, such a change would not result in all platform-based workers being defined as employees, or ensure that such workers have access to all the entitlements typically associated with being an employee. And, in Western Australia, the constitutional issue referred to earlier has a very limiting effect.

5.14(e)The Gig Economy – Amended Coverage?

959. Another suggestion to better protect workers in the gig economy is the creation of a new category somewhere between employee and independent contractor, variously proposed as "dependent contractor", "platform contractor" and "independent worker".

960. The proposals vary but all involve giving people who would otherwise be considered independent contractors access to some or all of the entitlements normally accruing to employees. Classification as a dependent contractor would be based upon a certain percentage of a contractor's business coming from the same principal. Intermediate categories of various kinds already exist in Italy, Canada, Germany, Spain and the United Kingdom.[571]

961. Opponents of this idea argue that if a new category was created which did not provide access to all employee entitlements, it could lead to further segregation in the labour market and encourage employers to falsely reclassify employees. It has

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569 Productivity Commission, *Workplace Relations Framework*, Final Report, (2015), 807- 815.

570 Senate Education and Employment References Committee, 2017, *Corporate avoidance of the Fair Work Act 2009*, Recommendation 24. See also chapter 8 of the Senate Report 'The gig economy: hyper flexibility or sham contracting?'.

571 Above n 546.

been observed that when a classification of this type was introduced in Italy, it led to many employers utilising the option to disguise employment relationships and reduce employment costs.[572]

962. A new category would also inevitably lead to further complexity in classifying employment and contractual relationships. The Grattan Institute has argued that "defining such a third category of worker would not be straightforward, and should only be attempted if it becomes clear that a meaningful group of workers would be covered by it."[573]

963. Another suggestion is that statutory entitlements could be extended to independent contractors by means of provisions which deem persons in certain situations to be employees for specific purposes. For example, the FW Act deems outworkers in the textile, clothing and footwear industries to be employees for most purposes.

964. A recent Senate Committee inquiry examining avoidance of the FW Act also recommended that:

> … the Fair Work Act be amended to ensure that all workers have the protections of the Act and access to the labour standards, minimum wages and conditions established under the Act, so that these rights accrue to dependent and on demand contracting, preventing those arrangements from being disguised as independent contracting. These amendments should capture the dependant contractor who is dependent upon a labour hire company, a company using a work allocation platform or a major corporation using a relationship power imbalance to exercise control over the worker.[574]

965. There is evidence to suggest that online platforms are being used by individuals and businesses to solicit applications for employment.[575] In these instances, the existing industrial relations framework could apply, though some of the current exclusions from State industrial legislation (of persons engaged in domestic service in private homes and persons remunerated wholly on a piece rate or commission only basis) could result in some workers in Western Australia continuing to have no access to minimum conditions and entitlements, even if it was established that their work met the common law definition of employment.

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572 Ibid.

573 Minifie, Jim & Wiltshire, Trent, *Peer-to-peer pressure: policy for the sharing economy*, (2016) Grattan Institute.

574 Above, n 570 Recommendation 25.

575 Above, n 570.

966. During Estimates Committee Hearings on 21 September 2017, the Minister also raised the question of whether gig economy workers are covered by the workers' compensation system.[576] This issue would need to be considered in relation to the provisions of the WCIM Act, rather than industrial relations legislation. The State Government has announced that it will be drafting a Bill to modernise workers' compensation legislation. It is quite possible that this issue will be considered as part of that process.

967. Concerns have also been raised as to whether workers in the gig economy are accumulating superannuation. Under the *Superannuation Guarantee Administration Act 1992* (Cth), there is no requirement to make contributions for independent contractors or for employees who earn less than $450 in a calendar month. Academics and the Association of Superannuation Funds of Australia have proposed extending superannuation coverage to the self-employed and removing the earnings threshold.[577]

5.14(f) Reflections on the Gig Economy

968. The Review considers the observations of Gostencnik DP in *Kaseris*[578] quoted above to be apposite.

969. Importantly, however, the legislative reform which His Honour considered may be necessary is not, in the Review's current opinion, within the constitutional coverage of Western Australia. That is, it is not something capable of being legislated about by the Western Australian Government. The gig economy and the working conditions within the gig economy are however, something that the Review thinks ought to be further considered and monitored by the Government.

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576 Western Australia, *Parliamentary Debates*, Legislative Assembly Estimates Committee A — Thursday, 21 September 2017 p E442.

577 Boccabella, D. & Kaine,S. 'Guaranteed superannuation? Not if you're a worker in the 'gig economy'. *ABC News Online*, 19 October 2017/9063114. www.abc.net.au/news/2017-10-19/gig-economy-workers-left-short-superannuation-guarantee; ASFA media release, 'Super and retirement incomes at stake in the gig economy', 7 September 2017.

578 At [66].

970. The Review will invite submissions from stakeholders and interested parties on how this might be best done. At this stage, the Review is minded to propose that the Government set up an arrangement within DMIRS to monitor the situation of the possible regulation of the participants in the gig economy by the State of Western Australia and the working conditions of workers within the gig economy. If such an arrangement were set up it would probably make sense for participants to include not only a departmental officer from DMIRS but also a representative from the State Solicitor's Office, the Law Society of Western Australia, CCI and UnionsWA as well as the Chief Commissioner of the WAIRC or her nominee.

5.15 Proposed Recommendations and Request for Additional Submissions

971. On this term of Reference, the Review publishes the following proposed recommendations, and specific requests for further submissions, for discussion and comment.

Proposed Recommendations

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

(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.

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.

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 SES, 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.

Attachment 5A - Definition of "Employee" in Industrial Relations Legislation – History of Exclusion for Domestic Workers

Year	Legislation	Issue
1912	*Industrial Arbitration Act 1912* (IA Act)	When the IA Act was introduced the definition of "worker" was amended to be: > any person of not less than fourteen years of age of either sex employed or usually employed by an employer to do any skilled or unskilled work for hire or reward, and includes an apprentice; but shall not include any person engaged in domestic service.
1925	*Industrial Arbitration Act Amendment Act 1925*	In 1925 the definition of "worker" in the IA Act was amended to qualify the exemption of persons engaged in domestic service. The new definition of "worker" stated that it: > … shall not include any person engaged in domestic service in a private home, provided that no home in which more than six boarders and/or lodgers are received for pay or reward shall be deemed a private home. The amended definition of "worker" therefore did not exclude larger boarding houses with more than six boarders and/or lodgers.
1937	*Industrial Arbitration Act Amendment Bill (No 1)*	This Bill was introduced by the Willcock Labor Government in the Legislative Council and proposed a variety of amendments to the definition of "worker" in the IA Act, one of which would have specifically extended the definition to include domestic servants. However, the Legislative Council significantly amended the Bill, including deleting the proposed changes to the definition of a "worker".[579] The Bill eventually lapsed when agreement could not be reached between the Houses on final terms of the legislation.
1938	*Industrial Arbitration Act Amendment Bill*	This Bill was also introduced in the Legislative Council by the Willcock Government. As with the 1937 Bill that was set aside, the 1938 Bill contained an amendment to the definition of "worker" in the IA Act that would have extended coverage to domestic servants. The Bill was passed by the Legislative Assembly; however it was defeated at the Second Reading stage in the Legislative Council.
1941	*Industrial Arbitration Act Amendment Bill*	This was a further Bill introduced by the Willcock Government (during the war time period) which proposed including workers engaged in domestic service in the definition of "worker" in the IA Act. Members spoke of the poor treatment and conditions the 'women and girls' working in domestic service often faced and the need for greater protection. However, in the Legislative Council, the bid to remove the exemption of domestic workers from the definition of "worker" was defeated.

[579] It is worth noting that conservative parties controlled the balance of power in the Legislative Council for 103 consecutive years between 1894 and 1997.

Year	Legislation	Issue
		Many Upper House Members held concerns that this would intrude into private arrangements in the home; push up the cost of domestics (who were in short supply at the time); and turn housewives engaging domestics into employers.
1958	*Long Service Leave Act 1958* (LSL Act)	The *LSL Act* was introduced under the Hawke State Labor Government and originally applied only to those employees who were not entitled to a long service leave benefit from a State or federal industrial instrument.[580] Of note, domestic workers were not excluded from the definition of "employee" for the purposes of long service leave in the original LSL Act. During debate on the LSL Act, Liberal Opposition members moved an amendment in the Legislative Assembly to bring the definition of "employee" into line with the definition of "worker" in the IA Act, by excluding domestic servants (except where the domestic worker was engaged in any establishment where more than six persons are received as boarders or lodgers). However, the amendment was defeated with Country Party Members siding with the Labor Members to oppose it. In the Legislative Council the Liberal Members proposed the same amendment and this too was defeated.
1973	*Industrial Arbitration Act Amendment Bill 1973*	This Bill was introduced by the Tonkin Labor Government and included amendments that would have removed the exclusion of domestic workers from the definition of "worker" in the IA Act. However, the entire Bill was defeated in the Legislative Council and progressed no further.
1979	*Industrial Arbitration Act 1979 (later the Industrial Relations Act 1979)*	The *Industrial Arbitration Act 1979* was introduced by the Coalition Government led by Sir Charles Court. During debate on the Bill several Labor Members noted that the definition of "employee" (which replaced the term "worker") continued to exclude domestic service workers, observing that this exclusion appeared to be discriminatory. However, no amendments were made to the definition of "employee" during debate.
1984	*Acts Amendment and Repeal (Industrial Relations) Bill 1984 (No. 1)*	This Bill would have modified the term "employee" to narrow the exemption for domestic workers. The revised definition of "employee" would have contained the following exclusion: …but does not include a person employed by an owner or occupier of a private residence to perform domestic work in that private residence unless the engagement of that person was procured or arranged in the course of the business of an employment agent within the meaning of the Employment Agents Act 1976. However, the entire Bill was subsequently defeated in the Legislative Council in April 1984.

[580] Employees working under State awards and agreements were already entitled to long service leave benefits by this point in time.

Year	Legislation	Issue
1984	*Acts Amendment and Repeal (Industrial Relations) Act (No. 2) 1984*	This Act contained many of the provisions of the defeated Acts Amendment and Repeal (Industrial Relations) Bill No. 1. However, the proposed changes to the definition of "employee" contained in the earlier Bill were not included in this version.
1987	*Industrial Relations Amendment Act (No 4) 1987.*	The exclusion of domestic workers from the definition of "employee" in the *Industrial Relations Act 1979* was further tightened in 1987, so that it now only applies where a person is directly employed in domestic service in a private home by the owner or occupier of the home. The effect of this was that domestic employees supplied by a third party (e.g. a contract cleaner or Silverchain) are no longer excluded from the definition of "employee", where the private home has six or less boarders or lodgers. The revised definition that was agreed to by the Parliament stated that an "employee" - *…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;*

Chapter 6 Minimum Conditions of Employment

6.1 Term of Reference

972. 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.

973. In considering 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 contained in these instruments 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 Overview

974. Submissions received by the Review addressed these questions, as well as issues relating to whether the minimum conditions of employment in Western Australia ought to be expanded to include conditions not currently covered by the MCE Act, the LSL Act or the TCR General Order. Additionally, submissions were made upon the general issue of whether the employment conditions contained in the two Acts and the TCR General Order ought to be included in a single piece of legislation. For reasons later set out, the Review considers this to be an appropriate way to proceed. A main reason for this is that, as much as possible, employers and employees

governed by the State system ought to be able to direct their attention to a single piece of legislation to ascertain what their rights and responsibilities are. It is not of assistance to have terms and conditions of employment spread across a multiplicity of legislation and General Orders. This is particularly so when one has regard to the small business component of the State system.

975. Another key issue considered was whether the minimum conditions of employment for Western Australian employees ought to reflect the NES established under the FW Act. Reference is made below in detail to the nature and extent of the NES. Some of the submissions received by the Review expressed reservations about this connected with the small business component of the Western Australian State system. It needs to be remembered, however, that in each of the other States of Australia, private sector employees, including those employed in small business, are employed pursuant to the FW Act and therefore subject to the NES. On the information presently before the Review, there does not seem to be a compelling case as to why, despite the small business component of the State system, the minimum conditions of employment for State system employees ought not be generally based on the NES, but with the retention of any conditions of employment that are presently superior in the State system. There is further consideration of the issue later.

976. The issue upon which the Review is most uncertain is as to whether the updating of the minimum conditions of employment ought to be reposed in the WAIRC or not. Submissions on this issue are divided and the issue is referred to in more detail later. The preliminary position of the Review is that the WAIRC ought to be the body that can update the minimum conditions of employment, but only to add to or enhance them. Any diminution of minimum conditions is something that ought to remain in the domain of the State Parliament.

6.3 Minimum Conditions of Employment Act

977. The MCE Act was the first statute in Australia to enact comprehensive statutory minimum conditions of employment.

978. With the exception of two parental leave provisions (discussed at [1035] below), the MCE Act only applies to employers and employees covered by the State industrial Relations system. These are mainly unincorporated small businesses and the public sector.

979. The 2009 Amendola Review[581] recommended that the statutory minimum conditions form part of a new Act (replacing the IR Act and the MCE Act) and be collectively known as "State Employment Standards".[582]

980. In 2012, the then Barnett Liberal Government tabled, but did not introduce, the Green Bill into State Parliament.

981. The Green Bill, if it had become an active parliamentary bill and enacted, would have repealed the MCE Act and the TCR General Order and incorporated the MCE Act's provisions and some (but not all) provisions of the TCR General Order into the IR Act. These entitlements were collectively to be termed the "State Employment Standards" (SES).

982. The Green Bill included a suite of proposed amendments to the MCE Act and the TCR General Order (most modelled on the FW Act) including the following:

(a) An amendment to the definition of employee to remove certain exclusions.[583]

(b) Allowing for the SES to be enforceable under s 83 of the IR Act, rather than by implication into industrial instruments or contracts of employment.[584]

(c) Provision for a person with a disability to be paid in accordance with the Supported Wage System or a wage tool contained in an industrial instrument, and removal of the MCE Act provision allowing an employer and employee to agree to some other weekly rate of pay if the employee is permanently or temporarily mentally or physically disabled.[585]

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581 Steven Amendola, *Review of the Western Australian Industrial Relations System Final Report,* 30 October 2009.

582 Recommendation 29.

583 As currently excluded by reg 3 and sch 1 of the *Minimum Conditions of Employment Regulations 1993*. This is discussed in Chapter 5 of the Interim Report.

584 As provided for in MCE Act s 5(1).

585 As provided for in MCE Act s 9.

(d) Provisions about when annual leave may be taken, required to be taken or refused, and providing an entitlement to a public holiday falling during a period of annual leave.

(e) Removal of the MCE Act limit on how much accrued personal/carer's leave an employee is able to use for caring purposes. [586]

(f) Introduction of compassionate leave to allow an employee to take paid leave to spend time with a family or household member who has an illness, or sustained an injury, that poses a serious and imminent threat to their life.

(g) Requirement for an employee to give notice to their employer of the taking of personal/carer's leave, bereavement leave or compassionate leave as soon as practicable.

(h) Allowing an industrial instrument to include provisions relating to the type of evidence an employee must provide to an employer of their entitlement to personal/carer's leave, bereavement leave or compassionate leave.

(i) Removal of all provisions relating to parental leave with the exception of an employee's right to request a return to work on a modified basis and a right to request a resumption of pre-parental leave working arrangements, and with a signpost to the parental leave provisions of the FW Act (which apply to all State system employees).

(j) Provision for an employer to lawfully withhold pay from an employee where the employee fails to provide the required notice of termination under an industrial instrument.

(k) Redundancy pay entitlements and associated provisions, and notification of change requirements.

586 As per s 20A.

(l) A signpost to the FW Act's notice of termination, unlawful termination, and redundancy notification and consultation requirements (which apply to all State system employees).

(m) Adoption of additional employment record requirements, in accordance with the FW Act.

(n) Provision that a written contract of employment or an industrial instrument is of no effect to the extent that it purports to allow an employer to make an impermissible deduction or require the employee to make an impermissible payment to the employer or another person.

(o) A requirement for an employer to issue pay slips.

983. As set out elsewhere, although the Green Bill was tabled into State Parliament for discussion purposes, and submissions were made about it, the Barnett Government took no other steps to legislate.

6.4 The Long Service Leave Act

984. The LSL Act provides long service leave entitlements and associated provisions regarding the taking of leave and the enforcement of the LSL Act.

985. In contrast to the MCE Act, the LSL Act applies to the majority of Western Australian employees, including employees covered by the national industrial relations system. Although there are complexities in the reasons for this, in simple terms, the only employees who are not covered by the LSL Act are:

(a) Employees covered by an award or agreement which provides for long service leave that is at least equivalent to the entitlement to long service leave under the LSL Act.[587]

(b) National system employees who are covered by long service leave entitlements in a Federal pre-modern award that would have covered the

[587] LSL Act s 4(3).

employee before 1 January 2010; or who are covered by long service leave provisions in a preserved Federal registered agreement.[588]

986. In the experience of the PSD, there are deficiencies and ambiguities in the LSL Act. **Attachment 6A** identifies these deficiencies and ambiguities.

987. As set out more fully in chapter 8 of the Interim Report about Compliance and Enforcement, the LSL Act contains no penalties for contraventions of the LSL Act, other than failing to keep records in accordance with regulations or for not less than seven years. The long service leave provisions, as an important aspect of employee rights, should be enshrined in legislation and be enforceable. More is said about this in chapter 8.

6.5 The Termination, Change and Redundancy General Order

988. The TCR General Order[589] provides termination, change and redundancy entitlements to the majority of State system employees.

989. The TCR General Order does not apply to employees paid pursuant to the *Salaries and Allowances Act 1975* (WA).

990. The TCR General Order also contains the following exemptions:

(a) Clause 4 (Redundancy) does not apply to:

(i) Employees terminated as a consequence of serious misconduct that justifies dismissal without notice.

(ii) Employees with less than one year's service.

(iii) Probationary employees.

(iv) Apprentices and trainees.

(v) Employees engaged for a specific period of time or for a specified task.

588 FW Act s 113. See [71]–[77] for further discussion regarding this.

589 2005 WAIRC 01715.

(vi) Casual employees.[590]

(b) Clause 4.4 (Severance pay) does not apply to employers who employ less than 15 employees, subject to a contrary order of the WAIRC in a particular case of redundancy.[591]

991. In broad terms, the TCR General Order provides for:

(a) An employee's job search entitlement during their notice period.

(b) Notification and consultation with employees and unions regarding significant change and redundancy.

(c) Notification of redundancies to Centrelink.

(d) Severance pay.

(e) Conditions relating to transfer to lower duties, employer incapacity to pay and transmission of business.

992. The MCE Act also places obligations on an employer to inform an employee of, and discuss matters relating to, a decision to make the employee redundant or take an action that is likely to have a significant effect on an employee. Unlike the TCR General Order, however, the MCE Act provisions do not extend to informing and discussing matters with a union nominated by the employee.

993. As discussed at [1006] to [1030], the FW Act also contains provisions relating to termination and redundancy that apply to State system employers and employees.[592]

994. The table at **Attachment 6B** compares the termination, change and redundancy provisions contained in the TCR General Order, the MCE Act and the FW Act.

590 Clause 4.9.
591 Clause 4.10.
592 The FW Act also contains provisions about redundancy pay but these do not extend to State system employees and employers.

6.6 General Orders

995. Section 50 of the IR Act provides the WAIRC with the power to make General Orders relating to industrial matters.

996. General Orders may:

(a) Apply to employees generally throughout the State, regardless of whether they are covered by an award or industrial agreement.

(b) Add to or vary all awards and industrial agreements.

997. Pursuant to s 51B of the IR Act, the WAIRC does not have the power to make a General Order setting a minimum condition in relation to a matter if the matter is the subject of a minimum condition of employment as defined in the MCE Act.

998. The WAIRC may, however, make a General Order in relation to a matter that is the subject of a minimum condition of employment as defined in the MCE Act if the General Order is **more favourable** to employees than the minimum condition of employment.

999. Although the WAIRC has had the ability since 2002 to improve on statutory minimum conditions or introduce new minimum conditions of employment via a General Order, to date, except for the TCR General Order, no such General Order has been applied for or made.

6.7 Federal Minimum Conditions of Employment

1000. In 2006, the *Workplace Relations Act 1996* (Cth) (WR Act) was amended[593] to incorporate five statutory minima: a minimum rate of pay and casual loading; maximum ordinary hours of work; annual leave; personal leave (including carer's leave and compassionate leave); and parental leave.[594]

1001. From 1 January 2010, the FW Act introduced comprehensive statutory minima collectively termed the NES. These generally only apply to national system

593 *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

594 Collectively termed the "Australian Fair Pay and Conditions Standard".

employers and employees, including private sector employees in all of the other States, as the other States have referred their industrial relations legislative powers to the Commonwealth.[595]

1002. The NES[596] cover:

(a) Maximum weekly hours.[597]

(b) Requests for flexible working arrangements.[598]

(c) Parental leave and related entitlements.[599]

(d) Annual leave.[600]

(e) Personal/carer's leave and compassionate leave.[601]

(f) Community service leave.[602]

(g) Long service leave.[603]

(h) Public holidays.[604]

(i) Notice of termination and redundancy pay.[605]

(j) Fair Work Information Statement.[606]

1003. The FW Act also contains minimum conditions that are not part of the NES. These relate to:

(a) The minimum wage and the casual loading for award/agreement free employees.[607]

595 See, eg, FW Act s 30C, s 30D and s 30M.
596 Section 61(2).
597 Part 2-2 div 3.
598 Part 2-2 div 4.
599 Part 2-2 div 5.
600 Part 2-2 div 6.
601 Part 2-2 div 7.
602 Part 2-2 div 8.
603 Part 2-2 div 9.
604 Part 2-2 div 10.
605 Part 2-2 div 11.
606 Part 2-2 div 12.

(b) Method and frequency of payment of wages.[608]

(c) Permitted deductions from an employee's pay[609] and unreasonable requirements for an employee to spend money.[610]

(d) Employment record keeping obligations[611] and a requirement to issue pay slips.[612]

(e) Notification and consultation requirements relating to certain terminations of employment.[613]

6.8 *Fair Work Act* Provisions which Extend to State System Employees

1004. The FW Act provisions about notice of termination,[614] unlawful termination,[615] notification and consultation requirements relating to certain terminations of employment,[616] and parental leave[617] extend to non-national[618] (State system) employees.

1005. These provisions were originally enacted in the *Industrial Relations Act 1988* (Cth) and subsequently, the WR Act. The provisions were legislated for under the Commonwealth's external affairs power[619] and gave effect to the following ILO Conventions and Recommendations to which Australia is a signatory:

(a) *ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer*.[620]

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607 Part 2-6 div 4.
608 Section 323.
609 Section 324.
610 Section 325.
611 Section 535.
612 Section 536.
613 Sections 785, 786.
614 Section 759.
615 Section 771.
616 Part 6-4 div 3.
617 Section 744.
618 Defined in FW Act s 12 to mean an employee who is not a national system employee.
619 *Constitution* s 51(xxix).
620 22 June 1982 [1994] ATS 4, cited in FW Act ss 758 and 784.http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C158.

(b) *Termination of Employment Recommendation, 1982* (Recommendation No. R166).[621]

(c) *ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation*.[622]

(d) *ILO Convention (No. 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers; Workers with Family Responsibilities*.[623]

(e) *Workers with Family Responsibilities Recommendation, 1981* (Recommendation No. R165).[624]

6.9 Notice of Termination

1006. Section 759 of the FW Act provides that the provisions of Part 2-2, Division 11, Subdivision A of (being notice of termination or payment in lieu of notice) apply to a non-national system employee as if any reference in the provisions to a national system employee and employer also included a reference to a non-national system employee and employer.

1007. Whilst the MCE Act, the IR Act and the TCR General Order do not provide for notice of termination, State awards and industrial agreements can and do include notice of termination provisions. By virtue of s 109 of the Constitution, the FW Act notice of termination provisions will override any such award and agreement provisions to the extent of any inconsistency.

1008. This means, for example, that an award such as the *Building Trades (Construction) Award 1987*, which only obliges an employer to provide an apprentice with one day's

621 Adopted by the General Conference of the ILO on 22 June 1982, cited in FW Act ss 758 and 784, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100::CHANG_LANG:NO:12100:P12100_INSTRUMENT_ID:312504:NO.

622 25 June 1958 [1974] ATS 12, cited in FW Act s 771, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111.

623 23 June 1981 [1981] ATS 7, cited in FW Act s 771, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C156

624 Adopted by the General Conference of the ILO on 23 June 1981, cited in FW Act s 743. http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R165.

notice,[625] is overridden by s 117 of the FW Act which requires the provision of no less than one week's notice and up to five weeks' notice of termination.[626]

1009. Section 762 of the FW Act provides, however, that the FW Act is not intended to apply to the exclusion of State laws that provide employee entitlements relating to notice of termination of employment or payment in lieu of notice to the extent that those laws apply to non-national system employees and provide entitlements for those employees that are more beneficial than the entitlements under the extended notice of termination provisions.

1010. This means, for example, that an award such as the *Government Officers' Salaries, Allowances and Conditions Award 1989*, which obliges an employer to give an employee one month's notice regardless of length of service,[627] would apply despite the inconsistency with s 117 of the FW Act, which, as it ties a period of notice to the length of the employee's period of continuous service, may therefore require a shorter notice period.

1011. Consistent with what is later set out, the Review is of the preliminary opinion that state employment standards should provide for notice of termination provisions that reflect this statutory and constitutional arrangement. This would mean that the State provision is as per the NES but would not exclude a provision in a State award or agreement that covers and applies to the employee's employment and which provides for a more beneficial period of notice. In chapter 7 of the Interim Report, there is a fulsome discussion about the future of State awards.

6.10 Unlawful Termination

1012. Under s 772 of the FW Act, an employer must not terminate an employee's employment for one of a number of reasons, including trade union membership or

625 Clause 36(1).

626 It is noted that, as per FW Act s 123(3)(b), notice of termination under the FW Act does not apply to daily hire employees in the building and construction industry. However, the State Building Trades (Construction) Award, unlike the national Building and Construction General On-site Award 2010, does not provide for daily hire employees. It is also noted that an apprentice cannot be a daily hire employee - https://www.fairwork.gov.au/employee-entitlements/types-of-employees/daily-hire-and-weekly-hire.

627 Clause 8(2)(b).

non-membership, race, colour, sex, age, disability, marital status, family responsibility, or religion.

1013. Pursuant to s 770 of the FW Act, "employee" and "employer" have their ordinary meanings and therefore these provisions extend to both national and non-national system employees and employers.

1014. Section 26 of the FW Act provides that the FW Act is intended to apply to the exclusion of all State and Territory industrial laws insofar as they would otherwise apply to a national system employee or employer. However, s 27(1A)(d) provides that s 26 does not apply to the *Equal Opportunity Act 1984* (WA) (EO Act). The EO Act therefore applies to both national and State system employers and employees.

1015. The EO Act includes provisions generally prohibiting the dismissal of an employee on a range of grounds, including sex, marital status, family responsibility, race, religion, impairment and age.

1016. Consistent with what is later set out, the Review is of the preliminary opinion that state employment standards should supplement the specific provisions in the EO Act, insofar as they apply to employment.

6.11 Notification and Consultation Requirements Relating to Certain Terminations of Employment

6.11(a)Notify Centrelink

1017. Section 785 of the FW Act obliges an employer who has decided to terminate the employment of 15 or more employees for reasons of an economic, technological, structural or similar nature to give a written notice about the proposed terminations to Centrelink.

1018. In accordance with s 770 of the FW Act, "employee" and "employer" have their ordinary meanings and therefore these provisions extend to both national and non-national system employees and employers.

1019. As set out in **Attachment 6B**, clause 4.8 of the TCR General Order includes provisions relating to notification of redundancies to Centrelink.

1020. The FW Act provisions are more expansive than the TCR General Order provisions insofar as an employer must provide the notice as soon as practicable after making the decision and before terminating the employee. An employer is also expressly prohibited from terminating an employee's employment unless the employer has complied with the FW Act. By virtue of s 109 of the Constitution, the FW Act will prevail over the TCR General Order to the extent of the inconsistency.

1021. Consistent with what is later set out, the Review is of the preliminary view that state employment standards should include the more expansive provisions of the FW Act and not just the TCR General Order.

6.11(b)Notify and Consult Registered Employee Associations

1022. Section 786(2) of the FW Act requires an employer to notify each registered organisation (of which any of the affected employees was a member and which was entitled to represent the industrial interests of that member) of the proposed terminations and the reasons for them, the number and category of employees likely to be affected, and the time or period over which the employer intends carrying out the terminations.

1023. Section 786(3) of the FW Act requires an employer to give each registered organisation an opportunity to consult with them on measures to avert or minimise the proposed terminations, and mitigate the adverse effects of the proposed terminations. The notice and the opportunity to consult must be given as soon as practicable after making the decision and before terminating the employee's employment.

1024. Under s 786(1), the FWC may make an order if it is satisfied that an employer has decided to terminate the employment of 15 or more employees for reasons of an economic, technological, structural or similar nature and has not complied with s 786(2) or (3) of the FW Act.

1025. In accordance with s 770 of the FW Act, "employee" and "employer" have their ordinary meanings and therefore these provisions extend to both national and non-national system employees and employers.

1026. As set out in **Attachment 6B**, clause 4.2 of the TCR General Order includes provisions relating to notification and consultation with employees who may be made redundant and with any union nominated by the employee.

1027. Section 41 of the MCE Act also places obligations on an employer to inform and discuss matters with an employee who is to be made redundant. There are no provisions, however, relating to notification and consultation with unions.

1028. Again, as noted above, by virtue of s 109 of the Constitution, the FW Act provisions relating to redundancy notification and consultation will override both the TCR General Order and the MCE Act to the extent of any inconsistency.

1029. As later set out, the Review is of the preliminary opinion that State Employment Standards ought to replicate the FW Act provisions, unless the provisions of the TCR Order provide for an enhanced employee entitlement. If that is the case, the State Standards ought to replicate the TCR General Order, as opposed to the MCE Act, so that no employee loses any entitlements they may have under the TCR General Order.

1030. Insofar as the Review is able to glean Government policy from the Terms of Reference, Term of Reference 6 on Awards makes it plain that the Minister does not think it desirable that existing employee entitlements are reduced. The preliminary opinion of the Review is that the same thought process ought to apply with respect to the current issue under consideration.

6.12 Parental Leave

1031. Section 744 of the FW Act provides that the provisions of Subdivision 5 of Part 2-2 (being parental leave and related entitlements) apply to a non-national system employee as if any reference in the provisions to a national system employee and

employer also included a reference to a non-national system employee and employer.

1032. The MCE Act includes extensive parental leave provisions, as do many State awards and industrial agreements. By virtue of s 109 of the Constitution, the FW Act parental provisions will override the MCE Act and award and agreement provisions to the extent of any inconsistency.

1033. This means, for example, that s 33 of the MCE Act and State awards such as the *Restaurant, Tearoom and Catering Workers Award*,[628] which each limit to one week the amount of concurrent unpaid parental leave that employees may take, are overridden by s 72(5) of the FW Act, which provides employees with eight weeks of concurrent parental leave. As noted above, the Review is of the preliminary opinion that State Employment Standards ought to replicate the FW Act provisions unless there is an applicable MCE Act standard that is superior to it. Further, as discussed in Chapter 7 on Term of Reference 6 about Awards, the Review is of the preliminary opinion that, although an award should refer to, in the sense of signpost the reader, to the SES, an award should only be permitted to have conditions covered by a SES if it is to include a superior or additional condition in a pre-existing award, or if it is required by the particular circumstances or needs of the industry or occupations to be covered by the award.

1034. Section 747 of FW Act provides that State laws which provide a parental leave entitlement to a non-national system employee that is more beneficial can continue to apply.

1035. The more beneficial provisions in the MCE Act are as follows:

(a) Section 38(4) provides that an employee may request a return to work on a modified basis[629] following a period of parental leave.

628 Clause 42(4)(c).

629 "Modified basis" means an employee working on different or fewer days, times or hours: s 38(8).

(b) Section 38(5) provides that an employee may subsequently request a resumption of work on the same basis as the employee worked immediately before starting parental leave.

1036. Under s 38B(5) of the MCE Act, a request made under s 38(4) or s 38(5) may be enforced as a minimum condition of employment and the onus lies on the employer to demonstrate that the refusal of the request was justified.[630]

1037. In contrast, the parental leave NES does not include provisions relating to returning to work on a modified basis. The FW Act does, however, include a separate NES for "Requests for flexible working arrangements" which provides that an employee who is a parent or carer of a school age child[631] (including a parent who is returning to work after taking parental leave)[632] may request a change in working arrangements.

1038. However, as this right is not enforceable as a minimum condition of employment,[633] it is a less beneficial entitlement than that provided for by s 38(4) of the MCE Act.

1039. The FW Act contains no provisions regarding a resumption of work on the same basis as the employee worked immediately before starting parental leave.

1040. Consistent with what is later set out, the Review is of the preliminary opinion that SES should provide for parental leave provisions that reflect this statutory and constitutional arrangement. However, the more beneficial MCE Act provisions regarding an enforceable right for an employee returning from parental leave to request a return to work on a modified basis and an enforceable right to request a resumption of work on the same basis as the employee worked immediately before starting parental leave should be retained. The Review also reiterates the point stated at [1033] about State awards.

1041. Section 66 of the FW Act provides that the Act is not intended to apply to the exclusion of State laws that provide employee entitlements in relation to flexible

630 Section 38B(1) and (2) sets out the ground for refusing a request.
631 Section 65(1).
632 Section 65(1B).
633 Section 44(2).

working arrangements that are more beneficial to employees (being national system employees)[634] than the entitlements under Division 4. Notwithstanding s 26(2) of the FW Act,[635] it appears that s 66 would allow for the application of s 38(4) and s 38(5) of the MCE Act to national system employees.

6.13 Long Service Leave

1042. As noted previously, s 26 of the FW Act provides that the FW Act is intended to apply to the exclusion of all State and Territory industrial laws insofar as they would otherwise apply to a national system employee or employer. Section 27(1)(c) provides, however, that s 26 does not apply to a law of a State or Territory so far as the law deals with any non-excluded matters.

1043. Section 27(2)(g) provides that non-excluded laws of a State include long service leave, except in relation to an employee who is entitled to long service leave under Division 9 of Part 2-2 of the FW Act.

1044. 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.[636]

1045. An employee's pre-modernised award long service leave entitlement does not apply where:

(a) A collective agreement, an Australian Workplace Agreement (AWA) made after 26 March 2006, or an Individual Transitional Employment Agreement (ITEA) came into operation before the commencement of the NES, and applies to the employee; or

(b) One of the following kinds of instruments came into operation before the commencement of the NES, applies to the employee, and expressly deals with long service leave:

634 As defined in s 60.

635 Which excludes the application to a national system employee of a State Act that applies to employment generally and regulates workplace relations.

636 The FWC has prepared an indicative list of federal instruments which contained long service leave provisions - https://www.fwc.gov.au/awards-and-agreements/awards/award-modernisation/termination-instruments.

(i) An enterprise agreement (agreements made after 1 July 2009 and approved by the FWC).

(ii) A preserved State agreement (an agreement made in the State system before 26 March 2006).

(iii) A workplace determination made by the FWC.

(iv) A certified agreement made before 26 March 2006.

(v) An Australian Workplace Agreement made before 26 March 2006.

(vi) A s 170MX award made by the Australian Industrial Relations Commission before 26 March 2006 after terminating a bargaining period.

(vii) An old IR agreement approved by the AIRC before December 1996.[637]

1046. In some circumstances,[638] the FWC can make an order which preserves long service leave entitlements contained in a collectively bargained agreement (such as enterprise agreements, collective agreements, pre-reform certified agreements and old IR agreements). In this instance, the agreement terms prevail over the State or Territory long service leave laws.

1047. If there are no award or agreement terms regarding long service leave as set out above, a national system employee in Western Australia is entitled to long service leave under the LSL Act.

1048. It should be noted that the long service leave entitlement in the NES is a transitional entitlement pending the development of a uniform national long service leave standard.[639]

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637 Section 113(2).

638 See s 113(6).

639 *Fair Work Bill 2008 Explanatory Memorandum* [437].

6.14 Minimum Conditions of Employment Act and Fair Work Act Minima

1049. There are inconsistencies between the minimum conditions of employment in the MCE Act and those contained in the FW Act.

1050. Insofar as any of the MCE Act conditions are inferior to the FW Act conditions for an employee, the preliminary opinion of the Review, consistent with what is later set out, is that the FW Act conditions should apply. Insofar as any FW Act conditions are inferior to the MCE Act conditions for an employee, then the MCE Act conditions ought to continue to apply to State system employees. That is consistent with what is elsewhere stated about the terms and conditions of employment of State system employees not being reduced by the process of moving to a more comprehensive set of SES.

1051. The table at **Attachment 6C** compares the provisions of the MCE Act and the FW Act.

6.15 Family and Domestic Violence Leave

1052. The provision of family and domestic violence (FDV) leave as a minimum entitlement for employees has become a significant labour relations issue in recent years.

1053. There is presently no minimum entitlement to paid or unpaid leave specifically for FDV related purposes in the State or national industrial relations systems. In both systems, there are limitations on the extent to which other forms of leave might be used for purposes related to FDV.

6.15(a)Leave under the Minimum Conditions of Employment Act

1054. Section 19 of the MCE Act provides that an employee, other than a casual employee, is entitled for each year of service to paid leave for illness, injury or family care for the number of hours the employee is required ordinarily to work in a two week period during that year, up to 76 hours.

1055. This entitlement can be used as paid sick leave where the employee is unable to work due to illness or injury, and may also be used as paid carer's leave where a

member of the employee's family or household requires care or support because of an illness, injury or unexpected emergency affecting the member.

1056. Section 20B of the MCE Act provides an additional entitlement to unpaid carer's leave of up to two days for each occasion, if the employee cannot take paid carer's leave during the period.

1057. While these entitlements can be used if a member of the employee's immediate family or household is ill, injured or affected by an expected emergency, they cannot be used if only the employee themselves is affected by an unexpected emergency. This means that a victim of FDV is entitled to leave if they sustain an injury but not, for example, if they need to attend to legal matters or find new accommodation.

1058. The use of annual leave entitlements is generally planned and agreed in advance between employers and employees and may not be appropriate in urgent circumstances arising from FDV.

6.15(b)Leave under the Fair Work Act

1059. The FW Act provides employees with an entitlement to 10 days of paid personal/carer's leave for each year of service (other than casual employees),[640] and a further two days of unpaid carer's leave per occasion (including casual employees).[641]

1060. Similar to the entitlements in the MCE Act, the FW Act entitlements to personal/carer's leave can be used when the employee is not fit for work because of illness or injury, and when a member of the employee's family or household requires care or support because of an illness, injury or unexpected emergency affecting the member. The entitlements cannot be used if only the employee themselves is affected by an unexpected emergency.

640 Section 96.
641 Section 102.

1061. In 2011, the Australian Law Reform Commission (ALRC) recommended that the Commonwealth consider amending the FW Act with a view to including provision for additional paid family violence leave.[642]

1062. The 2015 Productivity Commission *Review of the Workplace Relations Framework*[643] considered entitlements for employees experiencing FDV but concluded that a decision should not be made prior to the outcome of the FWC's 4 yearly review of modern awards (detail provided at 6.15(d) below).

1063. Inclusion of FDV leave in the FW Act was a recommendation of the Victorian Royal Commission into Family Violence.[644] The issue was discussed at the December 2016 Council of Australian Governments (COAG) meeting but no determination was made. A communique issued following the meeting stated:

> COAG noted that the independent Fair Work Commission (FWC) is currently considering an application to include an entitlement to ten days of paid domestic violence leave in all modern awards and is expected to report in early 2017. COAG agreed that this issue will be considered at the first COAG meeting following the FWC decision.[645]

1064. In 2016, the then Federal Minister for Women, Senator Michaelia Cash argued that domestic violence leave provisions could act as a disincentive to employers considering hiring women.[646]

1065. The Federal Opposition supports the inclusion of five days of paid domestic and family violence leave in the FW Act.[647] The ACTU supports the inclusion of a minimum of 10 days of paid FDV leave in the FW Act.[648]

1066. The Australian Chamber of Commerce and Industry (ACCI) has opposed the inclusion of FDV in the FW Act, arguing that, while large businesses may deem it appropriate

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642 *Australian Law Reform Commission, Family Violence and Commonwealth Laws—Improving Legal Frameworks, Final Report* (2011) 420-9.

643 Productivity Commission, *Workplace Relations Framework, Final Report* (2015).

644 State of Victoria, *Royal Commission into Family Violence: Summary and recommendations, Parl Paper No 132* (2014–16).

645 http://www.coag.gov.au/meeting-outcomes/coag-meeting-communiqu%C3%A9-9-december-2016.

646 'Domestic violence leave would mean fewer jobs for women: Cash' *The Canberra Times*, 27 May 2016.

647 Ibid. See also http://brendanoconnor.ml.net.au/en-au/News/Latest-News/Post/14941/TURNBULL-GOVERNMENT-ABSENT-FROM-DOMESTIC-VIOLENCE-LEAVE-DEBATE.

648 *Workplace Express*, 'Unions shift focus of domestic violence leave campaign to NES' (20 July 2017).

to provide for FDV leave in enterprise bargaining agreements, the obligation should not be placed on all employers.[649]

6.15(c) Family and Domestic Violence Leave in the Western Australian Public Sector

1067. In September 2017, paid FDV leave was introduced for the Western Australian public sector via the Premier's Circular 2017/07 Family and Domestic Violence – Paid Leave and Workplace Support (Premier's Circular).[650] The introduction of 10 days' paid FDV leave in the public sector was a Government election commitment.

1068. The Premier's Circular provides that all employees, including casuals, can access up to an additional 10 days, noncumulative paid leave per calendar year. FDV leave can be used for activities related to family and domestic violence. Such activities may include, but are not limited to:

(a) Medical and/or legal appointments.

(b) Attending to financial matters.

(c) Relocation and moving.

(d) Attendance at court or legal proceedings.

(e) Matters which are compassionate or pressing in nature that arise without notice and require immediate attention.

1069. Other leave entitlements do not need to be exhausted to access FDV leave. If an employee uses all of the 10 days' paid FDV leave, they can access an extra two days' unpaid FDV leave on each occasion if required.

1070. A casual employee who is not able to attend scheduled work because of FDV related activities will be entitled to up to 10 days' FDV paid leave according to their regular work patterns on a case-by-case basis.

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649 ACCI submission, *ALRC Inquiry - Family Violence and Commonwealth Laws*, April 2011. https://www.alrc.gov.au/sites/default/files/pdfs/CFV%2019%20%20ACCI%20Submission_IP%2036.pdf.

650 Premier's Circular 2017/07 Family and Domestic Violence – Paid Leave and Workplace Support - https://www.dpc.wa.gov.au/GuidelinesAndPolicies/PremiersCirculars/Pages/2017-07-Family-and-Domestic-Violence-Paid-Leave-and-Workplace-Support.aspx.

1071. FDV is defined in accordance with s 5A of the *Restraining Orders Act 1997* (WA). FDV occurs when a person uses violence, or a threat of violence, or any other behaviour towards a family member that coerces or controls that family member or causes them to be fearful. This can include behaviour that is physically, sexually, emotionally, psychologically or economically abusive, threatening, coercive, or aimed at controlling or dominating the other person through fear.

6.15(d)Four Yearly Review of Modern Awards

1072. In 2015, the ACTU made a claim as part of the 4 yearly review of modern awards to include in all modern awards an entitlement to paid FDV leave.[651]

1073. The ACTU claim sought to provide all employees with a right to 10 days' paid leave per year for the 'purpose of attending to activities related to the experience of being subjected to family and domestic violence,' and up to two days of unpaid leave on each occasion.

1074. Large employer representatives opposed the ACTU claim, arguing that the inclusion of FDV leave clauses in modern awards is not necessary to achieve the modern awards objective as set out in s 134 of the FW Act.

1075. The ACCI and the Australian Industry Group (Ai Group) further argued that existing personal and annual leave entitlements are sufficient for employees experiencing FDV, and that the introduction of a new entitlement would be costly for employers and potentially difficult for smaller businesses to manage.

1076. Ai Group also claimed, "If specific leave entitlements were included in awards for domestic violence, the unions could be expected to pursue specific leave entitlements for a myriad of other social problems such as mental health issues, relationship breakdown, drug dependence, alcohol dependence and crime generally".[652]

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651 ACTU submission to FWC 4 Yearly Review of Modern Awards, Family and Domestic Violence and Family Friendly Work Arrangements Clauses, February 2015.

652 Final Submissions of the Australian Industry Group, 28 November 2016, https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am20151-sub-aig-281116.pdf.

1077. In July 2017, the FWC Full Bench dismissed the ACTU's application on the basis that the provision of paid FDV leave is not necessary to meet the modern awards objective as outlined in s 134 of the FW Act.[653] The Full Bench also stated that the clause as proposed by the ACTU was too broad and uncertain in its operation.

1078. The Full Bench did, however, express a preliminary view that workers covered by modern awards should have access to **unpaid** FDV leave, and also that workers who experience FDV should be able to access personal/carer's leave. In the decision, the Full Bench stated that it was not satisfied that existing entitlements meet the needs of employees who experience FDV.

1079. The Full Bench decision discussed limitations on the use of other forms of leave to deal with the consequences of FDV, observing that an employee cannot take personal leave to attend court or to find alternative accommodation and that annual leave can generally only be taken at a time agreed by the employer.

1080. The FWC Full Bench also expressed the view that current protections from unfair dismissal, unlawful dismissal and adverse action for employees who experience FDV are insufficient. The decision noted that creating a right to FDV leave in awards would establish a workplace right within the meaning of the FW Act and give employees additional protection.

1081. The Full Bench subsequently invited parties to make submissions on its preliminary view as expressed in the July 2017 decision. The FWC released a background paper on 15 September 2017[654] discussing relevant issues and outlining three proposed model award terms. A Full Bench hearing on the matter was held on 19 and 20 October 2017. Following the hearings, the FWC issued a statement on 20 October 2017[655] which notes that there had been progress towards a measure of agreement in relation to some aspects of a draft model unpaid FDV leave term (the clauses

653 [2017] FWCFB 3494.

654 FWC Background Paper, *4 yearly review of modern awards – Family and domestic violence leave*. Issues discussed include: different ways of defining family violence; circumstances in which leave might be taken and by whom (e.g. victims, witnesses, perpetrators); whether any entitlement should be available to casual employees; the quantum of leave that should be available; requirements for supporting evidence and privacy issues.

655 [2017] FWC 5445.

relating to definitions, the circumstances in which unpaid leave may be taken, notice and evidence requirements, confidentiality and compliance) while a number of matters concerning the extent of the entitlement to unpaid FDV leave remained contested. The FWC has reserved its decision.

1082. The ACTU has indicated that there will be a renewed focus on rallying support for changes to the NES following the FWC Full Bench decision rejecting paid FDV leave clauses in modern awards.[656]

6.15(e)Developments Elsewhere

1083. A number of large private sector employers, including Telstra, PwC, QBE Insurance, Qantas and National Australia Bank, have reportedly introduced paid FDV leave.[657] An analysis of Federal enterprise agreements conducted in 2015 found that there were 759 current agreements containing a FDV clause, covering 586,585 employees. The most common type of clause offered FDV leave either as a separate entitlement or as access to existing leave entitlements.[658]

1084. All State and Territory Governments around Australia have made provision for FDV leave for their public sector workforces, either as an additional entitlement and/or by specifying that existing entitlements can be utilised in circumstances related to FDV.[659]

1085. The Federal Government has previously rejected proposals by the Community and Public Sector Union to provide for FDV violence leave in enterprise bargaining agreements in the Commonwealth public sector, arguing that existing leave entitlements are sufficient.[660]

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656 *Workplace Express*, 'Unions shift focus of domestic violence leave campaign to NES', 20 July 2017.

657 https://thewest.com.au/opinion/gareth-parker/union-power-makes-its-mark-with-domestic-violence-leave-ng-b88507107z.

658 Productivity Commission, *Workplace Relations Framework*, *Final Report* (2015).

659 Queensland's FDV leave provisions are now contained in the *Industrial Relations Act 2016* (Qld) and apply to everyone in the Queensland State jurisdiction, which includes State and local government workers.

660 "Domestic violence leave would mean fewer jobs for women: Cash" *The Canberra Times*, 27 May 2016.

6.16 Analysis of Submissions

6.16(a)General Comments

1086. The Liberal Democrats Western Australia submitted that the MCE Act ought to be repealed to remove legal obstacles that prevent a vulnerable worker from competing on a level playing field with better off workers. That is not a submission that was made by others. It is not a submission favoured by the Review.

1087. A general thrust of the submissions was that, for the sake of trying to simplify the legislative contents of the State system, it would be suitable to consolidate the MCE Act, the LSL Act and the TCR General Order into a single piece of legislation. This submission was made by the ANF IUWP, the CoSBA, the ELC, Eureka Lawyers, the Housing Industry Association (HIA), UnionsWA and United Voice.

1088. The Australian Medical Association (AMA) submitted that the minimum conditions in the MCE Act and the LSL Act should all be imported into relevant State awards. A different view was expressed by Labourline Industrial and Workplace Consulting (Labourline). Labourline submitted the minimum conditions should be kept discrete from the awards and agreements with a restatement of the principle that awards and agreements ought to be prohibited from containing terms that are inconsistent with the minimum conditions of employment if they result in a less beneficial outcome to a worker.

1089. The Review is of the present opinion that the MCE Act, LSL Act and TCR General Order entitlements and obligations ought to all be combined within a single piece of legislation. This is consistent with what was contained in the Green Bill and also a recommendation of the Amendola Report. All of these entitlements and obligations ought to be able to be enforced in the IMC.

1090. The Review also considers it preferable for there to be a set of employment standards that are, by their nature, imported into each employment relationship as opposed to the minimum conditions being imported into all awards. The Review considers it is more appropriate for such minimum standards to be legislated for.

6.16(b)Consistency with the Fair Work Act

1091. A number of submissions were made upon the issue of whether the State system minimum conditions of employment ought be the same as, or similar to, the NES. Support for this view, albeit to differing degrees, was contained in the submissions received from the CCI, CoSBA, the ELC, Restaurant & Catering Australia, the SBDC, and United Voice. The SBDC did not have any specific comments in relation to the minimum conditions of employment. Instead, the SBDC simply argued that small businesses in the State system should not be worse-off than their competitors covered by the national system.

1092. The small business nature of the private employers covered by the State system was also emphasised by the HIA and the Master Builders Association Western Australia (Master Builders). The HIA and the Master Builders questioned whether there was any need to change the current minimum conditions and adopt either the national or any other model.

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.

6.16(c) Particular Minimum Conditions of Employment

1095. Various submissions were made about the contents of particular minimum conditions of employment that ought to apply to State system employers and employees. These are discussed below.

6.16(c)(i) Casual Employees

1096. Submissions about casual employees were made by the ACTU, the ELC, Labourline, UnionsWA, United Voice and the WASU. These stakeholders supported an increase in the casual loading from the current 20 per cent to at least 25 per cent to match the casual loading in the national minimum wage order.

1097. The ACTU thought that there needs to be a definition of a casual employee which clearly delineates the circumstances in which an employee can be engaged on a casual basis. They also made a submission in support of a right of a casual employee to convert to permanent employment if certain legislative criteria are met. Labourline submitted that contractual terms ought to be rendered void if workers were notionally engaged as casual employees but the true relationship does not satisfy the common law definition of a casual employee.

1098. In the State system, casual loading is a statutory minimum condition of employment as well as condition in State awards. In this respect it differs from the national casual loading, which is not a NES but is provided for via the national minimum wage order and modern awards.

1099. Based on advice from the Secretariat, the Review is aware that the casual rate under some State awards is 25 per cent. The Review is also mindful that the 25 per cent casual loading in the national minimum wage order applies in all other State jurisdictions. However, the Review is aware that economic times are tough in Western Australia and an increase in the casual rate could be acute for small businesses.

1100. The Review therefore seeks additional submissions on the question of whether the statutory casual loading ought to be increased or whether the issue should be deferred to consideration by the WAIRC – either on an award by award basis under the process later set out above and in the Chapter on Awards, or as a possible updated or enhanced State Employment Standard for the WAIRC to consider in the future.

6.16(c)(ii) Parental Leave

1101. The ACTU and the IEU submitted that **paid** parental leave be included as a statutory minimum. The IEU also submitted that the duration of parental leave should extend to five years to coincide with the age of compulsory schooling.

1102. The ELC submitted that the right to request an extension to parental leave is limited under the FW Act, insofar as there are no sanctions where an employer refuses a request, even if the refusal is not on reasonable business grounds. They submitted that this right should include sanctions. The SDA similarly submitted that an employer's decision with respect to an employee's request for an additional 52 weeks' parental leave be appealable.

6.16(c)(iii) Family and Domestic Violence Leave

1103. The ACTU, together with the SDA, UnionsWA and United Voice, made submissions in support of a FDV leave minimum condition of employment. United Voice submitted this ought to occur based upon a model developed by the ACTU. The SDA specified that there ought to be 10 days' (non-cumulative) FDV leave per annum.

1104. As set out earlier, FDV is something that has been gaining national attention as a possible industrial entitlement. The concerns of the Western Australian community about domestic violence have been emphasised in recent years. The Review thinks there is strong in-principle support for there being a minimum condition of employment for the taking of FDV leave. The Review is unsure as to how it is best proposed that this be incorporated into minimum conditions of employment and accordingly additional submissions are requested on that point.

6.16(c)(iv) Flexible Working Hours

1105. Submissions on this issue were made by the ACTU, the SDA, UnionsWA, United Voice and the WASU. As submitted by the ACTU, there ought to be a right to reduced or flexible hours of work to accommodate parenting and other caring responsibilities and to revert to former hours at the conclusion of those responsibilities. That is something that is taken into account in the discussion earlier regarding the MCE Act and the NES.

1106. The ELC and the SDA submitted that the FW Act right to request flexible working arrangements (if adopted) should include sanctions where an employer refuses a request other than on reasonable business grounds.

6.16 (c)(v) Union Rights

1107. The ACTU made submissions that there ought to be, within the State minimum conditions of employment, positive workplace rights and protection for union activity, consistent with the FW Act.

1108. These types of protections in the FW Act are not in the nature of minimum conditions of employment. Instead, the FW Act prohibits conduct that involves adverse actions against employees because of, amongst other things, their engagement in union activities or membership of a union.[661] That issue was not generally addressed in the submissions to the Review and the Review considers it inappropriate to make proposed recommendations at this stage based upon the submissions made. It also may be outside the Terms of Reference as it is not a minimum condition of employment.

6.16(c)(vi) Cashing Out of Entitlements

1109. Submissions on this issue were made by the ANF IUWP and Labourline. The ANF IUWP thought that the cashing out of leave entitlements, including sick leave, ought be permitted. Labourline submitted that employees ought to be able to contract out of leave and unpaid leave where their remuneration for average hours of work exceeds a nominated amount.

6.16(c)(vii) Accruals and Taking of Leave

1110. Submissions on this point were made by the CCI, the HIA and the IEU. The CCI thought the accrual and payment of annual and personal leave ought to be addressed insofar as it applies to non-standard working arrangements such as fly-in/fly-out. With respect, the Review considers that is more a Federal, rather than State, matter because workers engaged in fly-in/fly-out work are unlikely to be employed by non-constitutional corporations employers.

1111. The HIA thought that employers and employees ought to be able to agree on the accrual, taking and payment of annual leave. The IEU submitted that an employer should be prevented from refusing any reasonable request by the employer to take annual leave.

661 The Review notes that Part VIA of the IR Act contains similar prohibitions.

6.16(c)(viii) Employment Records and Pay Slips

1112. The CoSBA, the SDA and the IEU made submissions regarding the need to update the minimum requirements for employment records. Certainly, record keeping is of assistance to both employers and employees in keeping, as the name suggests, a record of employment to maintain working conditions and ensure compliance. CoSBA supported harmonisation with the requirements under the NES/FW Act as per the 2012 Green Bill. The SDA and the IEU both advocated the introduction of more extensive and detailed record keeping requirements.

1113. Provisions for record keeping are already contained in the IR Act and the LSL Act. There are, however, no provisions regarding pay slip obligations. The Review notes that the Green Bill included amendments to record keeping requirements and adopted pay slip requirements which aligned with the FW Act. The preliminary view of the Review is that the State employment record and pay slip requirements should reflect the FW Act obligations, where appropriate.

1114. The CoSBA, the IEU, the SBDC and the SDA made submissions regarding the introduction of an obligation for employers to issue, and keep copies of, pay slips.

6.16(c)(ix) Public Holidays during Period of Leave

1115. The CoSBA and UnionsWA submitted that, if a public holiday occurs during an annual leave period, then the employee should be entitled to that public holiday.

6.16(c)(x) Termination of Employment

1116. Labourline submitted that the MCE Act should provide that the minimum notice periods in the FW Act are not limited to a maximum of five weeks and that, if five weeks' notice is not reasonable in all the circumstances, it should not satisfy the minimum conditions.

1117. Labourline submitted there should be grounds of unlawful termination modelled upon the FW Act. It was also submitted by the WASU that an employee's wages should be paid within 48 hours of termination.

6.16(c)(xi) Minimum Rate of Pay

1118. UnionsWA supported the existing provisions which permit the higher State minimum wage. The CCI questioned whether the minimum rate of pay for Western Australia ought be the same as the rest of Australia, whilst R&CA submitted that increases to the State minimum wage should not exceed the Commonwealth increases, and the SBDC submitted that the WAIRC should be required to take into account the capacity of small employers to afford a minimum wage increase.

1119. Submissions on this issue by the CCI have been made to the Commission in Court Session of the WAIRC in the context of the State Wage Case over a number of years and have been appropriately dealt with in that forum.

6.16(c)(xii) Compassionate/Bereavement Leave

1120. The CoSBA and UnionsWA submitted that the minimum conditions should include compassionate leave, whilst the WASU submitted that bereavement leave should be replaced with five days' compassionate leave. The Independent Education Union submitted that bereavement leave be increased to five days.

6.16(c)(xiii) Union Delegate Rights

1121. United Voice set out a detailed set of union delegate rights that it asserted should be minimum conditions of employment.

6.16(c)(xiv) Fixed Term Contracts

1122. A submission from Labourline was to the effect that there ought to be limitations upon the use of fixed term contracts. That is not something that is currently addressed by the NES and the Review is presently of the opinion that it is not something that it has received sufficient information about to suggest any variation from the lack of national attention on the issue.

6.16(c)(xv) Evidence to Support Leave

1123. The WASU made a submission that the minimum evidence to claim sick, carer's or compassionate leave should be a statutory declaration rather than evidence to satisfy a reasonable person.

6.16(c)(xvi) Termination, Change and Redundancy General Order

1124. Consistent with what has been stated earlier, submissions were made suggesting the terms of the TCR General Order be incorporated into legislation, together with the MCE Act and LSL Act. As set out earlier, the Review provisionally agrees with that submission.

1125. As to the terms of the TCR General Order, the HIA submitted that, by and large, the minimums contained within the General Order are appropriate and operating effectively. Similarly, the Master Builders submitted there was no need to vary the TCR General Order and that the core aspects of it currently reflect the NES.

1126. The CoSBA submitted that redundancy pay should not apply to employers with less than 20 full time equivalent employees. Labourline submitted that redundancy pay ought to be included in a MCE Act but it ought to be based on age, years of service and likely future employability, rather than the redundancy pay provisions as contained in the TCR General Order. It was submitted that redundancy pay should not be paid to employees aged under 50 years with less than 10 years of service, redundancy pay for employees aged between 50 and 60 years with 10 or more years' service should be 10 months' pay, and redundancy pay for employees aged over 60 years with 10 or more years' service should be significantly higher at 12 months' pay. It was also submitted that the current exclusion of obligations for employers with fewer than 15 employees should be removed, and that a redundancy scheme could be modelled on that used for the construction industry portable paid long service leave scheme.

1127. The SDA submitted that all employees should be entitled to redundancy pay, including the employees of small business. It was further submitted that, if the

Government wanted to protect small businesses from the prospect of redundancy payments, it could fund the payment of those redundancies.

1128. In general terms, the Review does not think it is in the position to recommend any reduction or change from the standards set by the General Order. This is because it stands as a General Order of the WAIRC and there has been no application to the WAIRC to amend the Order.

1129. Consistent with what has been said earlier, the Review is presently of the opinion that the terms of the TCR General Order ought to be included into the same piece of legislation as the minimum conditions of employment and long service leave provisions.

6.16(c)(xvii) Submissions on Minimum Conditions as Contained in the Long Service Leave Act

1130. Submissions were made supporting the retention of the terms of the LSL Act as it is. The HIA submitted the merits and utility of long service leave should be considered in their entirety and that any review of the LSL Act conditions must be considered within the context of the *Construction Industry Portable Paid Long Service Leave Act 1985* (CIPPLSL Act). Not dissimilarly, the Master Builders submitted there was no need to vary the LSL Act as the application of the Act was well understood. The Master Builders also submitted that any material change to the LSL Act will have an immediate flow on effect to the CIPPLSL Act.

1131. The IEU made a comprehensive submission regarding the following proposed amendments to the LSL Act:

(i) Expand the definition of employee to take into account the changing nature of work and types of employee engagement.

(ii) Include shift premiums, overtime, penalty rates, allowances and the like in the definition of ordinary pay, where these rates and allowances are being paid for the employee's ordinary rostered hours of work.

(iii) Remove the reference to 15 days' absence due to sickness or injury and replace with "any period of absence from duty necessitated by sickness or injury provided that the employee is in receipt of paid entitlements".

(iv) Include paid parental leave as time worked for the calculation of long service leave entitlements.

(v) Include pro-rata provisions that deal with termination due to sickness or injury and pressing domestic necessity, as contained in NSW long service leave legislation.

(vi) Remove the requirement for long service leave to be taken in separate periods of not less than one week and ensure that there is no stipulated maximum or minimum period of leave.

(vii) Define "relevant person" in s 26A(1) of the LSL Act to include an employee representative.

(viii) Remove the prohibition on employment during a period of long service leave.

(ix) Require an employer to pay long service leave to a deceased employee's estate automatically on an employee's death, without the need for a request from the deceased employee's family.

1132. The IEU and the SDA submitted there ought to be consideration of portable long service leave for some employees, similar to the CIPPLSL Act. United Voice submitted that portability of long service leave should be reviewed in industries such as security, contract cleaning and community services (aged care, disability care work, home care and early childhood education and care workers). In contrast, Mr Peter Katsambanis MLA from the Liberal Party, writing in his private capacity, submitted there ought not be a new broad based levy for portable long service leave schemes.

1133. The SDA submitted there ought to be provision for the transfer of one employer's records to another employer where there is a transmission of business, with

penalties for failing to do so. This was because of the difficulties in establishing long service leave at times after a transmission of business had occurred. It was also submitted that, if there were no records to show the average hours of a part time employee, an employee's entitlement should be based on the employee working full time, unless the employer can provide credible evidence to the contrary. With respect to a transmission of business, the Law Society of Western Australia submitted there should be an alignment with the FW Act's transfer of business provisions. It was also submitted that the current 'disconnect' between the FW Act and the LSL Act regarding the definition of continuous service ought to be addressed.

1134. The ELC submitted the LSL Act needed to be amended to clarify whether payment in lieu of notice forms part of an employee's period of continuous employment for the accrual of leave, and clarify continuity of service associated with a transmission of business.

1135. Labourline submitted that long service leave should be incorporated into the MCE Act, funded in the same manner as the Construction Industry Portable Paid Long Service Leave Scheme, and reserved for taking courses that will upgrade worker skills and facilitate obtaining new ones.

1136. Both the AMA and the Department of Justice referred to the decision of *Public Transport Authority of Western Australia v Yoon*[662] requiring amendment over the phrase of "at least equivalent to" in s 4(3) of the LSL Act.

1137. The Department of Justice also focused on the question of inconsistencies across industrial agreements and legislation of eligibility of employees to access pro rata long service leave. It was submitted that a uniform approach in length of service and eligibility for accessing pro rata long service leave and the circumstances in which it can be accessed was required.

1138. The Review considers, provisionally that the following needs to be addressed with respect to long service leave entitlements in Western Australia:

662 [2017] WASCA 25.

(a) Confirmation that casual and seasonal workers are entitled to long service leave, and guidance on how to calculate their continuous employment.

(b) Provision that no long service leave may be "cashed out" until it is an entitlement that has accrued or crystallised as a legal entitlement.

(c) Clarification that any form of paid leave counts towards an employee's continuous employment.

(d) Clarification that an employee will have continuous employment in circumstances equivalent to when there has been a transfer of a business under the FW Act.

(e) Provision that an employer be obliged to provide a copy of the relevant employee's employment records to a 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, insofar as they relate to long service leave.

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

(g) Clarification that service as an apprentice counts towards an employee's continuous employment.

(h) Clarification that the term 'one and the same employer' in s 8(1) of the LSL Act includes related bodies corporate within the meaning of s 50 of the *Corporations Act 2001* (Cth).[663]

6.16(d)Process for Periodically Updating Minimum Conditions of Employment

1139. There were a variety of submissions on the topic. The major division, however, concerned whether the WAIRC was the appropriate body to update the minimum conditions.

[663] See *Baker Hughes Australia Pty Ltd v Venier* [2016] WAIRComm 843.

1140. This proposition had support from the ACTU, Ms Alison Preston (UWA Business School), Ms Xamon, the IEU, the Plumbing and Pipe Trades Employees Union, the SDA, UnionsWA and the WASU.

1141. In contrast, AMMA, the ANF IUWP, the HIA, R&CA and United Voice variously submitted that there is no demonstrated need to change the process for altering minimum conditions of employment; statutory minimum conditions should be of long standing character and changes should be made by the legislature as it is its duty to do so; and the statutory minimum conditions should not be subject to periodical reviews by an unelected and unaccountable Commissioner of the WAIRC.

1142. The ELC, whilst supporting a process for regularly considering and updating statutory minimums, did not have a view on the body best placed to undertake a review process. The Australian Rail, Tram and Bus Union WA (RTBU) was cautious in supporting the updating of minimum conditions by the WAIRC. It submitted that it could raise questions and create issues regarding political affiliations between the members of the WAIRC and the public and that, although legislative change is arduous, it provides a system of checks and balances which are not available necessarily under the suggested approach. It further submitted that, if any updating by the WAIRC was proposed, a panel comprising union and employer representatives should be elected to assist the WAIRC. Similarly, Ms Xamon said the development and implementation of such a process would require union and worker involvement.

1143. The Australian Lottery and Newsagents Association, whilst not presenting a firm view, questioned how the Government would ensure that decisions made by the WAIRC did not drift apart from community standards. It also questioned whether, if the WAIRC had this role, the community, including employers, would have a genuine opportunity to participate and to debate change.

1144. The preliminary opinion of the Review is that it can see that it could be helpful to the WAIRC to obtain assistance from union and employer representatives before making decisions on any update to the minimum conditions of employment. However, the

Review at this stage, considers that can be provided by employer and union representative bodies and other stakeholders being able to make submissions to the WAIRC about community standards and other relevant economic and social matters in a similar manner to the State wage case.

1145. At the present stage, the Review inclines to the view that the WAIRC ought to be charged with responsibility of updating minimum conditions of employment and could do so on two yearly intervals unless the WAIRC thought it was necessary to do so more regularly with respect to a particular condition. Legislation could continue to enshrine that the WAIRC cannot reduce the minimum standards. That way, for any reduction of the minimum conditions of employment to occur, there would need to be parliamentary support. The legislation could prescribe that the WAIRC must take into account, as a relevant consideration, the NES and any decisions by the FWC about whether or not a minimum standard should be imposed via modern awards and, if so, the nature and content of such a standard. If the updating of minimum conditions of employment is only left to Parliament, there is a legitimate concern that the issue becomes political and does not pay sufficient regard to the individual employers and employees who may be affected by the decision.

6.17 Proposed Recommendations and Request for Additional Submissions

1146. Taking all of the above into account, the Review is presently of the opinion that the following recommendations could be made. The Review also requests further submissions on the issues set out below.

1147. To the extent that any issue raised in the submissions is not included in what is set out below, the reason is that the Review is provisionally of the view that the matter does not warrant a recommendation. It is open, of course, to any stakeholder or any other interested person to expand on their submissions made or make new or additional submissions about any of these matters, to try and garner the Review to a contrary opinion before the final report is provided to the Minister.

Proposed Recommendations

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.

Additional Submissions

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.

Attachment 6A – Deficiencies in the Long Service Leave Act 1958 Identified by PSD

The following table sets out deficiencies in the LSL Act identified by PSD in the course of its investigations into complaints of non-compliance with the LSL Act and answering queries from employers and employees.

LSL Act provision		Deficiency	PSD Comment
Section 4(1)	**Definition of employee**	• Lacks clarity regarding application of the LSL Act to casual employees[664] • Does not extend to seasonal workers	• Drafting is such that employers and casual employees may not be aware that a casual employee may be entitled to long service leave • Inconsistent to include casual employees but exclude seasonal workers
Section 4(3)	**Definition of employee and an equivalent long service leave entitlement**	• Lacks clarity regarding coverage of casual employees who are not entitled to long service leave under their award or agreement (in contrast to permanent employees who are entitled to long service leave under the same award or agreement) • Lacks clarity regarding how to determine whether a person is entitled to an equivalent benefit under an award or agreement[665]	• Industrial instruments commonly extend long service leave to permanent employees but not casual employees • Employers and employees are unable to readily ascertain whether they are entitled to the provisions of the LSL Act
Section 5	**Limited contracting out of long service leave**	Lacks clarity regarding: • inability to agree to cash out long service leave prior to an employee completing the requisite period of service • inability to pay long service leave incrementally via a loaded up hourly rate or rate of commission Only provides for receipt of an **adequate** benefit in lieu rather than an **equivalent** benefit in lieu	• PSD deals with employers who operate under the assumption they can cash out an employee's long service leave by paying a loaded hourly/commission rate in advance • This is particularly the case for national system employers where modern awards allow for such arrangements in relation to other leave entitlements
Section 6(1)	**Continuous employment**	• Only includes a period of absence due to injury of up to 15 days per annum and therefore does not address employees absent on lengthier periods of workers' compensation • Does not recognise all forms of paid leave such as paid parental leave and paid carer's leave • Does not specify that service as an apprentice counts towards an employee's period of service and therefore their long service leave entitlement	• Employees with injuries sustained at work are disadvantaged • Provisions have failed to keep pace with contemporary forms of paid leave • PSD deals with employers who operate on an assumption that an employee's service as an apprentice (prior to employment by the same employer as a tradesperson) does not count towards that employee's period of continuous employment
Section	**Continuous**	• Does not extend to service with related companies (as per	• The provisions of the Long Service Leave General Order regarding

664 The only reference to casual employees is in s 4(2)(c) in relation to weekly number of hours.

665 See, eg, *Public Transport Authority of Western Australia v Yoon* [2017] WASCA 25.

LSL Act provision		Deficiency	PSD Comment
6(4)	**employment and transmission of business**	the repealed Long Service Leave General Order) • Does not specify a time period within which an employee of the first employer becomes an employee of the second employer • Contains no obligation on the first employer to transmit an employee's employment records to the second employer in a transmission situation	service with related companies were not replicated in the LSL Act prior to the repeal of the General Order • The question of **when** a transmission must occur in order for there to be a transmission of business is ambiguous and uncertain (in contrast to the relatively straightforward definition of "transfer of business" under the FW Act) • Without an employee's employment records, it is difficult for a transmittee employer to determine a transmitted employee's long service leave entitlement
Section 8(1)	**Long service leave accrues based on continuous employment with "one and the same employer"**	It is not uncommon for employees to be employed by entities controlled by the same person, but technically, these entities are not "one and the same employer"	• PSD deals with employees who work across various businesses, which could be categorised as businesses controlled or owned by the same person. However, because there may be different legal entities behind these businesses, an employee may be denied long service leave. • PSD deals with many employers who have multiple business structures, and it is arguably unfair that employees should be denied long service leave when in substance they have worked for the same person for a long period of time • For example, an employee could be employed by a person ("that person") as a sole trader in one business; by that person as trustee for a trust in another business; by that person in partnership with another person in another business; and by that person as sole director of a company in another business
Section 9	**Commencement of long service leave**	• Lack of clarity regarding whether an employee is **obliged** to take their long service leave as soon as reasonably practical after it becomes due • Does not make provision for taking long service leave in alternative ways	
Section 11	**Industrial magistrates court**	An industrial magistrates court has no power to order the imposition of a penalty on a person who contravenes the LSL Act (other than for failing to keep records as required)	An absence of penalties impacts on the ability of PSD to ensure compliance with the LSL Act
Section 26	**Keeping of employment records**	Failing to create an employment record is not a civil penalty provision (although failing to keep records which are created in accordance with the regulations or for not less than 7 years is a civil penalty provision)	Disparate treatment of employers who fail to create employment records at all and employers who keep records but fail to keep them in accordance with the regulations

Attachment 6B – Comparison between the Termination, Change, Redundancy General Order, the Minimum Conditions of Employment Act 1993 and the Fair Work Act 2009

The following table compares the termination, change and redundancy provisions contained in the TCR General Order, the MCE Act and the FW Act.

Condition	TCR General Order	MCE Act	FW Act
Termination	• Does not contain notice of termination provisions • Provides for: ▪ a statement of employment ▪ job search entitlement during period of notice	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	An employer is required to: • notify affected employees of significant change • consult with affected employees • notify and consult with a union, if nominated by an employee	• Where an employer has decided to take action that is likely to have a significant effect on an employee, the employer must: • inform the employee of the action, as soon as reasonably practicable after the decision has been made • discuss with the employee the measures that may be taken by the employee or the employer to avoid or minimise a significant effect	Nil
Redundancy	• An employee is entitled to severance pay if their employment was terminated by reason of redundancy • Redundancy occurs where an employer has made a definite decision that the employer no longer wished the job the employee has been doing done by anyone • Minimum severance provisions based on years of service: ▪ from four weeks' pay for one year's service to 16 weeks' pay for nine years' service	• Where an employer has decided to make an employee redundant, the employer must: ▪ inform the employee of the redundancy, as soon as reasonably practicable after the decision has been made ▪ discuss with the employee the likely effects of the redundancy • An employee, other than a seasonal worker, who has been informed that they have been made redundant is entitled to	• An employee is entitled to redundancy pay if the employee's employment is terminated: ▪ at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or ▪ because of the insolvency or bankruptcy of the employer • Minimum redundancy provisions based on years of service: ▪ from four weeks' pay for one year's

Condition	TCR General Order	MCE Act	FW Act
	▪ an employee with 10 years' + service is entitled to 12 weeks' pay • An employer may make an application to the WAIRC to have severance pay varied if the employer finds the employee acceptable alternative employment • The following are exempt from the redundancy provisions: ▪ employees dismissed for serious misconduct ▪ employees with less than one year's service ▪ probationary employees ▪ apprentices and trainees ▪ employees engaged for a specific period of time or for a specified task ▪ casual employees ▪ businesses with less than 15 employees • Includes provisions regarding: ▪ transfer to lower paid duties ▪ employee leave during the notice period ▪ incapacity to pay ▪ transmission of business • Employers must: ▪ notify and consult with employees about proposed redundancies as soon as practicable ▪ notify and consult with a union, if nominated by an employee • Employers must notify Centrelink regarding the redundancies	up to 8 hours' paid leave for the purpose of being interviewed for further employment	service to 16 weeks' pay for nine years' service ▪ an employee with 10 years' + service is entitled to 12 weeks' pay • On application, the FWC may determine that the amount of redundancy pay is reduced or is nil if the employer: ▪ obtains other acceptable employment for the employee; or ▪ cannot pay the amount • The following are exempt from the redundancy provisions: ▪ businesses with less than 15 employees (head count); ▪ employees with less than 12 months' continuous service; ▪ fixed term, casual, and trainee employees ▪ employees dismissed for misconduct ▪ daily hire employee in the building and construction and meat industries • Awards may include industry specific redundancy entitlements • Employers must notify and consult with unions about proposed redundancies as soon as practicable and before terminations occur • Employers must notify Centrelink regarding the redundancies as soon as practicable and before terminating an employee • Includes provisions relating to transmission of business

Attachment 6C 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[666]	• 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 ▪ the employee is given an equivalent benefit in lieu of the	• 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: ▪ four weeks' leave remains ▪ the arrangement is in writing

[666] These factors are similar to, but not the same, as the factors in the FW Act.

Condition	MCE Act provision	FW Act provision
	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	▪ 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
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)

Condition	MCE Act provision	FW Act provision
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 • An employer is only able to refuse on reasonable business grounds[667] and must give written reasons

[667] 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.

Condition	MCE Act provision	FW Act provision
		• 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	Refer to Attachment 6B
Redundancy	Refer to Attachment 6B	Refer to Attachment 6B
Employment record keeping	• Employers are required to keep employment records[668] • 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
Payslips	No requirement to provide payslips	• 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

[668] 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 Term of Reference

1148. The sixth 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…
>
> 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.

1149. This Term of Reference is reasonably prescriptive in the sense that it asks the Review to devise a particular process. The process is to update State private sector awards with the objectives set out. Each of these objectives is put in aspirational terms by the use of the word "ensuring". Whilst no process for updating a State award can ensure the occurrence of the four things specified, the Review considers it is being requested to try to devise a process that maximises the chances of the four things eventuating.

1150. The Term of Reference also sets parameters around the process to be devised. For example, it is to be driven by the WAIRC. The process is to have input from award parties and other relevant stakeholders. The awards are to be updated so as to not reduce existing employee entitlements. Further, the awards system is to ensure the scope provides comprehensive coverage to employees.

1151. For reasons which will be set out in detail in this chapter, the Review is of the preliminary opinion that the award system and the awards for the private sector in Western Australia are in need of some repair. The legal and practical environment for making and updating awards has changed fundamentally since 2005 with the introduction of the Work Choices legislation, and the system of modernisation of Federal industrial awards that occurred thereafter. The outcome of this process has been that many State awards that formerly applied to corporations and their employees no longer do so. These employees are covered by Federal awards that set a safety net for working conditions which are more and more frequently governed by the terms of enterprise bargaining agreements registered under the FW Act.

1152. Further, there has now been a lengthy period of time of award modernisation at the Federal level. This has followed from Commonwealth ministerial directives to the now FWC to engage in award modernisation. This process commenced under the auspices of Work Choices and has continued under the FW Act. There has been a legislative requirement for there to be award modernisation and amendments every four years; albeit support for this process has waned and legislative amendment is afoot.[669] The result has been that there has been a marked decline in stakeholder interest in the updating of State awards. Accordingly, many State awards have fallen into disrepair with neither employer nor employee organisations being willing or able to make applications to the WAIRC to effect change.

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

669 Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017 (Cth).

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.

1155. As will be set out, the Review has a preliminary view about the methodology it is contemplating recommending to the Minister in response to this Term of Reference, but would like further input from stakeholders and interested parties before finalising the recommendation.

7.2 Awards in Western Australia

1156. Currently there are 163 private sector awards, 16 private sector enterprise awards, and two local government awards operating in the State industrial relations system. A full list of private sector awards is at **Attachment 7A.**

1157. As set out above the framework for awards in the IR Act and most of the current State awards, were developed when coverage of the State industrial relations system was significantly different to its current composition. Now, in the private sector in Western Australia, State awards only apply to employees of unincorporated small businesses (those operating as sole traders, unincorporated partnerships and unincorporated trust arrangements) as well as incorporated associations and other not-for-profit organisations that are not trading or financial corporations.

1158. An analysis by the Secretariat for the Review indicates the State awards applying to the hospitality industry, building industry and small retail sector[670] have the highest coverage in terms of State system employers and employees. Data on State awards, based on calls to the DMIRS Wageline contact centre, visits to its website and compliance matters handled, is set out in **Attachment 7B.**

[670] Including hairdressing.

7.3 State System Award Framework

1159. The IR Act establishes the ability for the WAIRC to make[671], update[672], vary[673] and cancel[674] State awards.

1160. Section 38 of the IR Act provides that the parties to proceedings in which an award is made will be listed in the award as the named parties to the award. Section 38 also provides that at any time after an award is made the WAIRC may upon application add as a named party to the award any employer, organisation or association.

1161. The capacity for employee and employer organisations to be named as parties to awards as provided in s 38 of the IR Act continues to be strongly supported by unions.[675]

1162. The scope of a State award can be fixed by reference to an industry carried on by a named employer. However, the naming of the respondent employer or employers as parties to an award can create difficulties in understanding the coverage of the award, as discussed in more detail below.

1163. Section 36A allows for an application for award coverage for non-award employees to be made to the WAIRC. There have been very few new awards created in the last several decades. In 2011, five interim awards were made by the WAIRC to provide coverage to employees in the local government and social and community services sectors[676] who were "returning" to the State system at the end of the transitional period established by Work Choices.

671 Section 36A.
672 Section 40B.
673 Section 40(1).
674 Sections 40(3) and 47.
675 Feedback provided at stakeholder meetings.
676 Report of the Chief Commissioner of the Western Australian Industrial Relations Commission – 2010-11, p12. The five awards in question are: the *Aboriginal Communities and Organisations Western Australia Interim Award 2011*; the *Crisis Assistance, Supported Housing Industry – Western Australian Interim Award 2011*; the *Local Government Officers' (Western Australia) Interim Award 2011*; the *Municipal Employees (Western Australia) Interim Award 2011*; and the *Social and Community Services (Western Australia) Interim Award 2011*.

1164. Further, there have been low levels of variations to State awards.[677] The lack of creation of new awards to cover emerging industries, combined with the problems with award coverage and respondency (discussed in more detail below) have created a significant number of industries and occupations within the State system which are award free. The extent and problems created by the current gaps in award coverage are discussed in more detail below.

7.4 Updating of State Awards

1165. Section 40 of the IR Act enables applications to vary awards to be made at any time by an organisation or association named as a party to the award or an employer bound by the award.

1166. Section 40B of the IR Act provides the WAIRC with the power, of its own motion, to vary an award to ensure that the award:

(a) Does not contain wages that are less than the minimum wage as ordered by the WAIRC under s 50A.

(b) Does not contain conditions of employment that are less favourable than those provided in the MCE Act.

(c) Does not contain provisions that discriminate against an employee on any ground on which discrimination in work is unlawful under the EO Act.

(d) Does not contain provisions that are obsolete or need updating.

(e) 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.

[677] Variations as contained in the Annual Reports of the Chief Commissioner of the WAIRC. This includes variations of both public and private sector awards.

1167. Section 40B was inserted into the IR Act in 2002[678] and was intended to provide for award modernisation.[679] The Explanatory Memorandum for the *Labour Relations Reform Act 2002* noted:

> Conditions of employment in some awards are complex, unwieldy and difficult to understand, or are no longer relevant or appropriate for the employees and organisations to whom the award applies. Some awards contain outdated provisions that are directly or indirectly discriminatory under the *Equal Opportunity Act 1984* (the EO Act), while other awards simply do not represent current working arrangements.[680]

1168. The Explanatory Memorandum then noted:

> The Commission will be given the power to review and vary awards to ensure all awards are consistent with current legislative and workplace requirements.
>
> The Commission will be required to ensure that awards provide at least the award minimum wage as determined by the Commission in Court Session each year and meet the standards established by the MCE Act.
>
> The Commission will also be required to ensure that awards do not contain any provisions which are obsolete or require updating, or any provisions that discriminate against employees on any grounds provided in the EO Act as being unlawful.[681]

1169. Despite the award updating provisions in the IR Act having been in place for 15 years, the provisions and language of State awards has not been comprehensively reviewed and amended during this time to meet the intent of s 40B of the IR Act.

1170. **Attachment 7C** details 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.

678 *Labour Relations Reform Act 2002*, s 118.
679 Explanatory Memorandum Labour Relations Reform Bill 2002 [84-92].
680 Ibid [78].
681 Ibid [84]-[86].

7.5 Problems with the Section 40B Updating Process

1171. There are a range of reasons why the s 40B award updating process introduced in 2002 did not result in significant change to State awards.

1172. In the 2016- 2017 Annual Report of the Chief Commissioner of the WAIRC, Chief Commissioner Scott said:

> The Commission has no power to review awards generally of its own initiative. Section 40B of the Act enabled the Commission to review its awards to ensure that they were up to date however this was a once only process. It occurred some years ago and many of the review processes initiated by the Commission were ultimately abandoned because of the lack of participation by unions and employers in the private sector. This was due to the difficulty in those unions organising private sector employees and a lack of resources by employer organisations to represent small businesses.[682]

1173. The s 40B award updating process undertaken in the early 2000s was a collaborative process which required significant work to be undertaken by unions and employer organisations.

1174. As noted by Chief Commissioner Scott, the resource intensive nature of the process was an impediment to award updating. This issue was also spoken about by Acting Senior Commissioner Kenner in his paper *State Awards: Are they up to date*[683] in the following quotation, together with the point that the s 40B process itself now occurred some time ago:

> Another significant problem encountered was that the process was very resource intensive for both employer organisations and unions. For this reason, in my opinion, the level of support for the process from parties to awards, waned. Whilst a considerable number of State Commission awards were subject to the award review process, this process did not achieve as much as it could have.
>
> …
>
> However, even in the case of an award review undertaken in 2006, over 10 years ago now, there may be a need for a further review to ensure its terms are consistent with contemporary industry conditions and general standards.

1175. As set out earlier, after Work Choices many employers and employees were moved out of the State industrial relations system, and the focus of unions and

682 2016-2017 Annual Report of the Chief Commissioner of the WAIRC, p 18.

683 Kenner S, 'State Awards: Are They Up To Date?', Paper presented to the UnionsWA Industrial Officers and Lawyers Network Annual Conference, 2 November 2017.

employer associations turned to the "award simplification" processes for Federal awards, which the Review understands was a long and labour intensive exercise.

1176. The Review also understands a difficulty with the way in which the s 40B process proceeded is that it was a collaborative tripartite exercise, so that mainly the changes made were minimalist - such as updating wages and conditions clauses so as to be not less favourable than the MCE Act, making the terms of awards gender neutral and grouping like clause under functional headings. There was also the lack of a defined timeframe so that the process could be deferred if unions or employer groups did not have the capacity or inclination to be engaged in a timely way.

1177. The Review also understands that there was some governmental attempt to try to enhance the prospect of engagement by providing a series of grants to unions, employer associations and industry groups to undertake the s 40B award updating; but that too produced limited results.

7.6 The Amendola Report

1178. The Amendola Report[684] considered a range of options to deal with private sector awards. The Report recommended that either of the following two options be pursued:

(a) Undertake an award modernisation process in the tribunal which is the subject of Ministerial direction and which produces a smaller number of sector awards containing core conditions of general common rule operation, where prevalent in that sector.

(b) Pursue an administrative process, upon request, and by direction, of the relevant Minister to a Core Sector Review Taskforce to provide recommendations about a core set of sector conditions (to be made by way of regulation), where prevalent in that sector.

[684] Above n 13, s 7.

7.7 Labour Relations Legislation Amendment and Repeal Bill 2012

1179. The Green Bill contained extensive provisions regarding State awards, including:

(a) A 12-month process of private sector award modernisation to be conducted by the WAIRC to replace existing awards and create modern State awards.

(b) Mandated consultation with UnionsWA, CCI, the Minister, and any employer, employee, organisation or association which the WAIRC considered to have an interest in any relevant matter.

(c) A requirement for the WAIRC to make an exposure draft of every proposed modern State award and to make the exposure drafts available for public comment.

(d) Proscription on the fixing of modern State award scope clauses by reference to any industry or part thereof carried on by an employer who is specified by name in the award.[685]

1180. Under the parameters of the Green Bill award modernisation process, the WAIRC was required to review all existing private sector awards and make such modern State awards as the WAIRC determined was necessary or expedient to replace every pre-modern State award. This included the capacity to create new modern State awards for industries or occupations where there is currently no award coverage.

1181. The WAIRC would have been required to make modern awards to replace existing State private sector awards within 12 months.

685 Labour Relations Legislation Amendment and Repeal Bill 2012, Pt 3.

7.8 Responses to the Green Bill

1182. Although the Green Bill was not introduced into Parliament, the Minister did call for submissions on the Bill. Submissions were provided by the stakeholders but the Government still did not progress the Green Bill.

1183. The major stakeholders who provided submissions on the Green Bill provisions about State private sector awards, such as UnionsWA and CCI, have also now provided submissions to the Review. Therefore, it is unnecessary to discuss the submissions then made.

7.9 Current Problems with State Awards

7.9(a) Awards are not Being Maintained

1184. One of the difficulties with the existing award system is awards are not being maintained. In his paper to the UnionsWA Industrial Officers and Lawyers Network Annual Conference in 2017, Acting Senior Commissioner Kenner highlighted a marked downturn in the number of applications by unions and employers to vary private sector State awards.[686] The Acting Senior Commissioner said:

> However, the fact remains that apart from action by the State Commission itself to update its awards in respect of wages and location allowances by general orders, most awards in the State Commission's private sector jurisdiction have languished. As a recent example, in the last year, in the State Commission's private sector jurisdiction, there were no applications for an award and no applications to vary awards made by unions to seek improvements in terms and conditions of employment.[687]

1185. The Acting Senior Commissioner said that State private sector awards were not being maintained, in large part because unions have very limited coverage of private sector employees in the State jurisdiction:

> …In effect, the level, of union involvement in the private sector coverage of the State Commission has become negligible. It is also reasonable to conclude that apart from State Wage Case general orders and location allowance general orders, most State Commission awards in the private sector that may cover employees, have become

686 Above n 683, 5-9.
687 Ibid 9.

> well outdated. They have not been comprehensively reviewed for some years. One can only speculate as to why this is so. It is the case however, that apart from the State Commission's obligations to keep wages and certain allowances updated by general orders, the responsibility to maintain awards rests with the parties to them – the respondent unions and employers. Possible reasons may be that unions respondent to those awards, particularly in the Retail Trade and Hospitality sectors, who have few members in the unincorporated sector, may find it difficult to organise and to obtain instructions.[688]

1186. This suggests the failure to maintain awards is systemic. The structure created to do so is generally reliant on the parties to awards to make applications; but because of the changed industrial relations landscape that is unlikely to occur.

7.9(b) Gaps in Award Coverage

1187. There are major gaps in State award coverage. The scope clauses of State awards are complex and many awards have not been varied to reflect changes in industry and occupations over the last 40 years.

1188. This is a real issue because the consequence is that a significant proportion[689] of State system employees may be without an award safety net and more vulnerable to exploitation.

1189. Approximately 20 per cent of state system callers to the Wageline contact centre within the PSD of DMIRS are award free employees.[690] While some of these employees are in professional or managerial occupations which are not traditionally award covered, advice from the Secretariat based on the Wageline calls is that a significant proportion of award free employees in the State system are in non-professional occupations where the job duties and classifications are comparable to employees who are covered by State awards or would be covered by an award if working for a national system employer.

1190. Due to the way in which the scope of a State award is determined, employees can be award free even if the type of work they do is similar to the type of work that is covered by a State award. Under s 37 of the IR Act, an award has effect according

688 Ibid 9.

689 The Secretariat advises it is not possible from ABS data to determine the numbers of State system employees who fall into the award free category.

690 Internal Wageline call recording data.

to its terms but unless and to the extent that those terms expressly provide otherwise the award binds "all employees employed in any calling mentioned in the award…in the industry or industries to which the award applies", as well as "all employers employing those employees…". This is sometimes called the "common rule" of an award, in that it applies to "all employees and employers in the industry to whom it extends, unless its terms provide otherwise".[691] The somewhat quaint word "calling" is defined in s 7 of the IR Act to mean "any trade, craft, occupation, or classification of an employee". An example which the Review understands to be correct is that a receptionist working in a chiropractic clinic (making appointments, taking payments from clients etc) will be covered by the State *Clerks (Commercial, Social and Professional Services) Award 1972* (the Clerks Award), while a receptionist working in a physiotherapy clinic undertaking the same duties is award free. This is because whilst there is a chiropractic clinic respondent to the Clerks Award, there was no physiotherapy clinic respondent to the Clerks Award, or any other State award. This can create a situation of inequity for employees undertaking similar types of work.

1191. The gaps in State award coverage can also create differences between the obligations of employers. As an example, a comparison can be made between two small business beauty clinics operating the same hours within the same shopping centre. The small business operator who structures their business as an unincorporated partnership (and is therefore in the State system) has different wage obligations than the owner of a similar beauty clinic which is incorporated. This is because there is no State award coverage for a beauty clinic business although there is Federal award coverage. The State system employer is required to pay the full time staff $18.66 per hour on a Sunday (the State minimum wage with no penalty) and the national system employer is required to pay full time staff $42.58 on Sunday (the relevant national award rate with a 100 per cent penalty for Sunday work).[692]

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691 Above n 683, 11.

692 Rate based on an adult beautician (level 3 of the Hair and Beauty Award). This may of course sound an argument for the movement of all State private sector award employers and employees to the Federal system, but as mentioned in chapter 1 that issue is outside of the scope of the Terms of Reference of the Review.

1192. As discussed in Chapter 5, about Term of Reference 4, currently, domestic service employees are excluded from the definition of employee in the IR Act and the MCE Act. These employees include age and disability carers, and cleaners and housekeeping workers employed directly by the home owner or occupier. As the IR Act does not apply to them they have no award coverage; and are not covered by the MCE Act either.

7.9(c) Respondency Issues – Scope Clauses in Awards

1193. Under section 37(1) of the IR Act, an "award has effect according to its terms, but unless and to the extent that those terms expressly provide otherwise it shall… extend to and bind all employees employed in any calling mentioned therein in the industry or industries to which the award applies", and "all employers employing those employees".

1194. The scope of a State award can be fixed by reference to an industry carried on by a named employer.[693] This can create complications for other employers and their employees if the named employer scope clauses make it difficult to determine the coverage of the award.

1195. These issues can arise out of named employer awards:

(a) If a respondent employer has ceased to operate many years ago and/or has a generic name that provides no indication of what the business did, research into the activities the business was undertaking up to 50 years ago is required in order to determine award scope. An example might be an award with the respondent "Brown and Co". Gaps in award coverage can occur when respondency lists are not maintained.

(b) There is legal uncertainty about whether the removal of an employer from an award's respondency list narrows the scope of the award. An example is the coverage of pharmacy assistants under the *Shop and Warehouse*

[693] *Freshwest Corporation Pty Ltd v TWU* (1991) 71 WAIG 1746 provides an example of how the scope of an award can be fixed by reference to the industry carried out by an employer.

(Wholesale and Retail Establishments) State Award 1977 (Shop and Warehouse Award).

(c) It can be difficult to determine the industry carried on by an employer when there are no headings to indicate the type of industry a respondent employer was working in at the time the award was made.

1196. These problems can have real consequences. For example, the *Shop and Warehouse Award* does not cover shop assistants working in mobile phone stores because the respondency list has not been updated to reflect contemporary business types.[694] **Attachment 7D** sets out other examples of employees who are not covered by a State award but who work in industries or occupations that could be considered as traditionally having been likely to be of a type to be covered by an award and/or who would be covered by a modern award if employed in the national industrial relations system.

1197. Outdated scope clauses can also create unintended consequences. For example, clause 45 of the *Building Trades (Construction) Award 1987* prohibits junior employees (excluding apprentices) being hired to perform any work covered by the award, unless the consent of the union is first obtained. Where the consent of the union is obtained, junior employees must be paid adult rates of pay. The Full Bench of the WAIRC has determined however that if an employer does not obtain the consent of the union before hiring a junior worker, the employee falls outside of the scope of the award and is award free.[695] This then means that, because they are award free, a junior employee will be paid junior rates under the MCE Act, which undermines the purpose of clause 45 of the award.

1198. A number of older State awards contain area and scope clauses that apply only within a radius of 14 or 15 miles (approx. 22.5 to 24.1 kilometers) from the Perth

694 *Shop and Warehouse Award* – Schedule C.

695 *Armando La Guidara v Antonino Tripolitano* (2001) WAIG 3054.

General Post Office.[696] Subsequently, awards that may have been intended to cover what was (then) the metropolitan area, no longer achieve this aim.

1199. Additionally, in contrast to national modern awards, many State awards do not extend to labour hire employees, thus rendering them award free.[697]

7.9(d) Outdated or Non-Existent Apprenticeship and Traineeship Provisions

1200. There are a range of industrial issues regarding apprentices and trainees in Western Australia due to inconsistencies between the *Vocational Education and Training Act 1996* (WA) (VET Act) and State awards, particularly where awards have not been amended to reflect changes to the VET Act. This situation may act as a disincentive for the establishment of apprenticeships and traineeships under the relevant awards.

1201. With regard to apprenticeships, the apprenticeship structure within many awards is outdated and does not reflect the current range of apprenticeships on offer. As an example, the *Hairdressing Award 1989* still provides rates for a four year apprenticeship, but all hairdressing apprenticeships are now a maximum of three years full time.

1202. A number of State awards reference the now defunct National Training Wage Award (NTW Award) in the wage schedules. The NTW Award was a federal pre-modern award that provided wages for trainees. In 2016, at the request of the Minister, the WAIRC included in the State Wage Order that no trainee working under one of these awards is to receive less than the minimum rate received by award free trainees. However, the references to the NTW Award remain in State awards, adding complexity for employers and employees aiming to understand their appropriate rates of pay. A significant number of other State awards include

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696 For example, see the *Bag, Sack and Textile* Award; the Bespoke Bootmakers' and Repairers' Award No. 4 of 1946; the Particle Board Employees' Award, 1964; the *Plywood and Veneer Workers' Award, 1952*; the *Case and Box Makers Award, 1952*; and the *Rope and Twine Workers' Award*.

697 An example of how national modern awards apply to labour hire employees is illustrated by the *Horticulture Award 2010*. Clause 4.7 of this award states: *"*This award covers any employer which supplies labour on an on-hire basis in the industry set out in clause 4.1 in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry. This subclause operates subject to the exclusions from coverage in this award.*"*

traineeship clauses that refer to now defunct traineeship schemes. The validity of these clauses is unclear. Other awards do not contain traineeship provisions at all.

7.9(e) Awards do not Reflect Contemporary Workplace Arrangements

1203. There are provisions within State awards that require updating to reflect the nature of contemporary workplaces. As an example, the hours and rostering provisions in a commonly used State award, the *Shop and Warehouse Award,* were developed prior to the advent of Monday to Friday late night trading and Sunday trading for general retail stores.

1204. There are also historical anomalies in the current State awards. For instance, the *Shop and Warehouse Award* requires employers to provide "saloon fares" when employees are travelling by coastal boat for work,[698] and the *Clerks (Accountants Employees) Award 1984* provides for a special allowance that is payable to comptometer or calculating or ledger machine operators.[699] The *Building Trades (Construction) Award 1987* requires an employer to provide notification by "letter or telegram" of a change of meal break arrangement.[700]

1205. **Attachment 7C** contains more examples of State awards that have obsolete and out of date provisions.

7.10 Federal System Award Framework

1206. In March 2008 the then Federal Minister for Employment and Workplace Relations, the Hon. Julia Gillard MP, issued an award modernisation request under s 576C(1) of the WR Act to the then Australian Industrial Relations Commission (AIRC) to commence an award modernisation process to create Federal modern awards.

1207. In accordance with the award modernisation request, the AIRC reviewed more than 1,500 awards and instead created 122 national modern awards. The modern awards commenced operation on 1 January 2010.

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698 Clause 25.
699 Clause 11.
700 Clause 13(4).

1208. Industry and occupational coverage of national modern awards is less complex than State awards. With the exception of enterprise awards,[701] the scope of national modern awards:

(a) Is not determined by the industry carried on by a named employer.

(b) Covers a whole industry or occupation.

1209. Section 143 of the FW Act provides amongst other things, that:

(a) A modern award must be expressed to cover specified employers and specified employees of employers.

(b) Employers may be specified by name or by inclusion in a specified class or classes, and employees must be specified by inclusion in a specified class or classes.

(c) The class may be described by reference to a particular industry, part of an industry, and/or particular kinds of work.

1210. The national modern award system covers all employees below what is described as the professional or managerial level, either by a modern award relevant to their industry or occupation or through coverage under the *Miscellaneous Award 2010*, which applies to those who do not have coverage under any other award.[702]

1211. Examples of different types of coverage clauses in national modern awards are:

(a) *Book Industry Award 2010* (clause 4.1): "This award covers employers throughout Australia in the book industry…".

(b) *Airport Employees Award 2010* (clause 4.1): "This award covers employers throughout Australia that operate airports…".

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701 Enterprise awards are awards that apply to specific businesses.

702 Clause 4.1 of the *Miscellaneous Award 2010* provides that **"**Subject to clauses 4.2, 4.3, 4.4, 4.5 and 4.6 this award covers employers throughout Australia and their employees in the classifications listed in clause 14 minimum wages who are not covered by any other modern award". Clause 4.2 specifies: "The award does not cover those classes of employees who, because of the nature or seniority of their role, have not traditionally been covered by awards including managerial employees and professional employees such as accountants and finance, marketing, legal, human resources, public relations and information technology specialists*."*

(c) *Clerks – Private Sector Award 2010* (clause 4.1): "This award covers employers in the private sector throughout Australia with respect to their employees engaged wholly or principally in clerical work…".

(d) *Manufacturing and Associated Industries and Occupations Award 2010* (clause 4.1): "This award covers employers throughout Australia of employees in the Manufacturing and Associated Industries and Occupations…".

1212. When the AIRC began the modern award process in 2008, consultation with union and employer organisations resulted in a timetable being established which prioritised 19 industries and occupations for the award modernisation process.[703]

1213. The classification of industries (and occupations) used in the AIRC's panel system for allocation of AIRC matters was used as a starting point for the award modernisation process with the aim of broadly grouping together industries where practicable into one modern award.[704] During the award modernisation process the list of industry and occupation groups was expanded with 122 modern awards being created by December 2009.

7.11 Potential Approaches to State Award Updating

1214. State award updating as envisaged by Term of Reference 6 provides an opportunity to address the current gaps in State award coverage and to establish State awards that provide, in combination with statutory minimum conditions of employment, a modern and user-friendly safety net of industry and occupational based entitlements.

1215. As set out earlier the Term of Reference requires the development of a system whereby:

(a) The scope of awards provides comprehensive coverage to employees.

703 [2008] AIRCFB 550; Attachment A: Draft list of priority industries.
704 [2008] AIRC 387 [5]- [12].

(b) Awards reflect contemporary workplaces and industry, without reducing existing entitlements.

(c) Awards are written in plain English and are user friendly for employers and employees.

(d) The award updating process is driven by the WAIRC, with appropriate input from the award parties and other relevant stakeholders.

1216. Other important issues for consideration in the award updating process are:

(a) Whether unions and employer associations in the award system are named parties to the awards and the consequences if they are not.

(b) The provision of an appropriate timeframe for award updating to ensure new awards are well drafted.

(c) Whether there should be a combining of State awards to reflect the nature of the private sector industries and occupations covered by the State system.

(d) The need to ensure State awards are gender neutral, non-discriminatory and support equal remuneration for work of equal or comparable value.

(e) Whether and if so how a comprehensive set of training wages that are suitable for apprentices and trainees in the State jurisdiction are to be incorporated into State awards.

(f) The extent to which State awards incorporate or provide markers to other key workplace entitlements – such as the minimum conditions of employment, and the FW Act termination and parental leave provisions that apply to State system employees.

7.12 Maintenance of Awards Post Award Updating

1217. As well as providing for a one off award updating process, it would be appropriate for the IR Act to provide that the WAIRC has responsibility to ensure that awards are kept up-to-date on an ongoing basis.

1218. When national modern awards were created in the Federal industrial relations system, the primary mechanism used to ensure they were kept up-to-date was a mandated four-yearly review carried out by the FWC.[705] In practice, this Federal review process has proved to be very resource intensive for employers, unions and the FWC. The 2015 Productivity Commission Inquiry into the Workplace Relations Framework recommended the 4-yearly review process be repealed.[706] This recommendation attracted widespread support from both unions and employer organisations.

1219. In response to the Productivity Commission's recommendation, the Commonwealth Government has introduced the Fair Work Amendment (Repeal of 4-yearly reviews and other Measures) Bill 2017, to abolish the 4-yearly review process. If passed, the FWC will still have the ability to make, vary and revoke national modern awards under Part 2-3 Division 5 of the FW Act, provided it is satisfied that making a determination is necessary to achieve the "modern awards objective." The FW Act will therefore still give the FWC jurisdiction and power to ensure national modern awards are kept up-to-date.

1220. To ensure that State awards are maintained and remain contemporary, consideration may need to be given to whether it is appropriate for the WAIRC to have the jurisdiction power to update awards, on its own motion, whenever it perceives there is a need.

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705 Under Part 2-3 Division 4 of the Act, 4 yearly reviews of modern awards were intended to be the principal mechanism by which modern awards would be reviewed to maintain a fair and relevant safety net of terms and conditions.

706 Above n 658- recommendation 8.1.

1221. To facilitate the award updating process, the WAIRC may be able to utilise General Orders under section 50 of the IR Act, to vary a number of awards simultaneously to affect desired changes to conditions of employment.[707]

7.13 Analysis of Submissions

1222. The Review received submissions on this Term of Reference from a total of 32 people and bodies. Of these 11 were employer groups, 9 were industrial organisations of employees, 4 were people or organisations who represent stakeholders within the field, 5 were government departments or government bodies, there was a political party, an academic and a not-for-profit community service organisation. The political party, the Liberal Democrats, thought all awards should be abolished as part of its overall submission that the IR Act should be abolished.

1223. The Salvation Army submitted that in the Federal system, award modernisation under the FW Act left a lot of workers worse off —particularly low paid workers. As such, the Salvation Army recommended that updating State awards should proceed only after new protections and pre-conditions are in place to ensure all workers, and especially low paid workers and workers vulnerable to exploitation— are not unduly disadvantaged.

1224. Professor Alison Preston from the University of Western Australia made a brief submission on this topic, making the point that the maintenance of a relevant framework of industrial awards is an important way through which those with weak or little bargaining power can be protected in contemporary labour markets.

1225. Many of the submissions reflected upon the award modernisation process at the Federal level and urged the Review not to make recommendations that would

[707] Term of Reference 6 of the Review is examining whether the minimum conditions of employment should be updated, and whether there should be a process for statutory minimum conditions to be periodically updated by the WAIRC, without the need for legislative change. At present, s 50 of the IR Act provides the WAIRC with the power to make General Orders relating to industrial matters. Under s 51B of the IR Act, the WAIRC does not have the power to make a General Order setting a minimum condition in relation to a matter if the matter is the subject of a minimum condition of employment as defined in the MCE Act. The WAIRC may, however, make a General Order in relation to a matter that is the subject of a minimum condition of employment if the General Order is more favourable to employees than the minimum condition of employment.

replicate that process. The submissions elaborated on the problems associated with the process, including the never ending cycle of award modernisation every four years. This was submitted to be labour intensive and unnecessary.

1226. The CFMEU submitted the awards presently in place in Western Australia exist because of determinations made by the WAIRC following an arbitral or conciliated process. The CFMEU submitted this history is important in understanding the nature of awards in Western Australia. The process has contributed to the content of the awards. It is, the union submitted a different process from the type of industrial regulation that now takes place at the Federal level by the FWC. This is noted by the Review but it does not necessarily mean that the system should not be effected to reflect modern industrial circumstances in Western Australia.

1227. As stated in Creighton & Stewart at 13.80[708]:

> The traditional system of award making under the auspices of State and Federal industrial tribunals was the product of the interplay of a particular set of circumstances; industrial, social, economic, political, legislative and constitutional. All of those circumstances have changed radically in recent years, including the interpretation of the Constitution.

1228. The Review considers wording in the Term of Reference pays respect to the arbitrated outcome of State awards. This is reflected by the Term of Reference requiring that the process to be devised by the Review is not to reduce existing employee entitlements.

1229. The Term of Reference may be construed however to be consistent with a desire to move to a contemporary framework for the present and into the future.

1230. In considering this Term of Reference the opinions of the CCI and UnionsWA are of some importance given their place as parties under s 50 of the IR Act. The CCI generally submitted that the award modernisation process at a Federal level had proved problematic in a number of ways. Despite this, it supported a modernisation of WA State awards by the WAIRC. It was submitted that consolidation of awards, numerically if not in award content, was necessary due

[708] Above n 19.

to the significantly reduced coverage of awards. It submitted that many awards have become obsolete and add little to the "small or micro businesses remaining" within the State private sector industrial system. The CCI suggested it would be important as part of the process to gain a deeper understanding of who the unincorporated employers are who remain in the State industrial relations system, which industries they work in, the occupations they employ and which of those are award reliant. It was submitted that through this process one could direct attention specifically to those who have active State award coverage and involvement. It was submitted that once this process has been gone through there could be a cancellation or consolidation of all other "legacy" State awards into a safety net of a catchall miscellaneous State award. It was submitted that the number of State awards could be condensed into approximately 10 key industry awards, plus a miscellaneous award for employers and employees who previously had award coverage. It was submitted that any award rationalisation process should not reduce employer flexibility or increase employer costs or reduce benefits for award employees.

1231. UnionsWA did not support any adoption of an award modernisation process or an updating of State awards; nor did it support the wholesale replacement of State awards by Federal awards. It submitted the Federal four yearly review process had proven to be a bad idea. The UnionsWA submission also referred to a submission made by the ACTU to the Productivity Commission's inquiry into the workplace relations framework, which said that the creation of modern awards had involved consolidation and simplification of award entitlements on a massive scale, and in the process well entrenched terms and conditions of employment had been eliminated.[709] The ACTU also submitted to the Productivity Commission that detailed provisions in modern awards were redrafted in order to clarify and/or simplify the safety net but in some cases critical information regarding the operation of the specific entitlements were removed, creating a degree of uncertainty or ambiguity in the safety net.

[709] Examples of jury service, make up pay and more beneficial leave entitlements were provided.

1232. The ACTU, in its submission to the Review, suggested that realistic boundaries and expectations be set from the outset for award updating. It submitted that this could be achieved by the industrial parties and the WAIRC cooperating at the commencement of the process to identify issues that they believe ought to be explored in the updating process. The issues should then be assessed and prioritised against agreed criteria for the need to address the particular issue in a practical sense.

1233. The ACTU was concerned that employers and unions retain control and ownership of the award updating process as parties to award creation, not just organisations to be consulted, but with necessary resourcing for and assistance from the WAIRC. Consistent with the submissions of other unions, the ACTU urged that union parties be fully resourced to represent the interests of those workers within their coverage. The ACTU noted that award updating is resource-intensive, and unions have limited resources and multiple competing priorities.

1234. UnionsWA submitted that any updating of State awards should be preceded by a number of steps to ensure that the rights of Western Australian workers are protected, along with their pay and conditions. It was submitted that unions and employers should remain principal parties to awards to guard against vexatious interference with award and agreement making by organisations and individuals who were not representative of the relevant industry. Accordingly, there should be restricted standing on who could make an award. It was submitted that there should be no concept of "allowable matters" as that was a restriction that had facilitated the stripping of award conditions at the Federal level.

1235. In response to this the Review reiterates the Term of Reference requires the system to be devised by the Review to not allow for the minimisation of working conditions.

1236. UnionsWA submitted the scope and respondency of all State awards should be reviewed and made comprehensive before any process of updating begins, as that would make any future process more efficient and effective. It was also

submitted that any new State awards should be enforceable from the day they are commenced.

1237. This submission was supported by the separate submission provided by United Voice. It submitted that if the award updating process mirrored the failed award modernisation process in the Federal system it would have a devastating impact on workers' conditions and come at a significant cost to the State Government and all stakeholders. It was submitted that there should be a clear structure and guidelines developed so as to prioritise awards and narrow the scope of the review of the awards.

1238. The submission from the SDA also emphasised the complexities involved in updating and modernising awards.

1239. Other submissions including those by the HIA also argued that there would be difficulties encountered by the implementation of a system that simply followed the Federal award modernisation process.

1240. There was some concurrence with the view that the scope of any modern award be industry based to lead to a reduction in the number of State awards. This opinion was provided by the Master Grocers Australia (MGA) (who provided examples), UnionsWA, the SDA and CCI. The SBDC also favoured reducing the number of awards.

1241. There was generalised support for the WAIRC to be used as the body and driver of the award modernisation process. This was the submission of the ELC, the MGA and Restaurant & Catering Australia.

1242. There was also an emphasis upon stakeholder input into the contents of State awards. One concern was the prospect of increased compliance costs in following an updated State award. This concern was expressed by CCI and Master Builders.

1243. It was also acknowledged by UnionsWA that there were pockets of award free employees within Western Australia. It was implicitly submitted that these employees ought to be covered by an award.

1244. It was submitted by the ELC, that in ensuring that workers' conditions were maintained, it would be appropriate to look at a condition by condition approach as opposed to an overall no worse off approach.

1245. A number of submissions made the point that it would be of assistance to establish industry review panels as part of the award modernisation process. The Review can see some merit in that submission. The SDA submitted that there ought to be principles to guide the award modernisation process and that parties should be engaged in the preparation of these principles.

1246. A number of employer groups said that there should, as far as possible, be harmonisation with the Federal awards. This point was made by the SBDC, CCI and CoSBA.

1247. A number of submissions also made the point that whilst the Term of Reference only referred to private sector awards, there should also be an award updating process for public sector awards. Whilst the Review can see the sense in such a submission, it is outside the Terms of Reference of the present Review to consider it. The Review notes however, for example, that the CPSU/CSA are a party to eight public sector awards.

1248. A number of the submissions were critical of the content, complexity and overlapping nature of the present State awards. Examples were given by the MGA and the Australian Lotteries and Newsagents Association. Due to this, the Term of Reference specification for the newly devised system to involve plain English awards was generally endorsed by employers and industry associations. However, some unions expressed reservations about adopting a plain English format for State awards, cautioning that such an approach can have unintended consequences and/or change the meaning of particular provisions.

1249. It is noted by the Review that the Federal award modernisation process has involved a consideration by the FWC of the nature and extent of plain English drafting in awards. The Review is aware that the FWC is to publish guidelines upon plain English drafting for awards. The Review recommends that this be considered by the State Government and the WAIRC in relation to the drafting of updated State awards. In the context of the importance of the precise consideration of the words used in an award, the CFMEU emphasised again the arbitral nature of the making of awards and that the wording in a particular clause may have involved some "give and take" on behalf of employers and employee groups in the formation of the terms. That is acknowledged but can probably be covered by the non-reduction of conditions requirement in the Terms of Reference.

1250. Some of the submissions to the Review referred to whether penalty rates ought to be maintained, or individually justified. The issue is however beyond the Terms of Reference. The Terms of Reference require the Review to devise a system that includes the maintenance of existing conditions as opposed to a system by which they could be reduced or removed.

1251. A number of bodies were concerned about the potential cost of the award updating process. Some union and employer bodies submitted the State should assist with the cost that award updating would impose upon stakeholders before the WAIRC. The Review accepts the issue is one of importance to the type of system the Review might recommend.

1252. The submission from Mr Nick Ellery, a partner at Corrs Chambers Westgarth, but provided in his personal capacity as a legal practitioner with experience in industrial relations matters in Western Australia, commented upon the process for updating State awards. Mr Ellery noted the WAIRC has the power to vary an award on its own motion under s 40B of the IR Act. However, he pointed out that the power had been used infrequently and with limited success. Mr Ellery suggested that new legislation could require the WAIRC to adopt a particular process and limit the time and scope for submissions from the parties about the

award review and updating of awards. Mr Ellery said, for example, there could be a six month period from commencement of the process to final determination. It was submitted that legislation could specify the objectives of the Review that could include:

(a) What type of award system is desired.

(b) Approximately how many awards there should be.

(c) What level of detail they should cover.

(d) What they must cover.

(e) What the transition process would be.

1253. It was submitted the legislation could specify that the current awards are to be entirely or largely replaced. It was submitted the more prescriptive the legislation was, the less scope there would be for the process to fail for some reason such as lack of input or support from employer and union representatives. It was submitted the WAIRC could also be required to model State awards on existing modern awards under the FW Act, or at least have regard to them. It was submitted by Mr Ellery that Federal awards were clearer and better drafted than State current awards.[710] Mr Ellery submitted in conclusion:

> Having such a prescriptive process would no doubt mean that some of the unique needs or historical characteristics of particular industries would not be able to be fully addressed. Some stakeholders would not be happy with the process or outcome. But to address those considerations would require a far more extensive and labour intensive review process. There may never be an end to it. Accordingly you may never get the outcome of a truly modernised user friendly State award system.

1254. With respect, the Review can see cogency in many of the arguments made by Mr Ellery.

[710] The Review notes the point was disputed in a number of submissions.

7.14 Options for Award Updating

1255. There is a range of options for how an award updating process could be undertaken within the State system. The Secretariat has provided the Review with four main potential options, which the Review has considered in conjunction with the submissions received**.**

1256. The **first option** would be for a review of each of the national modern awards with a view to its inclusion in the State award system. The content of each national modern award would form the template for a new modern State award covering the same industry. The WAIRC could make appropriate amendments to the content of national modern awards, to reflect the fact the award will be operating in the State jurisdiction, and to ensure that it does not reduce existing employment conditions. National modern awards that have no application in WA would not need to be replicated in the State jurisdiction. For example there is an *Alpine Resorts Award 2010* in the national award system, but as WA does not have alpine ski resorts there would be no need to replicate the award in the State system. A State Miscellaneous Award could be created, to cover employees in industries and occupations who are not covered by any other modern award but are a class of employee that has historically been covered by awards.

1257. The first option has the advantage that it utilises the main provisions of national modern awards that have already been through a comprehensive rationalisation and modernisation process, thus potentially reducing the resources required to update State awards. The option would also assist in ensuring the scope of State awards provides comprehensive coverage to all employees in industries and occupations that have historically been covered by awards and particularly if a State Miscellaneous Award is created. It would also provide a level playing field for incorporated and unincorporated businesses in the same industry.

1258. There are also disadvantages to the option. The option ignores the point made by the CFMEU that State awards are the product of agreements, arbitrations and conciliations that occurred in industry in Western Australia. Industry stakeholders

have criticised national modern awards. Additionally, and importantly, the Federal award framework, with 122 awards, is more complex than the Review considers is necessary to cover private sector State awards.

1259. The **second option** is to undertake a full award modernisation process in the State system, similar to the one undertaken Federally. This option would require all State awards to undergo a full award modernisation process, similar to what occurred with Federal award modernisation. The end result would be modern State awards that have conditions specific for State system industries and occupations which have been developed by the parties. The WAIRC could carry out the award modernisation process, in accordance with any written instructions issued by the Minister. Every State private sector award would be reviewed, in order that it be replaced with one or more new modern State awards. Following the process adopted Federally, the Minister would issue detailed instructions to the WAIRC on how it is to carry out the award modernisation process. An advantage of this model would be the degree of Ministerial control. However, the Minister in setting the Terms of Reference has already indicated the process should be driven by the WAIRC. The Federal award modernisation process was deeply unpopular with unions and employer associations, and a similar process is likely to be strongly resisted in WA. In written submissions and in the stakeholder meetings the Review has held, a regular theme was that Western Australia should not copy the Federal award modernisation process. The Federal award modernisation process was also an extremely resource intensive exercise. It is unlikely that unions and employer bodies would have the resources available to engage in a similar process for State awards.

1260. The **third option** is an award updating process unilaterally driven by the WAIRC and involving limited consultation with award parties. This model would see the WAIRC take a direct and interventionist role in the award updating process, to facilitate the timely updating of awards in a manner that minimises the resource commitment required from unions and employer bodies. Under this option the WAIRC would almost completely drive the process of award updating. The WAIRC

would be required to review all existing private sector awards over a set period of time, and make such modern State awards as it determines necessary or expedient to replace the previous State awards. Once the draft modern State awards have been developed, they would be released for public consultation, before final modern State awards are issued. The requirements for award updating could be enshrined in legislation. The legislative framework could require consultation with unions and employer bodies; however, this would only occur once the draft modern State awards have been developed. Award modernisation provisions could be inserted into the IR Act to give instructions to the WAIRC on the parameters for the award updating process.

1261. The WAIRC could also be required to make a miscellaneous award for employees who are award free, but who ought to be covered by an award as the work they perform has been traditionally regulated by awards. Unions and employer bodies could continue to be named parties to awards, allowing them to make application to vary awards outside of any award updating process. However, the requirement to maintain awards would be a legislative responsibility of the WAIRC, which would be required to update awards as and when necessary to ensure they remain up-to-date and contemporary. This option has the advantage of being less time and resource intensive than other options. It could probably lead to finalised new State awards in a lesser timeframe than for the other options. The process would facilitate a reduction in the number of State awards and provide a streamlined set of industry and occupation based awards. The downside in terms of resources for this option is that the resources of the WAIRC may be stretched or may need to be increased. Also, as the Review understands the position to be, the FWC experience is that a "better" award is created if you can have the involvement of union and employer bodies in the creation rather than just as, in effect, a reviewer. The Review anticipates that development of draft modern State awards by the WAIRC without input from unions and employer bodies would also be contentious.

1262. The **fourth option** would be for a tailored award updating process for State private sector awards, driven by the WAIRC. This is similar to the model advocated by Mr Ellery and discussed above. It is also similar to the methodology included in the Green Bill but with modifications to ensure that the modern State awards meet the criteria set out in the Term of Reference. Advantages of this option are that the process would be less time and resource intensive than a full award modernisation process, but at the same time cater for union and employer involvement in the making of the awards. Also the updated State awards would be tailored to suit the nature of the employers and employees within the State system and the gaps in award coverage removed to ensure comprehensive coverage for all employees who perform work that has traditionally been award covered. The process would facilitate a reduction in the number of State awards and provide a streamlined set of industry and occupation based awards.

1263. Under this option the WAIRC would drive the process of award updating and would be required to review all existing private sector awards over a 24 month period and make such modern State awards as it determines necessary or expedient to replace the previous State awards. The requirements for award updating would be enshrined in legislation. The award updating process would be structured to ensure new modern State awards protect employee entitlements. The WAIRC would consult with relevant parties, and develop exposure drafts of all modern State awards. Award modernisation provisions could be inserted into the IR Act to provide instructions to the WAIRC on the parameters for the award updating process. Unions and employer bodies could retain the capacity to be named parties to modern State awards. A clear legislative framework would ensure the WAIRC drives the process and establish timeframes and criteria for award updating.

1264. A disadvantage of this option is that there could be some lack of harmonisation with Federal awards. There would also be resource implications for the WAIRC and timeliness, having regard to the need to have union and employer involvement, could be an issue.

7.15 Preliminary Opinion of the Review and Proposed Recommendation

1265. In the preliminary opinion of the Review, a modified version of the fourth option is probably the best way to proceed.[a] This involves a prescriptive approach somewhat akin to that suggested by Mr Ellery. The Review proposes, at this point, making a recommendation that there be legislation providing for the WAIRC to undertake the making of new industry based awards. The aim will be to remove many of the uncertainties of the present system. It will also remove the difficulties of amending or cancelling awards involving the scope and common rule principles that presently apply.

1266. Additionally, if the State Government also accepts the State employment standards proposal set out in chapter 6, the need for particular matters to be included in each award under the auspices of the WAIRC will be diminished. The conditions that are the subject of the SES do not need to be set out in a State award unless the particular needs of a given industry require it. The WAIRC will be best placed, upon submissions from the parties, to make an assessment about that.

1267. Overall the Review considers, consistent with the scope of the Term of Reference, that the award system in Western Australia is in need of rejuvenation. It does not serve the purpose of providing a safety net to employees who are not covered by the Federal system. It does not provide an employer with an easily understandable pathway to ascertain what they must do to ensure their business complies with the applicable award. The process for an employer doing so is unduly difficult. Finding the applicable award can be difficult, as is then being able to understand what the award means.

1268. The Review can understand the place that the present State awards may have in what might be called the soul of unions and unionists in Western Australia. They are the people and institutions who were involved in the creation, maintenance and improvement of awards. In all probability many union officers, officials, shop stewards and members worked hard to make the gains that the awards represent.

[a.] The original version of the Interim Report published on 20 March 2018, due to an administrative error, referred to the "third option" in this paragraph and not the "fourth option". Therefore the Interim Report has been republished to correct the error and include this note by way of explanation of the corrigendum.

But there is, in the respectful preliminary opinion of the Review, a danger that the desire to hang on to the instrument that provides for and embodies these gains, can mask the need for a change for the benefit of the people who are the intended beneficiaries of the awards. These are the working people of the State, who for significant economic, political and/or industrial reasons, need to have a State endorsed construct to try to ensure they are paid an acceptable standard of living and treated at work in way that provides fairness and dignity.

1269. It needs to be remembered that when some State awards were made, there was no legislation at the State and Federal level that imposed minimum conditions of employment for the benefit of employees; and certainly not of the nature and extent now provided and likely to be recommended as part of the Review. That was, in the past, a primary role of awards. The award system can now operate on the basis that certain entitlements are enshrined in legislation and do not need to be duplicated in an award. The award system may operate in conjunction with and against the backdrop of enhanced statutory minimum conditions of employment.

1270. There is also the industrial reality that has changed with the expansion of the Federal award system. Most of the employers and employees who were once covered by State awards are no longer so covered. To the extent that an award governs their employment, it is a Federal modern award. Due to the changing coverage and dynamics of the Federal system, the general focus of unions and major employers and employer groups is Federal – like it or not, that is now the "main game". Accordingly, and as the statistics of the WAIRC reflect, little is being done by private sector unions, employers or employer groups within the State award making or updating system. This is not said in any pejorative way, but just as an observation of fact. As a consequence, State awards are not updated in the way that they could or should be, to ensure they serve the purpose they are designed for; and, axiomatically, the businesses and employees they cover, are at least to an extent, disenfranchised. A State system developed to enable unions

and employers or employer groups to negotiate, conciliate or arbitrate to make, vary and update State awards no longer applies in practice.

1271. It is with these thoughts in mind, that the Review considers, at this preliminary stage that the award system ought to be rejuvenated, as contemplated by the Term of Reference. This is despite the Review giving great respect to the opinions of the unions, who clearly find it difficult to embrace a system being put in place for the updating of State awards. Their trenchant opposition to the award modernisation process at the Federal level is noted and, at this time, the Review does not intend to make a recommendation of this type.

1272. The Review is of the preliminary opinion that a major problem with State awards is their number and complexity. Coverage can be difficult to discern. The awards also cover employment conditions that should, in the preliminary opinion of the Review, be covered in the SES, and so do not need to be included in an award, unless there is some special reason, peculiar to the industry or occupation to be covered by the award, that requires something additional.

1273. Despite the difficulties with the Federal modern award making process, the Review is of the preliminary opinion that there is merit in industry and occupational based awards to simplify coverage issues. From the work done for the Review by the Secretariat, the preliminary opinion of the Review is that State based awards can be reduced to the industries and occupations set out further below.

1274. The preliminary opinion of the Review is that the IR Act ought to be amended to require the WAIRC to engage in an award rejuvenation process. As contemplated by the Term of Reference, the process should be driven by the WAIRC. As also contemplated by the Term of Reference and supported by the preliminary opinion of the Review, the Federal experience has shown the benefit of awards not being drafted solely by a body like the WAIRC. The input of employers and employee organisations assists in the attempt to make a thorough, clearly-drafted, plain speaking and fair award.

1275. This creates a difficulty as to how this might be achieved when the resources of unions and employer associations are stretched and pointed to the Federal system; and the large employers, understandably, have no or little interest in a State system that does not apply to them. Also, to the extent that AMMA and CCI, as IR Act s 50 parties, may have some interest in State awards, they do not purport to represent the majority of the businesses that will be covered by State awards. To some extent Master Builders and other employer groups who have made submissions to the Review fulfil that role. But there remains a concern as to whether there will be sufficient stakeholder involvement in the process. As submitted to the Review, there are economic and resourcing issues that may hamstring the process and cannot be ignored.

1276. The rejuvenation of the awards may well be an exercise that takes resources to properly engage in and with. On the other hand, unions and employers and employer groups are unlikely to have or be able to commit the resources to make the process work in the way it might best do so.

1277. The response to this issue from the submissions provided is a request for economic support from the Government for stakeholders to engage in the process. Whilst that is of course a matter for Government, as part of the running of the economy of the State, from the public statements regularly made by the Government about "budget repair" it is perhaps unlikely that it will commit significant resources to an award rejuvenation process in the WAIRC; at least at this point in time.

1278. However, the alternatives would seem to be for the Government to find a way to prioritise financial resources to fund unions and employer groups to engage with the process, disregard the prospect of the non-involvement of these parties, or to develop a system that tries to make the changes required but in a more leisurely way.

1279. These are matters upon which the Review will benefit from further submissions. In the interim, the Review is minded to recommend that the WAIRC be

empowered and required to, within 12 months and with requested input from unions and employer groups and Government, prioritise the making of new State awards, on an industry and occupational basis, within the groupings set out below, or in such other groupings as the WAIRC might think preferable, having regard to its knowledge and after stakeholder input.

1280. The major criteria for establishing the priority list should be:

(a) The needs of employers and employees currently working in the State system – that is, those employers and employees who are to be still covered by State awards that apply to the employment, and whose employment relationship needs to be underpinned by a new award because the present award contains terms and conditions that need to be updated; and

(b) Providing award coverage for industries or occupations that are currently not covered by State awards but where there are employers and employees currently working in the State system in those industries.

1281. Under the model under consideration, after the prioritisation process has taken place, the WAIRC is to be empowered and required, after seeking input from unions, employer groups and Government, and within a period of two years, to make new State awards. The WAIRC ought to be empowered and required to do this, even if, for whatever reason, union and employer groups do not take the reasonable opportunities they should be provided with to participate in the making of the awards. The involvement of the unions and employer groups ought to occur, but if that cannot occur, for one reason or another, that should not forever hold up the making of the awards.

1282. Under the model under consideration the legislation providing for the creation of the new awards should also have the characteristics set out in the draft recommendation below.

1283. The method for updating or varying new awards after they are made is something that the Review seeks further submissions about. The new awards, as a matter of principle, it seems to the Review, ought to be part of a system whereby a union, which has members, or possible members, who are covered by a new State award, can participate in any amendment or later updating of the award. The same would of course apply to any applicable employer group.

1284. The Review has not received submissions on the process of updating that ought to apply following the initial making of the updated awards, as proposed. Accordingly, the Review calls for additional submissions on the issue.

1285. The Review of the State Industrial Relations System proposes the following recommendations in relation to Term of Reference 6.

Proposed Recommendations

55. Subject to [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.[711]

    (c) Similar to the FW Act, the New Awards have either industry based or occupational scope clauses, in accordance with (d).

[711] 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."

(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 [55](g) 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.

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.

Schedule A to Proposed Recommendations

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

Attachment 7A Private Sector State Awards

- Aboriginal Communities and Organisations Western Australian Interim Award 2011
- Aboriginal Medical Service Employee's 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 – The
- 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 Analysis of Usage of State Awards

1. The Wageline contact centre in the Private Sector Labour Relations Division (PSD) of the Department of Mines, Industry Regulation and Safety receives approximately 20,000 calls per annum.[712] An internal analysis of Wageline data for 2016/17 shows that, of the calls that pertained to the State system:

    a) 20 per cent related to award free employees;

    b) 14 per cent concerned the *Building Trades (Construction) Award*;

    c) 11 per cent concerned the *Restaurant, Tearoom and Catering Workers' Award*;

    d) 9 per cent concerned the *Hairdressers Award*; and

    e) 8 per cent concerned the *Shop and Warehouse (Wholesale and Retail Establishments) Award*.

2. Wageline's website includes award summaries for the top 35 State awards. Data on website hits for 2016/2017 shows that the most accessed award summaries were:[713]

    a) *Restaurant, Tearoom and Catering Workers' Award*;

    b) *Shop and Warehouse (Wholesale and Retail Establishments) Award*;

    c) *Building Trades (Construction) Award*;

    d) *Clerks (Commercial, Social and Professional Services) Award*;

    e) *Hairdressers Award*; and

    f) *Metal Trades (General) Award.*

3. Data for 2016/17 shows that the awards for which PSD received the greatest number of complaints from employees regarding alleged award contraventions were:[714]

    a) *Restaurant, Tearoom and Catering Workers' Award*;

    b) *Fruit Growing and Fruit Packing Industry Award*;

    c) *Building Trades (Construction) Award*;

    d) *Contract Cleaners Award*;

    e) *Shop and Warehouse (Wholesale and Retail Establishments) Award*;

    f) *Hairdressers Award*;

    g) *Transport Workers (General) Award*;

    h) *Motel, Hostel, Service Flats and Boarding House Workers Award*;

    i) *Metal Trades (General) Award*; and

    j) *Clerks (Commercial, Social and Professional Services) Award*.

712 Internal call recording data maintained by Wageline.

713 Internal analysis of DMIRS website analytics data.

714 Figures are derived from an internal compliance database maintained by DMIRS.

Attachment 7C 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.[715] 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."[716] 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.

[715] The minimum award wage is currently the same as the Adult Minimum Wage determined pursuant to MCE Act s 12.

[716] 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.

Section 40B provision	Component of criteria	Award provisions inconsistent with section 40B
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.
	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* <u>7. JUNIOR WORKERS</u> *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* <u>15. REST INTERVAL FOR FEMALES</u> *(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.* <u>17. PART-TIME EMPLOYEES</u> *(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.*

Section 40B provision	Component of criteria	Award provisions inconsistent with section 40B
		(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 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.

Section 40B provision	Component of criteria	Award provisions inconsistent with section 40B
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* 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.*[717]

[717] Clause 13(4) of the *Building Trades (Construction) Award*.

Section 40B provision	Component of criteria	Award provisions inconsistent with section 40B
		(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: *(2) 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 (Metropolitan) Award.* *(3) 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.

Section 40B provision	Component of criteria	Award provisions inconsistent with section 40B
		• 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: <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 7D 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

Chapter 8 Compliance and Enforcement

8.1 Term of Reference

1286. The seventh 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 …
>
> 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.

1287. This Term of Reference requires the Review to consider, firstly, the statutory compliance mechanisms that facilitate employees being paid their correct entitlements; secondly, industrial inspectors' powers; and thirdly, overall, the "tools of enforcement". Insofar as the Term of Reference in 7(a) and 7(c) refers to "ensuring" that employees are paid their correct entitlements and inspectors being able to effectively perform their statutory functions, the Term of Reference is clearly aspirational. There is no methodology the Review could devise which would necessarily and in all cases mean that these things would happen. The Review takes the Term of Reference to mean it should consider and make recommendations to improve the prospects of employees being paid their correct entitlements and for inspectors to effectively perform their statutory functions.

1288. On a first consideration, the Review did not think the Term of Reference involved a review of the "right of entry provisions" in the IR Act. On further reflection, and after meeting with and receiving submissions from stakeholders, the Review was persuaded to the view that the Term of Reference does so. This is because 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.

8.2 Enforcement mechanisms

1289. The sole enforcement mechanism to facilitate employees being paid their correct entitlements in the State industrial relations system is a prosecution or 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 certain orders of the WAIRC.[718] A proceeding can be brought in the IMC for the enforcement of long service leave entitlements under s 11 of the LSL Act. It should be noted that many State awards incorporate the provisions of the LSL Act into the award. Any enforcement proceedings can therefore be brought as a breach of the award, rather than the LSL Act.

1290. By contrast, under the FW Act, 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 breach of record-keeping and pay slip obligations;

(b) Compliance notices.

(c) Enforceable undertakings.

1291. Several people may institute proceedings in the IMC under s 83 of the IR Act or s 11 of the LSL Act. Proceedings may be instituted, inter alia, by or on behalf of the person affected by the alleged contravention as well as by industrial inspectors.[719] As relayed to the Review, in the experience of the PSD at DMIRS, many claims are made by, or on behalf of employees of small businesses (1 to 19

[718] Section 7 of the MCE Act provides that a minimum condition may be enforced where the condition is implied in an employer-employee agreement, under s 83 of the IR Act; where the condition is implied in an award (defined to include an award, an industrial agreement and an order of the WAIRC), under Part III of the IR Act; or where the condition is implied in a contract of employment, under section 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.

[719] Industrial inspectors are designated under s 98(1) of the IR Act and are officers of DMIRS. They are based in the Private Sector Labour Relations Division of DMIRS.

employees) and involve a small amount of money.[720] For the period 1 June 2016 to 17 November 2017, the average amount of unpaid wages and entitlements (excluding long service leave) recovered by the PSD for each employee was $2,253.03 through conciliation and $4,684.67 through investigation.[721] In the view of the PSD, as relayed to the Review, it is not cost effective and necessarily in the public interest to bring court proceedings to rectify non-compliance in such instances.

1292. In the opinion of the PSD, as relayed to the Review, the major impediment to employees being paid their correct entitlements in the State industrial relations system include:

(a) Employers failing to keep employment records, with the result that it is difficult to bring court proceedings due to lack of evidence. Thus, paradoxically, employers who keep better employment records are more likely to be prosecuted.

(b) Patchy and ambiguous award coverage, which makes it difficult to determine whether an employee is covered by an award.

(c) Complexities in calculating employees' entitlements under awards, particularly overtime and allowances.

(d) Difficulties in determining if and when there has been a "transmission of business" under the LSL Act, in comparison with the relatively straightforward definition of a "transfer of business" under the FW Act.[722]

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720 Other than long service leave claims, which tend to involve more significant amounts of money. For the period 1 June 2016 to 17 November 2017, the average amount of unpaid long service leave recovered by the PSD per employee was $9,110.92. It should be noted that the LSL Act also applies to most employers in the national industrial relations system.

721 Of the amounts recovered through conciliation, 79 per cent were less than $5,000 and 62 per cent less than $2,000. For the amounts recovered through investigation, 73 per cent were less than $5,000 and 45 per cent less than $2,000.

722 See FW Act s 311.

8.3 FW Act Enforcement Mechanisms

1293. Infringement notices issued under the FW Act are on-the-spot penalties for record keeping or pay slip contraventions. According to the Fair Work Ombudsman (FWO) Annual Report 2016-17,[723] the FWO issued 665 infringement notices in 2016-17, up from 573 in 2015-16.[724]

1294. Compliance notices under the FW Act formally require a person to do certain things to fix alleged entitlement-based breaches of the FW Act. The FWO usually issues these when an employer has not agreed to rectify a breach, or the FWO suspects that will occur. In 2016-17, the FWO issued 192 compliance notices, slightly up from 186 in 2015-16.[725]

1295. Enforceable undertakings under the FW Act are legally binding arrangements in which an employer agrees to address contraventions and prevent further breaches. As the name suggests, an enforceable undertaking can be enforced in court. In 2016-17, the FWO executed 40 enforceable undertakings, down from 43 in 2015-16.[726]

1296. The FWO has also developed a tool known as a "proactive compliance deed". This is similar to an enforceable undertaking but is made under the common law rather than the FW Act.[727] As such, there is no requirement for FWO to reasonably believe that contraventions have taken place, as is required with enforceable undertakings,[728] before entering into a proactive compliance deed with an employer or head franchisor.

1297. The FWO has not undertaken a formal evaluation of these enforcement tools in terms of their cost or effectiveness. The University of Melbourne's Centre for Employment and Labour Relations Law has, however, undertaken an extensive evaluation of the FWO's activities from 2006-2012 in its 2014 report *The*

723 *Fair Work Ombudsman and Registered Organisations Commission Entity Annual Report 2016-2017*
724 Ibid – Enforcement Outcomes Table 4.
725 Ibid.
726 Ibid.
727 https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/compliance-partnerships.
728 FW Act s 715(1).

Transformation of Enforcement of Minimum Employment Standards in Australia: A Review of the FWO's Activities from 2006-2012.[729]

1298. The report made these points:

(a) On the basis of public statements by FWO and the interviews conducted with FWO staff, enforceable undertakings are relatively inexpensive and time-efficient.[730]

(b) External stakeholders such as the Ai Group consider that enforceable undertakings are seen as fairer, less costly and more effective in securing compliance than prosecution, particularly where a party has not deliberately broken the law.[731]

(c) FWO staff consider that enforceable undertakings have a strong compliance impact, with the ability to have an equal or greater capacity to deliver deterrence as remedies available through the courts.[732]

(d) There was evidence to suggest that FWO was achieving, through enforceable undertakings, the legislator's goal of providing a quick, flexible remedy which encouraged co-operative compliance and delivered deterrence.[733]

(e) Both enforceable undertakings and proactive compliance deeds are generally directed at saving inspectorate resources, entrenching corporate commitment to compliance and prompting self-regulatory behaviour.[734]

(f) There was reluctance by the FWO inspectorate to issue compliance notices, possibly due to the work perceived to be involved and a

729 http://law.unimelb.edu.au__data/assets/pdf_file/0008/1556738/FWOReport-FINAL.pdf.
730 Ibid 195.
731 Ibid 207-8.
732 Ibid 208.
733 Ibid 213.
734 Ibid 216.

perception that they were not particularly effective in achieving the regulatory objectives.[735]

(g) FWO staff considered that compliance notices were best suited to particular situations generally involving smaller underpayments and small to medium businesses, or franchises.[736]

(h) Only 67 compliance notices were issued in 2011-12.[737] As noted above, however, the number of compliance notices has since increased significantly.

(i) The exercise of discretion by the FWO inspectorate to issue an infringement notice can be used to gain leverage to achieve compliance.[738]

(j) Infringement notices cannot be issued where a person has failed to comply with or respond to a notice to produce records, which is a significant limitation on their use.[739]

(k) The number of infringement notices issued was low (18 issued in 2011-12).[740] The number issued has, however, significantly increased (to 665 in 2016-17),[741] which may suggest that FWO considers them to be an effective enforcement tool.

1299. **Attachment 8A** summarises the tools of enforcement, other than prosecution, contained in industrial relations/employment legislation in the other State jurisdictions.

735 Ibid 227-8.
736 Ibid 229.
737 Ibid 223.
738 Ibid 232.
739 Ibid 234.
740 Ibid 231.
741 Above n 724.

8.4 Providing Effective Deterrents to Non-Compliance with State Industrial Laws and Instruments

1300. There is at present, an intensifying call for the introduction of significant fines and/or prison sentences for employers who deliberately fail to pay correct wages and entitlements – to combat the so-called "wages theft".

1301. The calls for prison sentences and/or severe fines for "wages theft" has followed high profile Federal prosecutions involving businesses such as 7-Eleven, Dominos, Caltex and Han's Café. The calls have been made in particular, by unions,[742] the New South Wales ALP,[743] the South Australian ALP,[744] the Federal ALP[745] and the Australian Greens.[746]

1302. Whilst the Review understands the thrust of these calls, and the importance of the issue, it could be argued that it is beyond the scope of the Term of Reference to enter into the discussion about whether there should or should not be prison sentences for "wages theft". It should also be recognised that to go down this path would be a significant step for Western Australia as, so far as the Review is aware, there are no jurisdictions in Australia where "wages theft" is a criminal offence - State or Commonwealth. Generally, the Review considers at this point that issues about whether there should or should not be criminal sanctions for "wages theft" are probably best dealt with in the domain of the Attorney General of Western Australia. Accordingly, the Review intends to write to the Attorney General to bring the matter to his attention.

1303. That does not mean however that the Review should not and could not recommend that the IMC have the powers to significantly punish, by way of a fine,

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742 See, eg, https://www.australianunions.org.au/wage_theft_factsheet; http://www.abc.net.au/news/2017-05-16/union-boss-wants-underpaying-employers-jailed/8528882; http://www.unitedvoicewa.org.au/employers_exploiting_underpaying_migrant_workers_by_5_per_hour; http://www.unionswa.com.au/wa_ir_review_change.

743 http://www.abc.net.au/news/2017-07-29/luke-foley-pledges-to-crack-down-on-wage-theft-if-elected-in-nsw/8756236.

744 https://www.sbs.com.au/news/sa-labor-promises-crackdown-on-wage-theft.

745 See, http://www.billshorten.com.au/speech_address_to_queensland_labor_s_state_conference_townsville_saturday_29_july_2017.

746 https://greens.org.au/news/vic/greens-call-royal-commission-underpayment-penalty-rates-and-other-wage-theft.

a business that is within the State system that may engage in a systematic method to avoid the payment of wages of employees.

1304. The pecuniary penalties for non-compliance with State industrial laws and instruments are much less than those under the FW Act.[747] It is quite arguable that the penalties are so low that they fail to act as a specific or general deterrent to non-compliance. The Productivity Commission has also argued that penalties for employers that keep false or misleading records should be increased.[748]

1305. The *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth) recognised that the penalties under the FW Act were too low to effectively deter unscrupulous employers who exploit vulnerable workers because the costs associated with being caught are seen simply as a cost of doing business.[749] The penalties under the FW Act were already significantly higher than those under the IR Act prior to the enactment of the *Protecting Vulnerable Workers Act*; the disparity is now even greater.

1306. The Productivity Commission conducted a review into the enforcement and administration of Australian consumer law in 2017.[750] Its report noted concerns with whether the pecuniary penalties available to the consumer law regulators ($1.1 million for companies and $220,000 for individuals) were sufficiently large to deter breaches, particularly where the penalty imposed was significantly less than the commercial returns generated by the breach.[751] The Productivity Commission found that the maximum financial penalties are small compared to the benefits that a business can achieve by breaching consumer laws[752] and argued there was a strong case to strengthen the enforcement of consumer laws by increasing

747 See Attachment 8B for a comparison of State and Federal penalties.

748 *Workplace Relations Framework; Productivity Commission Inquiry Report Volume 1* No. (No. 76 30 November 2015) 48 - https://www.pc.gov.au/inquiries/completed/workplace-relations/report/workplace-relations-volume1.pdf.

749 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 Explanatory Memorandum, 2 http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr5826_ems_e0207b3c-41de-45b8-9631-4d08f9f88e23%22.

750 *Consumer Law Enforcement and Administration: Productivity Commission Research Report* (March 2017) - http://www.pc.gov.au/inquiries/completed/consumer-law/report/consumer-law.pdf.

751 Ibid.

752 Ibid 19.

maximum financial penalties.[753] The Review considers the Productivity Commission discussion has some relevance to the topic under consideration.

1307. A newly released survey report titled "Wage Theft in Australia"[754] analysed the responses of 4,322 temporary migrants across 107 nationalities working in Australia. The report found a substantial proportion of international students, backpackers and other temporary migrants were paid around half the legal minimum wage in Australia.[755] A key finding of the report was that "wage theft is endemic among international students, backpackers and other temporary migrants in Australia. For a substantial number of temporary migrants, it is also severe."[756] From a compliance viewpoint, the report notes that this finding:

> …raises urgent and challenging questions for a number of actors. For government, it demands examination of levels of resourcing required to address the scale of non-compliance, and consideration of specialised programs and infrastructure to prevent and remedy wage theft among temporary migrants. Employers, franchisors and businesses at the peak of supply chains must employ more effective methods to detect and remedy wage theft in the knowledge that it is widespread within their industries in Australia. The findings also invite scrutiny of how certain businesses profit from wage theft and gain advantage over others that pay workers in compliance with Australian labour law, and how wage theft among temporary migrants may be driving wages down for all workers in certain industries.[757]

8.5 Penalties and Accessorial Liability

1308. The FW Act was amended in 2017 to introduce higher pecuniary penalties for "serious contraventions". This involves systemic contraventions.[758]

1309. A table comparing the penalties under the IR Act and the FW Act is set out at **Attachment 8B**. The penalties under the IR Act are significantly lower than under the FW Act, and have not been reviewed in over 15 years. The Review notes that there are many small businesses operating in the State industrial relations

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753 Ibid 2.

754 Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, November 2017.

755 Ibid 5.

756 Ibid 7.

757 Ibid.

758 See the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017*, which amended the FW Act and commenced on 15 September 2017.

system[759] and that account should be taken of this in setting penalties. Nevertheless, "employers, be they small, medium or large, have an obligation to meet minimum standards in relation to their employees, and they cannot overcome financial difficulties by underpaying their employees."[760] Additionally the penalties when set, were to apply to all employers including constitutional corporations, and in the opinion of the Review it could be argued they were low then.

1310. Another point is that the division between Commonwealth and State industrial relations coverage does not depend on whether a business is small or not, it depends on corporate status. It is just that there is often a correlation between a small business and a lack of being incorporated. For example, working side by side in Western Australia, there could a company that is trading and have one employee and an annual turnover of $80,000; and a partnership with fifty employees and a turnover of $1 million. In the example it is only the smaller business that is the trading corporation and subject to the larger penalties, presently, under the FW Act. The partnership could commit a more blameworthy breach of an award than the company but if they both are taken to court for a breach, the maximum fine the partnership can be required to pay is much less than that of the small business corporation. Even if they are or may be prosecuted in different courts and under different statutory regimes, this seems to the Review to be wrong in principle.

1311. Additionally, rather than prescribe maximum penalties to suit the presumed size and nature of the businesses covered by the State system, the size and nature of a business is a consideration the IMC should and will take into account in determining whether a penalty should be imposed, and if so, the quantum of the penalty.

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759 As of the 2016 Census, there were a total of 60,851 owner managers of small businesses (1 to 19 employees) in Western Australia. Of these, 21,522 (35.4 per cent) were owner managers of unincorporated small businesses and 39,329 (64.6 per cent) were owner managers of incorporated small businesses –
ABS (2017) *2016 Census of Population and Housing, Working Population Profile, Western Australia*, cat no. 2006.0, tables 10a and 10b.

760 See *Fair Work Ombudsman v Commercial and Residential Cleaning Group Pty Ltd & Ors* [2017] FCCA 2838 [59]; *Kelly v Fitzpatrick* [2007] FCA 1080 [14].

1312. The FW Act also contains accessorial liability provisions, unlike the IR Act and LSL Act.[761] Section 211(2) of the Green Bill, if enacted, would have included accessorial liability provisions in the IR Act.

1313. The accessorial liability provisions of the FW Act would be particularly useful in the context of the LSL Act, which applies to both national and State system employers. The Review is advised by the PSD that the last four enforcement proceedings taken by DMIRS under the LSL Act have been against incorporated employers that are no longer trading. Despite obtaining judgments against these employers, PSD understands they have not complied on the basis that the companies are no longer solvent. In such instances, there is little prospect of the employees being paid their long service leave. Accessorial liability provisions would enable the directors of failed companies to be held jointly and severally liable where they are sufficiently involved in the company's contravention.[762]

1314. Accessorial liability provisions would have wider application than just the LSL Act and could also be included in the IR Act. The provisions could have application to the following if they were relevantly involved in a breach:

(a) Officers of an incorporated association that is not a constitutional corporation.

(b) Human resources advisers and payroll consultants.

(c) The hosts of labour hire workers.[763]

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761 The history of the FW Act's accessorial liability provisions is usefully summarised at [5]-[10] of the 2014 Australian Labour Law Association Conference paper 'Accessorial Liability under the *Fair Work Act'*, Ingmar Taylor SC and Larissa Andelman.

762 The Federal Circuit Court of Australia recently held the sole director of a company jointly and severally liable for part of the company's underpayments to an employee. Penalties were also imposed against the director - *Fair Work Ombudsman v Mhoney Pty Ltd & Anor* [2017] FCCA 811. For a useful summary of the authorities concerning accessorial liability, see *Fair Work Ombudsmen v Priority Matters Pty Ltd* [2017] FCA 833 [111]–[120].

763 Accessorial liability provisions under the IR Act could clearly apply where both the labour hire operator and the host were unincorporated. If the labour hire operator was a national system employer, then the FW Act's accessorial liability provisions could apply to an unincorporated host and would arguably cover the field on this subject matter (it is unlikely State law could hold an unincorporated host accessorially liable for a labour hire operator's contraventions of the FW Act). If the labour hire operator was a State system employer and the host was a constitutional corporation, then the IR Act would arguably not be excluded from applying to the host (i.e. notwithstanding s 26 of the FW Act). The IR Act would not be applying to the host in its capacity as a "national system employer" within the meaning of s 14(1) of the FW Act, but rather, in the host's capacity as an accessory

1315. Two recent decisions have highlighted the scope of the accessorial liability provisions under the FW Act. In *Fair Work Ombudsman v NSH North Pty Ltd trading as New Shanghai Charlestown*,[764] the Federal Court of Australia found that three employees of the respondent company were liable for accessorial responsibility: the sole director/shareholder, the human resources manager and the store manager.

1316. In *Fair Work Ombudsman v Blue Impression Pty Ltd & Ors*,[765] an accountancy firm that knowingly failed to maintain current award rates in its payroll system was found accessorially liable for one of its client's underpayments.

1317. A table summarising accessorial liability provisions in industrial relations legislation in the other State jurisdictions is at **Attachment 8C**.

8.6 Reverse Onus of Proof

1318. Although, as a rule, a person seeking to demonstrate that there has been a contravention of a statute or industrial instrument has the onus of proof, this rule has exceptions where, for reasons of justice or public policy, there is an onus upon the defendant. A reversal of proof, in practice in a prosecution, or in effect by placing an onus on an employer to challenge a sanction administratively imposed upon them, can be a tool to be used in the enforcement of some industrial instruments and laws.

1319. For example, under s 557C of the FW Act,[766] in proceedings relating to a contravention by an employer of certain specified provisions, if an applicant makes an allegation in relation to a matter and an employer was required, but failed, to:

(a) Make and keep a record in the specified form;

(b) Make a record available for inspection; and/or

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to a contravention of State law. It is acknowledged that constitutional issues could arise if either the labour hire operator or the host were constitutional corporations.

764 [2017] FCA 1301.

765 [2017] FCCA 810.

766 As introduced by of the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* pt 8 s 4.

(c) Keep and give a pay slip,

in relation to the matter, then the employer has the burden of disproving the allegation.

1320. To similar effect is s 716 of the FW Act. Under this section, a Fair Work Inspector may issue a compliance notice requiring an employer to fix a contravention of the NES, an award, agreement, workplace determination, minimum wage order or equal remuneration order. An employer may then apply to the courts for a review of a notice under s 717.[767]

8.7 Updating Industrial Inspectors' Powers and Tools of Enforcement to Ensure They are Able to Effectively Perform Their Statutory Functions

1321. The table at **Attachment 8D** compares the powers of industrial inspectors under the IR Act with those of inspectors under the other States' legislation.

1322. In the experience of the PSD, as related to the Review, the following are the problems with the current powers of inspectors under the IR Act:

(a) A requirement that an industrial inspector physically be at an "industrial location"[768] before they can compel a person to answer questions relevant to an investigation. This requirement is not practicable given that many employers under investigation have ceased to trade, and many employers are regionally-based.

(b) Employers wilfully misleading inspectors and providing false or doctored records.[769]

(c) Uncertainty about whether the powers of industrial inspectors negate the privilege against self-incrimination. Although it appears from the terms of

767 See eg *Hindu Society of Victoria (Australia) Inc v Fair Work Ombudsman* [2017] FCCA 423.

768 IR Act s 98(3).

769 In *Fair Work Ombudsman v NSH North Pty Ltd trading as New Shanghai Charlestown*, the respondents made and produced false records to FWO. Justice Bromwich noted at [224] that the conduct was "essentially criminal in nature", and that the maximum penalties (as they were then) under the FW Act were "a woefully inadequate sanction for such serious and premeditated conduct involving direction and collaboration." He observed that in other regulatory settings, the maximum penalty was imprisonment and "even that may be inadequate for conduct as serious and calculated as occurred in this case, which in other settings often has the flavour of perverting the course of justice."

ss 98 and 102 of the IR Act that the privilege is intended to be abrogated, the issue is untested in Court.[770]

(d) No express statutory powers to share information acquired in an investigation within DMIRS or to obtain relevant information from another State Government agency.[771] The inability to share information within DMIRS or another agency may impede joint investigations.[772]

1323. With respect to the privilege against self-incrimination, it is not a topic the Review thinks has been sufficiently canvassed in submissions to it, to support some variation. As the High Court has reiterated in recent years,[773] the right to silence is part of the rule of law and is only to be taken to be abrogated in the clearest of legislative instances. The Review does not, at this stage, think it is necessary or worthwhile to consider the issue in depth. If stakeholders take a different view, then submissions may be made on the topic in response to the Interim Report.

8.8 Contraventions of the Long Service Leave Act

1324. When the LSL Act was enacted in 1958,[774] its purpose was to provide for long service leave to employees who were not entitled to long service leave under State or Federal awards or agreements, or Government long service leave provisions.

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770 By way of comparison, see *Fair Trading Act 2010* (WA) s 86, as well as s 211(2) of the Green Bill. If the privilege against self-incrimination could be raised in response to an industrial inspector's request to produce records or answer a question, the compliance function undertaken by inspectors would be hampered. As observed by the High Court in *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at [28], "In deciding whether a statute impliedly excludes the privilege much depends on the language and character of the provision and the purpose which it is designed to achieve. The privilege will be impliedly excluded if the obligation to answer, provide information or produce documents is expressed in general terms and it appears from the character and purpose of the provision that the obligation was not intended to be subject to any qualification. This is so when the object of imposing the obligation is to ensure the full investigation in the public interest of matters involving the possible commission of offences which lie peculiarly within the knowledge of persons who cannot reasonably be expected to make their knowledge available otherwise than under a statutory obligation".

771 In contrast, see the information sharing provisions in *Fair Trading Act* ss 112 and 113. See also FW Act s 718.

772 For example, with the Australian Border Force or the FWO. Joint investigations are currently being contemplated with both agencies. Also, a number of employers investigated by the PSD are occupationally licensed and regulated by another division of DMIRS (such as the Building Commission, Energy*Safety* or Consumer Protection). There may also be an overlap between the work of the PSD and WorkSafe. Each of these areas is regulated by separate legislation, which may or may not allow for information sharing.

773 See eg, *Lee v The Queen* (2014) 253 CLR 455 and *X7 v Australian Crime Commission* (2013) 248 CLR 92

774 See: https://www.slp.wa.gov.au/pco/prod/filestore.nsf/FileURL/mrdoc_11006.pdf/$FILE/Long%20Service%20Leave%20Act%201958%20-%20%5B00-00-00%5D.pdf?OpenElement.

1325. At the date of enactment, s 20 of the LSL Act provided:

(a) That an employee who alleged a breach by their employer of an obligation, or a determination made, under the Act could apply to the "Court of Arbitration"[775] for enforcement of the obligation.

(b) The Court of Arbitration with the power to order an employer to pay the employee the amount that should have been paid under the LSL Act or a determination.

(c) For the purpose of any appeal, an employer found to be liable was deemed to have been convicted of a breach of the Act and any amount for which they were liable was deemed a penalty.[776]

1326. Debate on the Bill regarding penalties for breach of obligations was limited to the following statement from the then Minister for Labour, the Hon. William Hegney: "all clause 20 does is give to the court the same powers as it has under s 89 of the *Industrial Arbitration Act* (1912)."[777]

1327. Section 20 of the LSL Act referenced s 99 (rather than s 89) of the *Industrial Arbitration Act 1912* (IA Act) and a comparison of the Legislative Assembly Hansard with the LSL Act at that time suggests that it was s 99 to which the Minister was referring.

1328. Section 99 of the IA Act[778] provided the Court of Arbitration with the power to:

(a) Impose a penalty for breach of an award or order as it deemed just; and

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775 The Court of Arbitration consisted of three members, one of whom was a Judge of the Supreme Court (and was the President of the Court of Arbitration). In accordance with s 23 of the LSL Act, the powers conferred on the Court of Arbitration could also be exercised by an Industrial Magistrate.

776 This provision was included to enable an employer to appeal an order to pay unpaid entitlements to a higher court. The Government initially objected to this amendment but eventually accepted it in order to avoid defeat of the Bill – see Western Australia, *Parliamentary Debates,* Legislative Assembly, 27 November 1958, 2451-2, http://www.parliament.wa.gov.au/Hansard/hansard1870to1995.nsf/vwMainBackground/19581127_Assembly.pdf/$File/19581127_Assembly.pdf.

777 Western Australia, *Parliamentary Debates,* Legislative Assembly, 2 October 1958, 1208, http://www.parliament.wa.gov.au/hansard/hansard1870to1995.nsf/vwMainBackground/19581002_Assembly.pdf/$File/19581002_Assembly.pdf.

778 As at 31 March 1955, https://www.slp.wa.gov.au/pco/prod/filestore.nsf/FileURL/mrdoc_27323.pdf/$FILE/Industrial%20Arbitration%20Act%201912%20-%20%5B05-00-00%5D.pdf?OpenElement.

(b) In addition, order that a worker be paid the difference between the amount paid and that which should have been paid under the award.

1329. Although s 20 of the LSL Act did not provide the Court of Arbitration with the power to impose a penalty (notwithstanding the Minister's statement to Parliament), s 32 provided that a person who contravened any provision of the Act or determination committed an offence. The penalties were:

(a) Not more than 100 pounds;

(b) Not more than 200 pounds for a second offence; and

(c) Not more than an additional penalty of five pounds per day if the offence was continuing.[779]

1330. Proceedings were heard by an Industrial Magistrate, the "Conciliation Commissioner" or the Court of Arbitration.[780]

1331. In 1995, the then Liberal Government repealed these provisions (with the exception of an offence relating to the failure to keep records).[781] There are no details in the Explanatory Memorandum,[782] Second Reading Speech,[783] or Hansard[784] as to why these provisions were repealed.

1332. The Review has been advised by the PSD that the absence of penalties in the LSL Act is a significant impediment to enforcement and employers voluntarily rectifying breaches.

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779 Section 33.

780 Section 36.

781 *Industrial Relations Legislation Amendment and Repeal Act 1995* s 56 - https://www.slp.wa.gov.au/pco/prod/filestore.nsf/FileURL/mrdoc_6737.pdf/$FILE/Industrial%20Relations%20Legislation%20Amendment%20and%20Repeal%20Act%201995%20-%20%5B00-00-00%5D.pdf?OpenElement.

782 http://www.parliament.wa.gov.au/intranet/libpages.nsf/WebFiles/EM+-+Industrial+relations+legislation+amendment+and+repeal+bill+1995+explanatory+notes/$FILE/WA+Industrial+Relations+Legislation+Amendment+and+Repeal+Bill+1995+-+explanatory+notes.pdf.

783 See: http://www.parliament.wa.gov.au/hansard/hansard1870to1995.nsf/vwMainBackground/19950921_Assembly.pdf/$File/19950921_Assembly.pdf 8363.

784 See: http://www.parliament.wa.gov.au/Hansard/hansard1870to1995.nsf/vwMainBackground/19951122_Assembly.pdf/$File/19951122_Assembly.pdf.

8.9 Contraventions of Long Service Leave Provisions in Awards and Agreements

1333. The LSL Act duplicated, for the most part, the provisions of a long service leave consent award made by the Court of Arbitration on 1 April 1958 between the Employers' Federation and the Trade Union Industrial Council.[785]

1334. The standard long service leave clause for awards and agreements (as contained in the consent award) was varied and consolidated by the Commission in Court Session on 23 September 1964.[786]

1335. Contraventions of the long service leave provisions in an award or agreement attracted a penalty as prescribed by the IA Act (and now the IR Act).

8.10 Contraventions of the Long Service Leave General Order (LSL General Order)

1336. An application to amend various awards in respect of long service leave was heard by the Commission in Court Session on 15 December 1977. The Commission in Court Session subsequently handed down the LSL General Order on 27 January 1978 (with a date of effect of 1 January 1978)[787] and issued the proposed long service leave conditions in the form of a consolidation.[788]

1337. The LSL General Order applied to most Western Australian employees whose employment was regulated by a State award or agreement.

1338. Some State awards incorporated references to the LSL General Order. For example, clause 33 of the *Shop and Warehouse Award*;[789] clause 19 of the *Restaurant, Tearoom and Catering Workers' Award*;[790] and clause 21 of the *Hairdressers Award 1989*.[791]

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785 Award No.55 of 1958, 38 WAIG 261.

786 44 WAIG 606.

787 58 WAIG 116, https://www.slp.wa.gov.au/industrial/indgaz.nsf/BDEAC3904D7FB49748257ED70012ACAB/$File/v58Feb01.pdf.

788 58 WAIG 1, https://www.slp.wa.gov.au/pco/prod/filestore.nsf/FileURL/mrdoc_4951.pdf/$FILE/Labour%20Relations%20Legislation%20Amendment%20Act%202006%20-%20%5B00-00-02%5D.pdf?OpenElement.

789 "The long service leave provisions published in Volume 59 of the Western Australian Industrial Gazette at pages 1 to 6, both inclusive, are hereby incorporated in and shall be deemed to be part of this award."

790 "The Long Service Leave General Order provisions as varied from time to time published in the Western Australian Industrial Gazette, are hereby incorporated in and shall be deemed to be part of this award."

791 "The Long Service Leave provisions set out in the Western Australian Industrial Gazette Volume 69 part 1, subpart 1, page 1, are hereby incorporated in and shall be deemed to be part of this award."

1339. Contraventions of the LSL General Order attracted a penalty as prescribed by the IA Act and later the IR Act. It should be noted, however, that where a State award (or agreement) incorporated the LSL General Order and deemed its provisions to be part of the award, long service leave contraventions could be prosecuted as an award contravention.

1340. In 2006, the LSL General Order was repealed by the *Labour Relations Legislation Amendment Act 2006.*[792] In accordance with s 65 of the Act, references to the LSL General Order, or a provision of it, in an industrial instrument were to be read as a reference to the LSL Act or the corresponding provision of the LSL Act. Consequently, where an award (or agreement) incorporated the LSL General Order and deemed its provisions to be part of the award, the award clause should be read as a reference to the LSL Act. As the award deems the long service leave provisions to be part of the award, long service leave contraventions can be prosecuted as an award contravention, which then attracts a penalty.

1341. With the repeal of the LSL General Order, the LSL Act became the source of long service leave entitlements for the majority of Western Australian employees. The only employees who are not covered by the LSL Act are:

(a) Employees covered by an award or agreement which provides for long service leave that is at least equivalent to the entitlement to long service leave under the LSL Act.[793]

(b) National system employees who are covered by long service leave entitlements in a Federal "pre-modern" award that would have covered the employee before 1 January 2010; or by long service leave provisions in a preserved Federal registered agreement.[794]

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792 Section 64 - https://www.slp.wa.gov.au/pco/prod/filestore.nsf/FileURL/mrdoc_4951.pdf/$FILE/Labour%20Relations%20Legislation%20Amendment%20Act%202006%20-%20%5B00-00-02%5D.pdf?OpenElement.

793 LSL Act s 4(3).

794 FW Act s 113. The FWC has prepared an indicative list of Federal instruments which contained long service leave provisions - https://www.fwc.gov.au/awards-and-agreements/awards/award-modernisation/termination-instruments.

1342. From data collected by the PSD, in 2016-17:

(a) Of the long service leave complaints investigated, 79.5 per cent were from national system employees and 20.5 per cent were from State system employees.

(b) Of the calls to Wageline in the DMIRS concerning long service leave, 67.9 per cent came from national system callers and 32.1 per cent were from State system callers.

1343. Most salaried State public sector employees (that is, government officers and other salaried employees) are covered by an award or agreement which provides for long service leave that is at least equivalent to the LSL Act. The LSL Act does not, therefore, apply to these public sector employees.

8.11 Submissions Received – Penalties and Powers of Industrial Inspectors

1344. From the submissions received, there was widespread support for an increase in the prescribed penalties to assist in the deterrence of non-compliance. Submissions to this effect were provided by the CoSBA, the Department of Health, the IEU, the ELC, Eureka Lawyers, Labourline, SDA, Slater & Gordon Lawyers, the Salvation Army, UnionsWA, United Voice, and Ms Xamon.

1345. Mr Katsambanis submitted to the Review that he supported effective deterrents that "warn off employers from treating people unfairly", albeit he did not say whether or not he thought the current penalties were or were not an effective deterrent.

1346. The MGA also made submissions about the importance of providing compliance support to employers and employees so as to heighten awareness of their obligations and make it easier for them to comply with them. The submission was also made that it would be of assistance if there was a one stop shop for employers and employees in relation to complaints about underpayments, award interpretation and bullying. That is a subject which is addressed in Chapter 3

about Term of Reference 2. It was also submitted by the MGA that worksite audits would be an effective method of ensuring compliance.

1347. Professor Alison Preston of the UWA Business School emphasised that ensuring employees were paid their correct entitlements was an important way of combatting the "black economy".

1348. The IEU submitted that it would be appropriate to penalise employers who deducted monies from an employee's pay without written authority.

1349. Eureka Lawyers, the ELC and Labourline supported the introduction of accessorial liability provisions similar to s 550 of the FW Act.

1350. Labourline also supported the introduction of class action claims where more than one worker was affected by a course of conduct.

1351. The Master Builders whilst not "suggesting employers who breach the State IR laws ought not face prosecution" submitted that the State should not necessarily follow the Federal level of penalties due to the small business coverage of the State system and it would be appropriate for the IMC to treat an unintentional breach less harshly than a breach with intent. As mentioned earlier this is something the IMC should take into account in setting the quantum of a penalty.

1352. The SDA also submitted that the IMC should be able to take into account whether the employer was a corporation or a sole trader and their capacity to pay. Again, that is something which the IMC would be expected to take into account in setting any penalties.

1353. The MGA submitted that it was important that there are mechanisms to ensure that there is "total compliance with the industrial relations system so as to protect the interest of all parties who participate in the system". The MGA reiterated the need to ensure compliance was important and "a greater understanding of the awards and other workplace obligations need to be constantly reinforced to employers. If there is greater clarity for employers in how to operate with modern

awards and information on employment obligations then compliance becomes much easier and assured. MGA "supports the establishment of statutory compliance and enforcement mechanisms that are proposed by the Review because this will stress the importance of ensuring that correct entitlements are provided to employees".

1354. Eureka Lawyers and the SDA submitted that there should be an indexation or regular review of penalties. The Review supports these submissions. This is because, unless this occurs, penalties go out of date and lose their deterrent effect. The Review notes that the FW Act uses penalty units which have, in the past, been increased by way of legislative amendment to s 4AA(1) the *Crimes Act 1914* (Cth). However, on 1 July 2020 and each third 1 July following that day, the penalty unit amount in the Crimes Act is to be replaced by an amount worked out using a specified formula (s 4AA(3)). Although a similar methodology could apply to maximum penalties to be set under the IR Act, the "penalty unit" system is not used in the same way across a number of statutes in the State, as federally. An alternative is that a formula be included in the regulations to increase the amounts in a manner similar to how the salary amounts are determined for employees, for the purpose of the unfair dismissal and denial of contractual benefits jurisdiction of the WAIRC.[795]

1355. The Salvation Army submitted that fines for non-compliance needed to be higher so that they were not something that could just be written off as a cost of doing business. It was submitted that what was required was both pecuniary penalties and criminal penalties, because of the power imbalance that currently enables unscrupulous employers to leverage control and keep workers silent about unlawful workplace conduct. It was also submitted that "public messaging" and reporting of existing penalties could be used as visible evidence of accountability for those who breach the law. That is something that could be taken into account in the future via either the website of the WAIRC or alternatively DMIRS.

[795] *Industrial Relations (General) Regulations 1997 (WA) Reg 5*.

1356. United Voice also emphasised that penalties should be set for wages theft and effectively "modern slavery".

1357. With respect to the powers and tools of enforcement of inspectors, there was a variety of submissions. CoSBA supported the contents of the Green Bill which provided for infringement notices, inspectors' powers consistent with the FW Act and the ability of the Minister to direct inspectors to take action. The SBDC also supported enhancement to inspectors' powers.

1358. By contrast, the ANF IUWP said there was no need for additional powers; and indeed the powers of inspectors should be reined in. For example, it was said that it should be a reasonable excuse not to provide a written answer to a question on the basis of self-incrimination.

1359. Labourline said that, in some respects, inspectors have more powers than their Commonwealth counterparts. Examples were given of the ability to require truthful answers, there being no privilege against self-incrimination and no obligation to caution a witness.

1360. The ELC submitted there should be an introduction of enforceable undertakings. It also submitted that inspectors could be provided with the power to "enforce above minimum contractual matters relating to statutory minima". The Review does not entirely understand what is meant by this submission. It may be however that the submission is referring to proceedings being able to be taken at the one time in the IMC for failure to pay award or minimum conditions entitlements, and payments due under a contract of employment. This was something that was included in the Green Bill.[796] This would, for example, enable an inspector (or employee) to enforce a minimum entitlement to four weeks' annual leave plus a contractual entitlement to any additional quantum of leave at the one time. The Review notes that there is a capacity for the enforcement of

[796] Green Bill s 213.

"safety net contractual entitlements" in the FW Act;[797] and considers that if this is the thrust of the submission, then it is, at this preliminary stage, supportable.

1361. Master Builders also thought that the provision of legally enforceable undertakings would be a welcome addition to the powers of industrial inspectors. It was submitted that a breach of any undertaking could be pursued in the courts similar to the Federal Work Health and Safety model.

1362. The Plumbing and Pipe Trades Employees Union emphasised that inspectors need the tools to be able to successfully undertake their work. The Review accepts this is an essential part of the proper operation of the inspectorate.

1363. Restaurant & Catering Australia also emphasised that inspectors should be enabled to engage with employers to assist in compliance and submitted that memorandums of understanding with industrial associations to achieve compliance within specific industries would be of assistance.

1364. The SDA said that inspectors needed to have a right of entry into places of work where domestic workers and those in the "gig economy" carried out their work or records were kept. That is a subject matter which is referred to in Chapter 5 of the Interim Report about Term of Reference 4. The SDA also supported the introduction of infringement notices.

1365. The Salvation Army also supported the proposition that a private home which is a workplace for a domestic worker should be subject to inspection. The Salvation Army referred to right of entry provisions in South Africa and measures the ILO has discussed as being necessary to enhance the powers of inspectors.

1366. The ACTU submitted that dual appointments to the WAIRC and the IMC could streamline enforcement and compliance procedures. That is something the Review has considered in Chapter 2 dealing with Term of Reference 1.

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797 FW Act ss 541-3.

1367. The AMMA said it was not aware of any deficiencies or serious issues with compliance and enforcement mechanisms and that the IMC is a low cost and accessible jurisdiction for parties to seek redress. The HIA also submitted that it was unaware of any issues with current compliance and enforcement mechanisms and was opposed to any change.

1368. The CCI supported the following:

(a) Enforcement measures which focused on putting mistakes right, for example, voluntary rectification and small claims procedures similar to the approach adopted by the FWO.

(b) Enforcement measures consistent with the national system with a harmonisation of compliance obligations and enforcement with the FW Act as much as possible.

(c) Government spending on informing employers and employees to complement and support money spent on inspection. It was submitted that this could be done in conjunction with the CCI.

(d) Undertaking research and obtaining legal advice on referring all enforcement and compliance powers and responsibilities for State awards and agreements and minimum conditions to the FWO.

(e) Resourcing the FWO or the ELC more effectively to promote employment obligations to Western Australian employers and employees, particularly informing migrant employees, younger employees and their employers and any other identified groups of employers and employees.

(f) The establishment of a consultation group with representation from the CCI.

1369. These recommendations seem, with respect, eminently sensible. Others go beyond the scope of the Terms of Reference, including referrals to, and resourcing of, the FWO.

1370. The ELC also emphasised that statutory compliance and enforcement mechanisms should be flexible, informal and drafted so that they are easily understood by a lay person. It was submitted that filing fees should be low and enforcement processes should not attract other fees, such as mediation and teleconference fees that can occur in the Federal Circuit Court.

1371. Mr Katsambanis supported the proposition that costs and increased compliance burdens on small business, in time and dollar terms, be kept to a minimum.

1372. Ms Xamon supported an ongoing State funded education campaign to inform employees and employers about obligations and entitlements.

1373. The SDA submitted that the system should be changed to enable unions to make applications to the inspectorate on behalf of members if breaches are reasonably suspected. The SDA also referred to the prospect of reversing the onus of proof on claims of underpayments so that a lack of employment records does not prejudice a claim against an employer, but rather the other way around. A reverse onus of proof was supported by UnionsWA.

1374. Slater & Gordon emphasised that simplicity would be achieved by removing the distinction between the IMC's general and prosecution jurisdictions as set out in s 81CA of the IR Act. Enforcement would also be simplified by permitting all breaches of the IR Act, orders or industrial instruments to be brought by an affected employee or union.

1375. The IEU, UnionsWA and United Voice similarly submitted that unions should be able to prosecute possible breaches of the IR Act, minimum conditions and industrial instruments.

8.12 Section 84A of the Industrial Relations Act

1376. 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,[798] on the basis that transferring the jurisdiction to the IMC could help to streamline the enforcement provisions of the IR Act.[799] 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.[800] 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.

8.13 Right of Entry

1377. Division 2G of Part II of the IR Act provides authorised representatives of organisations with various rights of entry and inspection (referred to collectively as a "right of entry"). Relevantly, s 49I of the IR Act enables an authorised representative to enter premises for the purpose of investigating a suspected breach of:

(a) The IR Act.

(b) The LSL Act.

(c) The MCE Act.

(d) The OSH Act.

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798 Labour Relations Legislation Amendment and Repeal Bill 2012 s 220. The repeal of s 84A was also a recommendation of the Fielding Review , above n 118, 275.

799 Draft Explanatory Memorandum for the Labour Relations Legislation Amendment and Repeal Bill 2012 [951].

800 *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 at [5].

(e) The MSI Act.

(f) An award, order or agreement of the WAIRC.

1378. As has been observed 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."[801]

1379. Division 2G of Part II of the IR Act was inserted in 2002 by the *Labour Relations Reform Act 2002*.[802] Immediately prior to that, right of entry in Western Australia was governed by:

(a) State awards, industrial agreements and orders which conferred right of entry on unions.

(b) Sections 49B and 49AB of the IR Act, which sought to limit right of entry conferred by State industrial instruments.[803]

(c) Part IX Division 11A of the (then) WR Act which regulated right of entry for employers and employees covered by Federal awards and collective agreements.

1380. Since 2006, right of entry in relation to national system employers and employees has been principally regulated by Federal legislation using the corporations power of the *Constitution*.[804]

1381. However, Division 2G of Part II of the IR Act still has application in relation to national system employers and employees. Relevantly, s 49I(1) of the IR Act

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801 *The Construction, Forestry, Mining and Energy Union of Workers v SNC-Lavalin (SA) Inc & Other* [2004] WAIRC 10880 [36]; (2005) 85 WAIG 139 [36].

802 *Labour Relations Reform Act 2002* s 146.

803 Section 49B was inserted in the IR Act by the *Industrial Relations Legislation Amendment and Repeal Act 1995* and s 49AB by the *Labour Relations Legislation Amendment Act 1997* (commonly referred to as the "third wave" of industrial relations legislation introduced by the Court Government in the 1990s).

804 FW Act pt 3-4.

enables an authorised representative to enter premises for the purpose of investigating a suspected breach of the OSH Act, the MSI Act or the LSL Act.

1382. While the FW Act generally applies to the exclusion of the IR Act in relation to national system employers and employees,[805] the IR Act is not excluded so far as it deals with any "non-excluded matters" prescribed by s 27(2) of the FW Act, or with "rights or remedies incidental to" any non-excluded matters. The non-excluded matters include "occupational health and safety" and "long service leave", (except in relation to an employee who is entitled to long service leave under Part 2-2, Division 9).[806]

1383. State or Territory laws providing for right of entry to premises for a purpose connected with occupational health and safety are therefore not excluded from applying to national system employers and employees.[807] The same rationale applies to State or Territory laws providing for right of entry to premises for a purpose connected with long service leave.

1384. It should be noted, however, that national system employers in Western Australia licensed with the Commonwealth Comcare system are covered by the *Work Health and Safety Act 2011* (Cth) rather than the *OSH Act*.[808] Part 7 of the *Work Health and Safety Act 2011* contains right of entry provisions in relation to that Act.

1385. It should also be noted that Part 3-4 Division 3 of the FW Act will apply where right of entry is exercised under a "State or Territory OHS law" in relation to national system employers and employees and occupiers of premises that are constitutional corporations. While Part 3-4 Division 3 does not of itself confer a right of entry, it does impose additional regulation and must be read in conjunction with Part II Division 2G of the IR Act. A consequence of this is that the

805 FW Act s 26(1).

806 Most Western Australian employees are entitled to long service leave under the LSL Act rather than under FW Act pt 2-2 div 9.

807 See the legislative note below FW Act s 27(1); *Ramsay v Sunbuild Pty Ltd* [2014] FCA 54 at [39]-[43]. See also the FW Act pt 3-4 div 3 (State or Territory OHS rights) and *Fair Work Regulations 2009* reg 3.25, item 4 (ss 49G and 49I to 49O of the IR Act prescribed as a "State or Territory OHS law").

808 There are currently 35 employers licensed with the Comcare scheme: https://www.srcc.gov.au/information_for_self-insurers/licensees.

prohibitions (civil remedy provisions) in Part 3-4 Division 4 of the FW Act will also apply, notwithstanding the right of entry is conferred by State law.[809]

1386. Additionally, the Western Australian Government has announced the development of a Work Health and Safety Bill,[810] based on the *Model Work Health and Safety Act* (Model WHS Act).[811] To this end, a Ministerial Advisory Panel on Work Health and Safety Reform (MAP) has been established to advise on the development of the proposed Bill, including possible right of entry provisions. Former WAIRC Commissioner Ms Stephanie Mayman, who sat on the Occupational Safety and Health Tribunal, is the Chair of the MAP. The proposed Bill is intended to replace the *OSH Act*, the *MSI Act* and the *Petroleum and Geothermal Energy Safety Levies Act 2011*.

1387. At present and in summary, Part II Division 2G of the IR Act has application to State system employers and employees and, to a limited extent, national system employers and employees.

1388. There are material differences between the current right of entry provisions under the IR Act and those under the FW Act. A table comparing the provisions is at **Attachment 8E**.

1389. There are also material differences between the right of entry provisions under the IR Act and those under the Model WHS Act in relation to right of entry for occupational safety and health purposes. A table comparing the provisions is at **Attachment 8F**.[812]

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809 *Ramsay v Sunbuild Pty Ltd* [2014] FCA 54.

810 Hon. Bill Johnston MLA, "New Work Health and Safety Bill to Protect Workers" (media statement 12 July 2017) https://www.mediastatements.wa.gov.au/Pages/McGowan/2017/07/New-Work-Health-and-Safety-Bill-to-protect-workers--.aspx.

811 The Model WHS Act was developed by Safe Work Australia, and forms the basis of occupational safety and health legislation in most jurisdictions in Australia (excluding Western Australia and Victoria). The Model WHS Act will be independently reviewed in 2018: https://www.safeworkaustralia.gov.au/law-and-regulation/model-whs-laws/review-model-whs-laws.

812 There are two versions of Part 7 of the Model WHS Act dealing with right of entry – the initial 2011 version and the current 2016 version. Most of the other jurisdictions' WHS legislation is based on the 2011 version, with modifications.

1390. There were a number of submissions that dealt with right of entry matters. The CCI made submissions about right of entry into private homes. That is dealt with in Chapter 5 about Term of Reference 4. It was also submitted that the right of entry provisions should not apply when a business is operating under the Federal system. This is not something that the Review is disposed to agree with on the basis that, for example, the FW Act specifically leaves matters of occupational safety and health within the domain of the State jurisdictions. Accordingly, even where a business is operating generally within the Federal System, the FW Act contemplates State right of entry provisions operate in conjunction with the Federal provisions. The CCI submitted, alternatively, that if State rights of entry were not abolished there ought to be, when a permit holder attends onsite, minimum particulars to be provided to the employer/occupier including details of the suspected breach, or equipment or processes involved, where on the premises the suspected breach is occurring and which employees are affected.

1391. CCI also submitted that entry notices should be provided in advance of the exercise of a right of entry, with the notice to include an extract from the rules demonstrating coverage of the relevant employees, including exceptions to coverage and clarification of which group of employees are subject to the notice.

1392. CoSBA supported the contents of the Green Bill, with the intent of obtaining "harmonisation" with the FW Act; a "fit and proper person" test for right of entry holders; 24 hours' written notice of entry other than for OSH matters; particularisation of suspected breaches; discussions with employees only being during authorised breaks; no access to non-member records; requirements to comply with reasonable requests; and civil penalties for the misuse of powers.

1393. By contrast, the CFMEU said that the right of entry regime was not in need of reform other than in two areas. The first was an amendment to s 49I(1) to include the CIPPLSL Act and the WCIM Act to allow union representatives to enter a workplace to investigate suspected breaches. With respect to the WCIM Act and rights of entry, the Review is of the opinion that it is not well placed to comment upon right of entry issues. Additionally, discussion of rights of entry in the context

of the WCIM Act is probably outside the Term of Reference 7, unless the phrase "industrial laws" is construed very broadly. The Review is not convinced that the intent of the Minister, from the words used in, context of, and comments made at and about the time of the announcement of the Terms of Reference, warrants a construction that would include the review of rights of entry in the WCIM Act.

1394. With respect to the former, the Review will canvass the views of the Board administering the CIPPLSL Act to ascertain its position before further consideration of the issue.

1395. The second area of concern for the CFMEU was that s 49I(2)(c) ought to be amended to enable the union representative to take photographs and make video and audio recordings. This is something which in the preliminary opinion of the Review is supportable on the basis that the existing section provides powers for inspection of employment records, or other documents kept by the employer "that are related to the suspected breach" and making copies of employment records and documents related to the suspected breach and inspecting and viewing "during working hours…any work, material, machinery, or appliance, that is relevant to the suspected breach". An entitlement to obtain a photograph or make an audio, video or digital recording can be seen to be making the benefit of this right 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. If the right were given however, there would need to be safeguards to ensure the right to record by these means was not abused, or if abused, could be sanctioned. The preliminary opinion of the Review is that this may adequately occur by way of a provision comparable to s 504 of the FW Act, but adapted to the requirements of the subject matter and means of recording under consideration.

1396. Mr Katsambanis MLA submitted that the pretence of inspecting pay, conditions, entitlements or safety issues should not be used as a cover for unreasonable "third party" right of entry onto work sites which could cause business "undue disruption". The Review understands this concern.

1397. The Master Builders provided submissions that were in some respects similar to those made by the CCI. The submission included a suggested amendment to s 49I(1) of the IR Act to require a right of entry holder to first detail the alleged contraventions; a requirement for an equivalent to s 49M about the contravention of right of entry provisions by a union official; the automatic adoption of a decision made by the FWC of the suspension or revocation of the right of entry permit or the imposition of conditions; an amendment to s 49I(2)(a) to limit the right of entry holder's requirement for an employer to produce documents for inspection to those that are directly related to the suspected breach; the introduction of a fit and proper person test similar to the FW Act and the provision for the cancellation of a right of entry permit within the IR Act. Section 49M(1) of the IR Act specifies that an occupier must not refuse, or intentionally and unduly delay entry to premises by a person entitled to enter premises. Section 49M(2) of the IR Act provides that a person must not intentionally and unduly hinder or obstruct an authorised representative in the exercise of the powers conferred by the right of entry provisions of the IR Act. It is difficult to see, conceptually, how these subsections might be amended to include application to right of entry holders. Section 49M(3) of the IR Act provides that a person not purport to exercise the powers of an authorised representative if the person is not the holder of a current authority issued by the Registrar under the IR Act. Subject to what is later set out, the Review is not presently convinced of any need to amend this subsection.

1398. UnionsWA submitted that right of entry holders ought to be allowed access to non-union member records because on some occasions it was only possible to determine an underpayment by comparing multiple records. The WASU also made a submission about permitting union access to non-member records. The Review is presently of the opinion that this is unnecessary given the definition of "relevant employee" in s 49G of the IR Act includes "an employee…who is eligible to become a member of the organisation" represented by the right of entry holder. The IR Act therefore allows for the inspection of the records of those who

could be members of the organisation as well as those who are members. The Review is not at present convinced that there is any need for any extension.

1399. By contrast, United Voice said there was no evidence of any problem with or need to review the right of entry provisions.

1400. Ms Xamon submitted there should be:

(a) Clarification of s 49H of the IR Act to ensure union representatives can access all areas of work premises where employees are located, to hold discussions.

(b) An amendment to s 49K to enable unions to access premises principally used by an employer for habitation.

(c) An amendment to allow unions to have access to information about the use of agency staff and contractors.

1401. With respect to points (a) and (b), these issues are discussed by the Review in Chapter 5 of the Interim Report in the context of removing the exclusion from the IR Act of people "engaged in domestic service in a private home". The Review is requesting additional submissions on the point. With respect to (c), at present the Review is not convinced that the suggestion is within the Term of Reference, or, if it is, that the suggested extension of coverage of the IR Act provisions is required.

1402. It is apparent that right of entry provisions are a contentious point between union and employer group stakeholders. There are also complexities in their operation and in the jurisdictional division between the FW Act and State legislation. The Review is of the preliminary opinion that care needs to be taken in simply transposing the contents of the FW Act, on right of entry, into the legislative and workplace circumstances that the State system currently operates. The Review is mindful of the fact, for example, that the Commonwealth could have, but has chosen not to regulate all areas of employment that might be covered by the corporations power. One area in which it has not covered the field is occupational

safety and health. In that area unions have in the past had an important statutory role to play in trying to keep workplaces safe.

1403. That is not to say there is not interaction between the State and Federal systems with respect to occupational health and safety laws. Safe Work Australia, an Australian government statutory body was established in 2008 to develop national policy relating to workplace health and safety (WHS) and workers' compensation.[813] It is also responsible for the development and evaluation of model WHS laws. The Commonwealth, States and Territories remain separately responsible for legislating for, regulating and enforcing the laws in their jurisdictions. The Model WHS Act was made in 2011. It has been amended since its publication in 2011, including by a number of substantial amendments in 2014 and 2015. The current version is dated 21 March 2016.[814] Interestingly Safe Work Australia reports that although the Model WHS Act in its 2016 form requires notice prior to the exercise of a right of entry, consistent with the FW Act, no State or Territory jurisdiction has implemented the notice provision in their WHS Acts.[815]

1404. The Review is very cautious about making any recommendations that might undermine the traditional role of unions in trying to help keep workplaces safe. This is particularly so when the MAP has been established to advise the Minister on the development of a harmonised work and safety bill, including consideration of right of entry provisions, and will be reporting in the near future. The Review presently considers that any broader consideration of right of entry provisions is best deferred until the MAP has considered and reported on the issue.

1405. Another reason for this is that there is, now, something of an anomaly in the right of entry provisions relating to occupational safety and health being in an industrial relations act based upon the paradigm of the employer-employee relationship. This is because that relationship is not the lynchpin for the Model WHS laws. Instead general duties under the Model WHS laws are imposed on a Person

813 *Safe Work Australia Act 2008* (Cth); and see https://www.safeworkaustralia.gov.au/about-us; accessed 11 March 2018.

814 https://www.safeworkaustralia.gov.au/doc/model-work-health-and-safety-act, accessed 11 March 2018.

815 https://www.safeworkaustralia.gov.au/law-and-regulation/law-your-state; accessed 11 March 2018.

Conducting a Business or Undertaking (PCBU). Duties are owed to a "worker". "Worker" is defined broadly and includes a person who carries out work in any capacity for a PCBU including work as an employee, contractor or subcontractor, employee of a contractor or subcontractor, an employee of a labour hire company who has been assigned to work in the person's business or undertaking, outworker, apprentice or trainee or a student gaining work experience.

1406. At first blush the Review can see the cogency of an argument that a ban from having a right of entry under the FW Act ought to also apply in the State system. However there are, again, some complexities with that, beneath the surface. For example, not all of the reasons that could lead to the sanctioning of an individual under the FW Act are necessarily applicable to the performance of the rights and duties given a right of entry holder under the IR Act. The present position of the Review is that it makes more sense to have, as part of the State right of entry provisions a broader "fit and proper person" test, so that a person may not be granted rights of entry if they fail that test, or will have their rights suspended or revoked if is established that they are no longer considered to be a fit and proper person to hold the important rights, duties and privileges that accompany a right of entry. Such an application should be able to be made to the WAIRC by the Registrar, or an industrial inspector. In the determination of an application, evidence that the right of entry holder had rights of entry under the FW Act suspended or revoked should be taken into account by the WAIRC, as a relevant consideration, but the WAIRC should have the discretion to nevertheless determine that a person is, despite that sanction, not unfit to be a right of entry holder under the IR Act, even if such cases could be rare.

1407. Currently in the State system, s 49J(5) of the IR Act sets out the circumstances in which a right of entry authority may be revoked or suspended. The WAIRC must be satisfied that the authorised representative:

(a) Acted in an improper manner in the exercise of any power conferred by Part II Division 2G of the IR Act; or

(b) Intentionally and unduly hindered an employer or employees during their working time.

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.[816] 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.

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.[817] 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.[818]

816 *Lee v McDonald* (2006) 86 WAIG 1094; 2006 WAIRC 04220.

817 *Re: Application for Authority to be Issued to Mr Joseph McDonald* (2011) 91 WAIG 2345; 2011 WAIRC 01045.

818 *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.

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.

1413. On the issue of right of entry, as relevant to this Term of Reference, the Review sets out at the end of this Chapter its proposed recommendations for discussion by interested parties.

8.14 "Sham" Contracting

1414. There were also submissions to the Review about "sham contracting" by the ACTU, the CPSU/CSA, the ELC and WACOSS. However, the Review is not of the opinion that sham contracting is part of the Term of Reference. It is a matter which could be otherwise taken up with the Minister by the parties concerned about the issue.

8.15 Proposed Recommendations

1415. Under this Term of Reference, the Review is presently contemplating making the following recommendations to the Minister and invites comments upon them.

Proposed Recommendations

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 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.[819]

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.

[819] This is consistent with the *Magistrates Court Act 2004* (WA) s 16(4).

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 (that is relevant to the suspected breach) by way 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.

Attachment 8A Tools of Enforcement in the Other State Jurisdictions

The following table summarises provisions relating to tools of enforcement (other than prosecution) in industrial legislation in the other State jurisdictions.

New South Wales		**Victoria**	**Queensland**		**South Australia**		**Tasmania**
Industrial Relations Act 1996 (NSW) (NSW IR Act): s 396	An inspector may issue a penalty notice to a person if it appears to the inspector that the person has committed a penalty notice offence	No comparable tools of enforcement	*Industrial Relations Act 2016* (Qld) (Qld IR Act): s 915	An inspector may, by written demand, require an employer, within a stated time, to pay to the inspector an employee's unpaid wages The employer must comply with the demand	*Fair Work Act 1994* (SA) (SA FW Act): s 219D	If it appears that an employer has failed to comply with a provision of this Act, or of an award or enterprise agreement, an inspector may issue a compliance notice requiring the employer, within a period stated in the notice, to: a) take specified action to remedy the non-compliance; b) produce reasonable evidence of the employer's compliance with the notice An employer who fails to comply with a compliance notice within the time allowed in the notice is guilty of an offence	No comparable tools of enforcement
Industrial Relations (General) Regulations 2015 (NSW): reg 43 and sch 2	Sets out the penalty notice offences				*Long Service Leave Act 1987* (SA) (SA LSL Act): s 12(1)	If it appears to an inspector that an employer has improperly refused to grant a worker long service leave or to make a payment in lieu of long service the inspector may, by notice in writing, direct the employer to grant the long service leave or to make the payment within a period (not being less than 14 days) stated in the notice	

New South Wales		Victoria	Queensland		South Australia		Tasmania
Fines Act 1996 (NSW): s 20	The *Fines Act* applies to a penalty notice – if a person issued with a penalty notice does not wish to have the matter determined by a court, the person may pay the amount specified in the notice and is not liable to any further proceedings				SA LSL Act: s 12(2)	An employer who receives a notice under s 12(1) may apply to the South Australian Employment Tribunal for a review of the notice	
Fines Act: s 19A	The officer who may issue a penalty notice determines whether to issue a penalty notice or whether an official caution would be more appropriate				SA LSL Act: s 12(6)	If an employer: a) fails to comply with a notice under s 12(1) (the employer **not** having made an application for review under s 12(2)); or b) having made an application for review, fails to comply with a notice confirmed by SAET within a period specified by SAET the employer is guilty of an offence	
Fines Act: s 26	If the penalty is not paid, a penalty reminder notice is issued						
Fines Act: s 42	If the penalty is not paid and the person does not elect to have the matter dealt with by a court, a penalty notice enforcement order may be made against the person If the person does not pay the amount (including enforcement costs) within						

New South Wales		Victoria	Queensland		South Australia		Tasmania
	28 days, enforcement action may be taken in the same way as action may be taken for the enforcement of a fine imposed after a court hearing for the offence						
NSW IR Act: s 400	If a corporation contravenes, whether by act or omission, any provision of the Act or regulations, each person who is a director of the corporation or who is concerned with the management of the corporation is taken to have contravened the same provision if the person knowingly authorised or permitted the contravention						

Attachment 8B Comparison of Penalties and Tools of Enforcement under the *Industrial Relations Act 1979* and the *Fair Work Act 2009*

Issue	IR Act	FW Act (All penalties are for corporations, unless otherwise stated)
Maximum penalty for contravention of award, agreement or statutory minimum condition	• **$2,000** – *Industrial Relations Act 1979* (IR Act) • **No penalties** in the *Long Service Leave Act 1958* (LSL Act)	**$63,000** (300 penalty units)
Maximum penalty for **serious contraventions** of award, agreement or statutory minimum condition	As above – no distinction between types of contraventions (serious/not serious)	**$630,000** (3,000 penalty units)
Maximum penalty for contravention of payslip and record-keeping requirements	• **$2,000** – for payslip breaches in industrial instruments under section 83 of IR Act • **$5,000 –** for record-keeping breaches under section 83E of IR Act • **No penalties** in the LSL Act	• **$63,000** (300 penalty units) • **$630,000** (3,000 penalty units) for serious contraventions
Maximum penalty for keeping false or misleading employment records or pay slips	• No express provision regarding the keeping of false or misleading records under IR Act • However, a person must not wilfully mislead a person in any particular likely to affect the exercise of an inspector's powers – s 102 of IR Act • **$5,000** – IR Act	• **$63,000** (300 penalty units) • **$630,000** (3,000 penalty units) for serious contraventions
Mechanism to increase penalties	Legislation must be amended to increase penalties	The value of penalty units, and therefore penalty quanta, will be automatically adjusted in line with inflation every three years (from 1 July 2020) - *Crimes Amendment (Penalty Unit) Act 2017*
Compliance and enforcement tools for inspectors	Sole form of enforcement for industrial inspectors under IR Act is to commence proceedings in the IMC	Fair Work Inspectors can utilise the following range of compliance and enforcement tools: <u>Infringement notices</u> • Power to issue infringement notices for contravening employment record or pay slip requirements • Fine of **$6,300** (10 per cent of the maximum penalty) per contravention

Issue	IR Act	FW Act (All penalties are for corporations, unless otherwise stated)
		Compliance notices • A written notice used by an inspector to legally require an employer to do certain things to fix contraventions of the FW Act (an employer who contests a compliance notice in court bears the onus of providing that they paid employees correctly - *Hindu Society of Victoria (Australia) Inc. v Fair Work Ombudsman* [2017] FCCA 423) • Penalty for failing to comply with a compliance notice - **$31,500** (150 penalty units) Enforceable undertakings • A legally binding written undertaking from an employer which involves the payment of monies owed, admission and contrition from the employer and undertakings regarding how they will ensure compliance in the future • Legal action can be taken to enforce the terms of an undertaking Litigation Action to recover underpayments, seek the imposition of a pecuniary penalty and/or injunctions to prevent future contraventions
Hindering or obstructing an inspector	• A person shall not resist or obstruct an inspector in the performance of a duty or the exercise of a power – s 102 of the IR Act • **$5,000** – IR Act	• A person is prohibited from intentionally hindering or obstructing a prescribed official • **$12,600** (60 penalty units) for an individual • **$63,000** (300 penalty units) for a corporation
Powers of inspectors	A number of the powers of industrial inspectors under s 98 of IR Act are limited to "industrial locations"	An inspector may exercise their powers at either: • the premises where work is or was being performed; or • business premises where the inspector reasonably believes there are relevant records or documents

Attachment 8C Accessorial Liability Provisions in the Other State Jurisdictions

The following table summarises the accessorial liability provisions in industrial legislation in the other State jurisdictions.

New South Wales		Victoria		Queensland		South Australia		Tasmania	
NSW IR Act: s 400	If a corporation contravenes, whether by act or omission, any provision of the Act or regulations, each person who is a director of the corporation or who is concerned with the management of the corporation is taken to have contravened the same provision if the person knowingly authorised or permitted the contravention	*Long Service Leave Act 1992* (Vic) (Vic LSL Act): s158A	Any conduct engaged in by a corporation is also conduct engaged in by an exective officer of the corporation if the executive officer knew about the conduct or was reckless as to whether it was engaged in An executive officer of a corporation means: • a director of the corporation; or • any other person who is concerned, or takes part, in the management of the corporation (regardless of the person's designation)	Qld IR Act: s 937	An organisation or person is taken to have committed an offence if they • take part in the commission of an offence • counsel, procure or aid the commission of an offence • encourage the commission of an offence are concerned, directly or indirectly in the commission of the offence	SA FW Act: s 236A	If: a) a body corporate commits an offence against the Act; and b) a member of the governing body of the body corporate intentionally allowed the body corporate to engage in the conduct comprising the offence, that person also commits an offence and is liable to the same penalty as may be imposed for the principal offence	*Industrial Relations Act 1984* (Tas) (Tas IR Act): s 93	Where an offence against is committed by a body corporate, every person concerned in the management of that body corporate shall be deemed also to have committed the offence and may be convicted of the offence, unless they prove that the act or omission constituting the offence took place without their knowledge
Long Service Leave Act 1955 (NSW)	An offence arising under section 4 (which provides the LSL entitlement) that is	LSL Act: s 164	A person who: a) attempts to contravene; b) aids, abets,						

New South Wales		Victoria		Queensland		South Australia		Tasmania	
(NSW LSL Act): s 10A	committed by a corporation is an executive liability offence A person commits an offence if: • the corporation commits an executive liability offence • the person is a director or other person involved in the management of the corporation; and the person knows or ought reasonably know that the executive liability offence would be or is being committed and fails to take all reasonable steps to prevent or stop the commission of that offence		counsels or procures a person to contravene; or c) induces, or attempts to induce, a person whether by threats or promises or otherwise to contravene a penalty provision is guilty of an offence against that provision and is liable to the specified penalty						
NSW LSL Act: s 10B	A corporate offence is an offence against the Act that is capable of being committed by a corporation A person commits an offence if: • the corporation commits an								

New South Wales		Victoria		Queensland		South Australia		Tasmania	
	corporate offence • the person is a director or other person involved in the management of the corporation • the person: ▪ aids, abets, counsels or procures the commission of the corporate offence ▪ induces the commission of the corporate office ▪ conspires with others to effect the commission of the corporate offence is in any other way, whether by act or omission, knowingly concerned in, or party to, the commission of the corporate offence								

Attachment 8D Powers of Inspection, Production of Records and Questioning

The following table summarises the powers of inspection, production of records and questioning in industrial legislation in the other State jurisdictions.

New South Wales		**Victoria**		**Queensland**		**South Australia**		**Tasmania**	
NSW IR Act: s 385	An inspector may, at any reasonable time: a) inspect any premises that the inspector has reasonable grounds to suspect are the premises of an employer, and inspect any work being done there, b) require an employer to produce for the inspector's examination, at such time and place as the inspector may specify, any specified records required to be kept (and retain any such record for such period as may be necessary in order to take copies of or extracts from it) c) require an	*Child Employ-ment Act 2003* (Vic) (CE Act): s 42	At any time during ordinary working hours, a child employment officer may without force enter: a) any premises identified in an application for a permit as an intended workplace of a child; or b) any premises at which the officer has reasonable grounds for believing that work, or any activity is being or has been performed or engaged in by a child; or c) any premises, being a place of business at which the officer has	Qld IR Act: s 910	An inspector may, without the occupier's consent, enter: a) a public place; or b) a workplace when: (i) the workplace is open for carrying on business; or (ii) the workplace is otherwise open for entry	SA FW Act: s 219C(1)	An inspector may at any time, with any assistance the inspector considers necessary, without any warrant other than this section: a) enter any workplace b) inspect and view any work, process or thing in the place c) question a person in the place on a subject relevant to employment or an industrial matter	Tas IR Act: s 76(1)	An inspector may require a person who is, or has been, an employer to produce: a) any record required to be kept by that person under the Act b) all pay-sheets or other documents in which an account is kept of the remuneration paid to an employee of that employer whose rate of remuneration (whether as wages rates or piecework rates) is or was fixed by an award or a registered agreement

New South Wales		Victoria		Queensland		South Australia		Tasmania	
	employer to deliver to the inspector, within such time and to such place as the inspector may specify, any specified information concerning the conditions of employment of the employees d) question any employee or employer as to any matter concerning the conditions of employment of the employee		reasonable grounds for believing that there are documents relevant to the purpose of determining compliance with the Act or the regulations						
NSW LSL Act: s 9(1)	Every inspector shall have power at any reasonable times: a) to enter, inspect and examine the premises of any employer or any premises in which the inspector has reasonable cause to believe that any person is employed b) to require an employer to produce, at such			Qld IR Act: s 911	For monitoring or enforcing compliance with the Act, the inspector may do any of the following: a) search any part of the workplace b) inspect, examine, photograph or film any part of the place or anything at the workplace c) place an	SA FW Act: s 219C(3)	An inspector may: • require the production of a time book, pay sheet, notice, record, list, indenture of apprenticeship or other document required to be kept • inspect, examine and copy it	Tas IR Act: s 76(3)	An inspector may: a) inspect and examine premises when they have reasonable cause to believe that any person is employed there b) question, either alone or in the presence of any other person, with respect to matters under the Act, any

New South Wales		Victoria		Queensland		South Australia		Tasmania	
	time and place as the inspector may specify, the long service leave record required to be kept under the Act c) to make such examination and inquiry as may be necessary to ascertain whether the provisions of the Act have been complied with d) to exercise all other powers that may be necessary to ensure the carrying out of the provisions of the Act				identifying mark in or on anything at the place d) take an extract from, or copy, a document at the workplace e) produce an image or writing at the workplace from an electronic document or, to the extent it is not practicable, take a thing containing an electronic document to another place to produce an image or writing f) take to, into or onto the workplace any person, equipment and materials the inspector reasonably requires for exercising the inspector's powers g) remain at the				person whom they find in or about those premises and whom they believe to be employed there, and require that person to: • answer the questions put by the inspector, • sign a declaration as to the truth of their answers

New South Wales		Victoria		Queensland		South Australia		Tasmania	
					place for the time necessary to achieve the purpose of the entry h) require a person at the workplace to give the inspector reasonable help to exercise a power mentioned in paragraphs (a) to (g)				
NSW LSL Act: s 9(3)	An inspector may, by notice in writing served personally or by post, require the employer to deliver or to send by post to the inspector, within such time and to such place as are specified in the notice: a) a copy of such specified part of the long service leave record required to be kept under the Act b) such other information of a specified kind relating to that payment as the inspector	CE Act: s 43	On exercising a power of entry, a child employment officer may: a) inspect any work, material, machinery, appliance, article, facility or other thing b) take samples of any goods or substances c) interview any employee d) require a person having the custody of, or access to, a document	Qld IR Act: s 912	An inspector may require a person to make available for inspection by an inspector, or to produce to the inspector for inspection, at a reasonable time and place nominated by the inspector: a) a document issued to the person under the Act; b) a document required to be kept by the person under the Act	SA FW Act: s 219C(4)	If an inspector has reason to believe that a document required to be kept by an employer is not accessible during an inspection, the inspector may, by notice in writing to an employer, require the employer to produce the document to the inspector within a reasonable period (of at least 24 hours) specified by the inspector		An inspector may: a) at any reasonable time, enter, inspect, and examine the premises of an employer, or any place in which he has reasonable cause to believe that a person is employed or that an offence against this Act has been committed b) require an employer to produce, at such time and place as

New South Wales		Victoria		Queensland		South Australia		Tasmania	
	considers necessary in order to investigate a claim for non-payment of long service leave		relevant to the purpose of investigating an application for a permit or determining compliance to produce the document to the officer within a reasonable period specified by the officer e) inspect, and make copies of or take extracts from, a document produced to him or her		c) a document relating to an employee, including, for example, a time sheet or pay sheet For an electronic document, compliance requires the making available or production of a clear written reproduction of the electronic document				the inspector specifies, the long service leave record required by this Act to be kept by the employer, and inspect or make a copy of, or extract from, that record; make such examination and enquiry as he thinks necessary to ascertain whether the provisions of this Act have been, or are being, complied with by an employer or an employee
		CE Act: s 44	A child employment officer may: a) by written notice, require a person to produce,	IR Act: s 913	An inspector may, in specified circumstances and during business hours, require a person to answer questions about a	Long Service Leave Act 1987 (SA) (SA LSL Act): s 11	An inspector may at any reasonable time: a) enter any premises where the inspector has		

New South Wales		Victoria		Queensland		South Australia		Tasmania	
			within a reasonable period specified in the notice, a document relevant to the purpose of investigating an application for a permit or determining compliance with this Act or the regulations b) inspect, and make copies of or take extracts from, a document produced to them		matter		reasonable cause to believe that a worker is employed b) require an employer to produce any records relating to long service leave c) examine and copy or take extracts from such records or require an employer to provide a copy of any such records d) require any person to answer, to the best of that person's knowledge, information and belief, any question relevant to the administration or enforcement of the Act		

New South Wales		Victoria		Queensland		South Australia		Tasmania	
				Qld IR Act: s 914	An inspector may, in specified circumstances, require a person to: • state their name and residential address • give evidence of the correctness of the stated name or address if it would be reasonable to expect the person to: ▪ be in possession of evidence of the correctness of the stated name or address ▪ otherwise be able to give the evidence				

Attachment 8E Comparison of State and Federal Right of Entry Provisions (Industrial)

Issue	IR Act	FW Act
Who may hold a right of entry permit	• Any person who holds an authority under the IR Act (referred to as an **authorised representative**) – s 49G and s 49J(3) • No requirement that the person be an official or employee of the relevant union – s 49J(1) • No requirement that the person be a "fit and proper person"	• A person who holds an entry permit under the FW Act (referred to as a **permit holder**) • The person must be an officer or employee of the relevant union – s 512 and the definition of "official" in s 12 • The person must be a "fit and proper person" – s 512 and s 513
Process for obtaining a right of entry permit	• Application for an authority is made to the Registrar of the WAIRC by the secretary of a union – s 49J(1) • The Registrar must issue the authority[1]	• Application for an entry permit is made to the FWC by a union – s 512 • The FWC may issue the entry permit if satisfied that the person is a "fit and proper person" [2] – s 512
Right of entry to investigate a suspected breach of an industrial law or instrument	• Authorised representative may enter premises to investigate a suspected breach of the IR Act, LSL Act or the MCE Act[3] - s 49I(1) • Authorised representative may investigate a suspected breach of a State award, agreement or order – s 49I(1)	• Permit holder may enter premises to investigate a suspected breach of the FW Act – s 481(1) • Permit holder may investigate a suspected breach of a fair work instrument – s 481(1) • Permit holder must reasonably suspect that the breach has occurred or is occurring – s 481(3) • The onus is on the permit holder to prove that the suspicion is reasonable – s 481(3)
Who the suspected breach must relate to	Suspected breach must relate to a "relevant employee", being an employee who is a member of the union or who is eligible to become a member – s 49G	Suspected breach must relate to a member of the union, whose industrial interests the union is entitled to represent[4] - s 481(1)

1 Unless the person for whom the authority is sought has previously had an authority revoked under the IR Act. In this case, the Commission in Court Session must order that the authority be issued - IR Act s 49J(2).

2 Although the Full Court of the Federal Court has held that a person who is not necessarily a "fit and proper person" in their own right may be issued with an entry permit by the imposition of conditions on their permit – *Maritime Union of Australia v Fair Work Commission* [2015] FCAFC 56 [43]: "Conditions may be imposed pursuant to [s.515 of the Fair Work Act] to remedy or address deficiencies or reservations in respect to an officer of an applicant, which deficiencies or reservations could otherwise lead to the conclusion that the person was not fit and proper."

3 IR Act s 49I(1).

4 The entitlement to represent the industrial interests of an employee refers to an organisation's entitlement to represent the industrial interests of persons eligible for membership of the organisation – see *Regional Express Holdings Limited v Australian Federation of Air Pilots* [2017] HCA 55.

Issue	IR Act	FW Act
Minimum notice to enter premises to investigate a suspected breach	No notice required (although there is a requirement to give notice for the production of records – see below)	Minimum 24 hours' written notice required, unless an "exemption certificate" has been obtained from the FWC waiving the requirement[5] - s 487(3) and (4)
Rights while on premises to investigate a suspected breach	Section 49I(2): • Require the production of relevant records, subject to at least 24 hours' written notice[6] • Inspect and make copies of relevant records • Inspect relevant work, material or machinery	Section 482(1): • Inspect and make copies of relevant records kept on the premises or accessible from a computer on the premises[7] • Inspect relevant work, process or object • Interview any person who agrees to be interviewed, and whose industrial interests the union is entitled to represent
Production and inspection of records	• At least 24 hours' written notice is required if the records are kept on the employer's premises – s 49I(6)(a) • At least 48 hours' written notice is required if the records are kept elsewhere – s 49I(6)(b) • Authorised representative may seek a waiver of the requirement to give notice by obtaining a certificate from the WAIRC – s 49I(7)	• Records may be accessed immediately if the permit holder has entered premises and the records are kept there or accessible from a computer – s 482(1)(c) • At least 14 days' written notice is required for later access to records (e.g. records that are not kept on the premises) – s 483 • The notice for later access to records must be given while the permit holder is on the premises, or within 5 days after the entry – s 483(3)
Right of entry to investigate a suspected breach relating to textile, clothing or footwear (TCF) workers	No specific right of entry for TCF workers under the IR Act	The FW Act provides a specific right of entry in relation to "TCF award workers", the definition of which includes contractors s 483A(1A)
Right of entry to hold discussions with employees	• Authorised representative may enter premises to hold discussions with employees – s 49H(1) • Minimum 24 hours' written notice required, unless applicable industrial instrument provides for a different notice period or no notice – s 49H(2) and (3)	• Permit holder may enter premises to hold discussions with employees – s.484 • Minimum 24 hours' written notice required – s 487(3)
Location of interviews and discussions	IR Act is silent on where an authorised representative may hold interviews and discussions with employees	• Permit holder must conduct interviews and discussions in a room/area agreed with the occupier – s 492(1) • If agreement cannot be reached, interviews or discussions may be held where meal breaks ordinarily take place – s 492(2) & (3)

5 If an exemption certificate has been obtained, the permit holder must give a copy to the occupier/employer before or as soon as practicable after entering the premises.

6 An employee who is party to an employer-employee agreement can request that their records not be inspected – IR Act s 49I(3).

7 However, a permit holder can only inspect a non-member's record if the record also substantially relates to the employment of a union member, or if the non-member consents in writing – FW Act s 482(2A). The permit holder may also apply to the FWC for an order allowing access to a non-member record – FW Act s 483AA.

Issue	IR Act	FW Act
Route to location of interviews and discussions	IR Act is silent on the route to be taken by an authorised representative to reach a room/area	Permit holder must comply with any reasonable request by the occupier to take a particular route to reach a room/area – s 492A
Occupational safety and health (**OSH**) requirements	No express requirement that authorised representative comply with reasonable OSH requirements of the occupier	Permit holder must comply with any reasonable request to comply with an OSH requirement that applies to the premises – s 491
Residential premises	Authorised representative cannot enter any part of premises principally used for habitation by the employer and their household – s 49K	Permit holder must not enter any part of premises that is used mainly for residential purposes – s 493
Prohibitions	Section 49O prescribes civil penalty provisions for a limited range of prohibited conduct, namely where: • an occupier refuses or intentionally and unduly delays an authorised representative entry • a person intentionally and unduly hinders or obstructs an authorised representative • a person purports to be an authorised representative without holding an authority under the IR Act Maximum penalty $5,000 for an employer or organisation and $1,000 for any other person – s 83E(1)	Sections 500-504 prescribe civil remedy provisions for a wide range of prohibited conduct, including where: • a person refuses or unduly delays a permit holder entry • a person hinders or obstructs a permit holder • a permit holder hinders or obstructs any person, or disrupts work • a permit holder acts in an improper manner • a person discloses information without authorisation Maximum penalty $12,600 for an individual and $63,000 for a body corporate – s 539
Revocation or suspension of entry permit	WAIRC may, on application by any person, revoke or suspend an authority if an authorised representative has: • acted in an improper manner – s 49J(5)(a); or • intentionally and unduly hindered an employer or employees during working time – s 49J(5)(b)	FWC may revoke or suspend an entry permit in a variety of circumstances, including where: • the FWC arbitrates a dispute about right of entry – s 505(2); • a Fair Work Inspector applies to the FWC to take action against a permit holder – s 507; • the FWC takes action on its own initiative if satisfied that a union or officials have misused rights of entry – s 508; • certain events have occurred[8] (e.g. where a permit holder has had a right of entry permit cancelled or suspended under a State or Territory industrial law)
Disputes about right of entry	Dispute could be brought to the WAIRC by an employer or union pursuant to s 44 of the IR Act	• FWC may deal with a dispute about right of entry on its own initiative or on application from a union, permit holder, employer or occupier – s 505 • Among other things, the FWC may deal with a dispute about the frequency of entry to hold discussions with employees – s 505A

[8] FW Act s 510(1) – the FWC must revoke or suspend an entry permit if satisfied that any of the prescribed events have occurred.

Issue	IR Act	FW Act
Accommodation and transport arrangements in remote areas	IR Act does not require employers or occupiers to provide authorised representatives with accommodation or transport in remote areas	• If certain conditions are met,[9] the FW Act places a requirement on occupiers to arrange accommodation for permit holders in remote areas • If certain conditions are met,[10] the FW Act places a requirement on occupiers to arrange transport so that permit holders can access premises in remote areas

9 FW Act s 521C(2).

10 FW Act s 521D(2).

Attachment 8F Comparison of State and Federal Right of Entry Provisions (Occupational Safety and Health)

Issue	IR Act	2016 Model Work Health Safety (WHS) provisions	2011 Model Work Health Safety (WHS) provisions
Who may exercise right of entry to investigate a suspected breach of OSH laws	• Any person who holds an authority under IR Act (referred to as an **authorised representative**) – s 49G and s 49J(3) • No requirement that the authorised representative be an official or employee of a union – s 49J(1) • No requirement that the authorised representative be a "fit and proper person" • No requirement that the authorised representative complete any training • Note, however, s 494(1) of the FW Act – if the occupier or employer is a constitutional corporation, the authorised representative must be a permit holder under the FW Act	• Section 131 – official[830] or employee of a union: ○ who has completed the prescribed training; and ○ who holds a WHS permit and either a permit under the FW Act or the relevant State or Territory industrial law • Note, however, s 494(1) of the FW Act – if the occupier or employer is a constitutional corporation, the WHS permit holder must be a permit holder under the FW Act	Same as 2016 provisions
Minimum notice to enter premises	No notice required (although there is a requirement to give notice for the production of records – see below)	• 24 hours' written notice, unless the WHS permit holder has obtained an exemption certificate[831] - s 117(5) and (6) • Exemption certificate must be issued if there is a serious risk to health or safety emanating from immediate or imminent exposure to a hazard – s 117(7)	• No prior notice required • WHS permit holder must, as soon as reasonably practicable after entering a workplace, give notice of the entry and suspected breach – s 119(1) • However, no requirement to give notice if it would defeat the purpose of entry, or unreasonably delay the WHS permit holder in an urgent case – s 119(2)

830 See definition of "official of a union" in s 116.

831 An exemption certificate is issued by the "authorising authority", which would presumably be the Occupational Safety and Health Tribunal in Western Australia.

Issue	IR Act	2016 Model Work Health Safety (WHS) provisions	2011 Model Work Health Safety (WHS) provisions
Production and inspection of records	• At least 24 hours' written notice is required if the records are kept on the employer's premises – s 49I(6)(a) • At least 48 hours' written notice is required if the records are kept elsewhere – s 49I(6)(b) • Authorised representative may seek waiver of the requirement to give notice by obtaining a certificate from the WAIRC – s 49I(7) • Note, however, s 495 of the FW Act – if the occupier or employer is a constitutional corporation, the authorised representative must give at least 24 hours' notice to inspect an "employee record" as defined by s 12 of that Act	At least 24 hours' written notice to enter "any workplace" for the purpose of inspecting records – s 120(5)	Same as 2016 provisions[832]
Reasonable suspicion of breach	No express requirement that the authorised representative reasonably suspect that a breach has occurred	WHS permit holder must reasonably suspect that a breach has occurred or is occurring – s 117(2)	Same as 2016 provisions
Identity of employees	IR Act silent on whether employer can require authorised representative to disclose the names of employees	WHS permit holder is not required to disclose the name of any worker at the workplace – s 130	Same as 2016 provisions
Who the suspected breach must relate to	Suspected breach must relate to an employee who is a member or eligible to be a member of the union ("relevant employee") – s 49G	• Suspected breach can relate to a broad range of workers, including an employee or contractor – definition of "worker" in s 7 • Worker must be a member or eligible to be a member of the union – definition of "relevant worker" in s 116 • Union must also be entitled to represent	Same as 2016 provisions

[832] Note, however, that a WHS permit holder could inspect records without 24 hours' written notice where they have entered a workplace under s 117 and are exercising a right under s 118(1)(d), as opposed to a right under s 120.

Issue	IR Act	2016 Model Work Health Safety (WHS) provisions	2011 Model Work Health Safety (WHS) provisions
		the industrial interests of the worker – definition of "relevant worker" in s 116	
Rights while on premises	Section 49I(2): • Inspect and make copies of relevant records • Inspect relevant work/material/machinery	Section 118: • Inspect and make copies of relevant records • Inspect relevant work/material/machinery • Consult with workers • Consult with the person conducting the business • Warn any person exposed to a serious risk to health or safety	Same as 2016 provisions
Residential premises	Authorised representative cannot enter any part of premises principally used for habitation by the employer and their household – s 49K	WHS permit holder cannot enter any part of workplace that is used only for residential purposes – s 129	Same as 2016 provisions
Entry to consult and advise workers	• Authorised representative may enter premises for the purpose of holding discussions with employees who wish to participate – s 49H(1) • At least 24 hours' written notice is required (unless industrial instrument applies which provides for no notice or different period of notice) – s 49H(2) and (3)	• WHS permit holder may enter workplace to consult on OSH matters with workers who wish to participate – s 121(1) • WHS permit holder may warn any person exposed to a serious risk to health or safety – s 121(2) • At least 24 hours' written notice is required – s 122	Same as 2016 provisions
OSH requirements	• No express requirement that authorised representative comply with reasonable OSH requirements of the occupier • Note, however, s 499 of the FW Act – if the occupier or employer is a constitutional corporation, the authorised representative must comply with reasonable OSH requirements of the occupier	WHS permit holder must comply with reasonable requests to comply with any OSH requirement that applies at the workplace – s 128	Same as 2016 provisions

Issue	IR Act	2016 Model Work Health Safety (WHS) provisions	2011 Model Work Health Safety (WHS) provisions
Prohibitions	Section 49O prescribes civil penalty provisions for a limited range of prohibited conduct, namely where: • an occupier refuses or intentionally and unduly delays an authorised representative entry • a person intentionally and unduly hinders or obstructs an authorised representative • a person purports to be an authorised representative without holding an authority under the IR Act Maximum penalty $5,000 for an employer or organisation and $1,000 for any other person – s 83E(1)	Sections 144-148 prescribe civil penalty provisions for a wide range of prohibited conduct, including where: • a person refuses or unduly delays a WHS permit holder entry – s 144 • a person hinders or obstructs a WHS permit holder – s 145 • a WHS permit holder hinders or obstructs any person, or disrupts work – s 146 • a WHS permit holder acts in an improper manner – s 146 • a person discloses information without authorisation – s 148 Maximum penalty $10,000 for an individual and $50,000 for a body corporate	Same as 2016 provisions
Disputes about right of entry	Dispute could be brought to the WAIRC by an employer or union pursuant to s 44 of the IR Act	• If a dispute arises, a party can ask the regulator to appoint an inspector to attend the workplace to assist – s 141 • Authorising authority may also deal with a dispute and make orders (including an order imposing conditions on a WHS entry permit, or an order suspending or revoking a permit) – s 142	Same as 2016 provisions

Chapter 9 Local Government

9.1 Term of Reference

1416. 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 Background, Constitutional Corporations and Jurisdictional Confusion

1417. Western Australia currently has 139 local government authorities.[833] In addition, there are 9 "regional local governments", which are separate entities consisting of two or more local governments.

1418. As at June 2017, an estimated 22,700 employees were employed within local government in Western Australia.[834]

1419. It is quite understandable that the Minister is desirous of the Review looking at the issue of the regulation of the industrial relations of local governments and their employees.

1420. At the moment, some local government authorities and their employees are regulated by the Federal system and some by the State. There is legal and factual confusion about whether a particular local government is within one system or the other. This is because of the current state of the law and whether the local government is, or is not, a "constitutional corporation".[835] If so, then the FW Act

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833 Information obtained from the Local Government Directory on the Department of Local Government, Sport and Cultural Industries website at www.dlgc.wa.gov.au. Figures include the Shire of Christmas Island and the Shire of Cocos (Keeling) Islands.

834 Australian Bureau of Statistics (ABS), *Employment and Earnings, Public Sector, Australia, 2016-17*, Cat. No. 6248.0.55.002.

835 For the purposes of s 51(xx) of the Australian Constitution, a "constitutional corporation" refers to "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth".

generally applies to the regulation of employment. If not, then the State system under the IR Act applies.

1421. This will be explained later in this chapter, but to understand the issues fully it is necessary to set out the position of local government and local government bodies, in their Constitutional and legislative contexts. Completing that analysis will allow for an understanding of their status as part of the governmental framework of the State.

9.3 Constitution of Western Australia, the Local Government Act and other Legislation

1422. In Western Australia, the State Constitution requires there to be a system of local government as part of the governmental apparatus of the State.

1423. Section 52 of the *Constitution Act 1889* (WA) provides as follows:

> **52. Elected local governing bodies**
>
> (1) The Legislature shall maintain a system of local governing bodies elected and constituted in such manner as the Legislature may from time to time provide.
>
> (2) Each elected local governing body shall have such powers as the Legislature may from time to time provide being such powers as the Legislature considers necessary for the better government of the area in respect of which the body is constituted.

1424. As stated therefore by Wheeler JA in *Glew v Shire of Greenough:*[836]

> In Western Australia, s 52 of the State Constitution imposes a positive duty on the State government to maintain a system of local governing bodies.

1425. That duty is carried into effect by the enactment of the LG Act.

1426. Section 1.3 of the LG Act provides as follows:

> **1.3. Content and intent**
>
> (1) This Act provides for a system of local government by —
>
> (a) providing for the Constitution of elected local governments in the State; and
>
> (b) describing the functions of local governments; and

836 [2006] WASCA 260 [25].

(c) providing for the conduct of elections and other polls; and

(d) providing a framework for the administration and financial management of local governments and for the scrutiny of their affairs.

(2) This Act is intended to result in —

(a) better decision-making by local governments; and

(b) greater community participation in the decisions and affairs of local governments; and

(c) greater accountability of local governments to their communities; and

(d) more efficient and effective local government.

(3) In carrying out its functions a local government is to use its best endeavours to meet the needs of current and future generations through an integration of environmental protection, social advancement and economic prosperity.

1427. Section 2.1(1)(a) of the LG Act provides that the Governor, on the recommendation of the Minister, may make an order declaring an area of the State to be a district.

1428. Section 2.3(1) of the LG Act provides that such an order is to include an order naming the district.

1429. Section 2.4(1) of the LG Act provides that the order is to include an order designating the district as a city, town or shire.

1430. Local governments are created as bodies corporate. Section 2.5 of the LG Act provides:

2.5. Local governments created as bodies corporate

(1) When an area of the State becomes a district, a local government is established for the district.

(2) The local government is a body corporate with perpetual succession and a common seal.

(3) The local government has the legal capacity of a natural person.

(4) The corporate name of the local government is the combination of the district's designation and name.

Example:

City of (*name of district*)

(5) If the district's name incorporates its designation, the designation is not repeated in the corporate name of the local government.

Example:

district's name: Albany (Town)

corporate name: Town of Albany

(6) Proceedings may be taken by or against the local government in its corporate name.

1431. Pursuant to s 2.6(1) of the LG Act, each local government is to have an elected council as its governing body. Section 2.6(3) provides that the "offices on the council of the local government of a shire are those of president, deputy president and the councillors."

1432. Section 2.7 of the LG Act sets out the role of the council as follows:

2.7. The role of the council

(1) The council —

(a) governs the local government's affairs; and

(b) is responsible for the performance of the local government's functions.

(2) Without limiting subsection (1), the council is to —

(a) oversee the allocation of the local government's finances and resources; and

(b) determine the local government's policies.

1433. Section 2.17 of the LG Act sets out the membership and size of the council of a local government. Section 2.19 of the LG Act provides for the qualifications for election to council. Terms of office and the vacation of office are then set out in s 2.28 of the LG Act.

1434. Sections 2.8-2.10 set out the roles of mayor/deputy mayor, president/deputy president and councillors. The election of office bearers is set out in s 2.11- s 2.16.

1435. Part 3 of the LG Act, comprised by sections 3.1 to 3.68, sets out the functions of local government. The general function of a local government is set out in s 3.1 as follows:

3.1. General function

(1) The general function of a local government is to provide for the good government of persons in its district.

(2) The scope of the general function of a local government is to be construed in the context of its other functions under this Act or any other written law and any constraints imposed by this Act or any other written law on the performance of its functions.

(3) A liberal approach is to be taken to the construction of the scope of the general function of a local government.

1436. In the opinion of the Review this section is important as it sets out the reason for existence of a local government and its overriding function. Section 3.2 of the LG Act provides that the "scope of the general function of a local government in relation to its district is not limited by reason only that the Government of the State performs or may perform functions of a like nature".

1437. Section 3.4 of the LG Act provides:

3.4. Functions may be legislative or executive

The general function of a local government includes legislative and executive functions.

1438. The legislative functions of local governments are set out in Division 2 of Part 3 of the LG Act, comprised by sections 3.5 to 3.17. Sections 3.5(1), (3) and (4) set out the general legislative power of local governments as follows:

3.5. Legislative power of local governments

(1) A local government may make local laws under this Act prescribing all matters that are required or permitted to be prescribed by a local law, or are necessary or convenient to be so prescribed, for it to perform any of its functions under this Act.

...

(3) The power conferred on a local government by subsection (1) is in addition to any power to make local laws conferred on it by any other Act.

…

(4) Regulations may set out —

(a) matters about which, or purposes for which, local laws are not to be made; or

(b) kinds of local laws that are not to be made,

and a local government cannot make a local law about such a matter, or for such a purpose or of such a kind.

1439. Section 3.10(1) of the LG Act confirms that a local law may establish that "contravention of a provision of the local law is an offence, and may provide for the offence to be punishable on conviction by a penalty not exceeding a fine of $5,000." Section 3.10(2)-(6) provides for other powers in relation to penalties and the payment of fines.

1440. Sections 3.11-3.16 provide for procedures in relation to local laws.

1441. The executive functions of local governments are set out in Division 3 of the LG Act comprised by ss 3.18 to 3.60.

1442. The general performance of executive functions is set out in s 3.18 of the LG Act as follows:

> **3.18. Performing executive functions**
>
> (1) A local government is to administer its local laws and may do all other things that are necessary or convenient to be done for, or in connection with, performing its functions under this Act.
>
> (2) In performing its executive functions, a local government may provide services and facilities.
>
> (3) A local government is to satisfy itself that services and facilities that it provides —
>
> (a) integrate and coordinate, so far as practicable, with any provided by the Commonwealth, the State or any public body; and
>
> (b) do not duplicate, to an extent that the local government considers inappropriate, services or facilities provided by the Commonwealth, the State or any other body or person, whether public or private; and
>
> (c) are managed efficiently and effectively.

1443. Section 3.21 of the LG Act is about the duties of a local government when performing its executive functions. They include, so far as is reasonable and practicable, to ensure that the lawful use of land is not obstructed; that there is a minimisation of harm, inconvenience and damage; danger to any person or property does not arise from anything done on land; not damaging buildings and other structures and not physically damaging land. Pursuant to s 3.27 of the LG Act a local government may do the things prescribed in Schedule 3.2, even though the land on which they are done is not local government property and the local government does not have consent to do it. The schedule includes drainage, earthworks and making thoroughfares.

1444. Sections 3.28 to 3.36 of the LG Act provide for powers of entry by local government bodies. Sections 3.37 to 3.48 provide for the impounding of abandoned vehicles and goods and the holding of them and disposal of sick or injured animals.

1445. Section 3.59 of the LG Act is about commercial enterprises by local governments. Section 3.59(1) defines a "trading undertaking" to include an activity carried on with a view to producing profit. Limitations are imposed upon a local government before it commences what are described and defined in s 3.59(1) as a "major trading undertaking", "major land transaction" or entering into a "land transaction that is preparatory to entry into a major land transaction". Section 3.59(2) provides that before this occurs a local government is to prepare a business plan. The contents of the business plan are to be in accordance with the requirements of s 3.59(3) of the LG Act. Notification requirements are contained in s 3.59(4) of the LG Act. Whilst this section contemplates that local governments will trade and indeed may engage in a "major trading undertaking", it is noted that there are restrictions upon the latter.

1446. Part 4 of the LG Act provides for the elections to the offices of a local government (ss 4.1 to 4.99).

1447. Part 5 of the LG Act, constituted by ss 5.1 to 5.125, is about the administration of a local government. It provides for the taking place of council meetings and committee meetings, local government employees, annual reports, disclosure of financial interests, access to information, the payment of expenses and allowances to those holding council offices and the conduct of certain officials.

1448. Section 5.36(1) of the LG Act provides that a local government is to employ a person to be its Chief Executive Officer and such "other persons as the council believes are necessary to enable the functions of the local government and the functions of the council to be performed".

1449. Part 6 of the LG Act, comprised by ss 6.1 to 6.82, is about financial management. Pursuant to s 6.2 a local government is to prepare an annual budget. Pursuant to s 6.4(1) a local government is to prepare an annual financial report. Pursuant to s 6.7(1) of the LG Act all money and the value of all assets received or receivable by a local government are to be held and brought to account in its municipal fund. Section 6.7(2) provides that money held in the municipal fund may be applied

towards the performance of the functions and the exercise of the powers conferred on the local government by the LG Act or any other written law. In addition, s 6.9 of the LG Act requires a local government to hold a trust fund. Pursuant to s 6.14 money held in a municipal fund or the trust fund of a local government, which is not required for any other purpose, may be invested in accordance with Part III of the *Trustees Act 1962* (WA).

1450. Division 5 of Part 6 of the LG Act is about the financing of local government activities. Sections 6.15 and 6.16 of the LG Act are as follows:

> **6.15. Local government's ability to receive revenue and income**
>
> (1) A local government may receive revenue or income —
>
> (a) from —
>
> (i) rates; or
>
> (ii) service charges; or
>
> (iii) fees and charges; or
>
> (iv) borrowings; or
>
> (v) investments; or
>
> (vi) any other source,
>
> authorised by or under this Act or another written law; or
>
> (b) from —
>
> (i) dealings in property; or
>
> (ii) grants or gifts.
>
> (2) Nothing in subsection (1)(a) authorises the making by a local government of a local law providing for the receipt of revenue or income by the local government from a source not contemplated by or under this Act.
>
> **6.16. Imposition of fees and charges**
>
> (1) A local government may impose* and recover a fee or charge for any goods or service it provides or proposes to provide, other than a service for which a service charge is imposed.
>
> ** Absolute majority required.*
>
> (2) A fee or charge may be imposed for the following —
>
> (a) providing the use of, or allowing admission to, any property or facility wholly or partly owned, controlled, managed or maintained by the local government;
>
> (b) supplying a service or carrying out work at the request of a person;
>
> (c) subject to section 5.94, providing information from local government records;

(d) receiving an application for approval, granting an approval, making an inspection and issuing a licence, permit, authorisation or certificate;

(e) supplying goods;

(f) such other service as may be prescribed.

(3) Fees and charges are to be imposed when adopting the annual budget but may be —

(a) imposed* during a financial year; and

(b) amended* from time to time during a financial year.

** Absolute majority required*.

1451. Section 6.17(1) of the LG Act is about how a local government sets fees and charges. The section provides that certain factors are to be taken into consideration including the cost of providing the service, the importance of the service to the community and the price by which it could be provided by an alternate provider. A higher fee may be charged for an expedited supply of the good or service if is requested that it be provided urgently. Section 6.17(3) provides that other than for specified services the "basis for determining a fee or charge is not to be limited to the cost of providing the service or goods…"

1452. The power to borrow and restrictions upon borrowing are provided for in Subdivision 3 of Division 5 of Part 6 of the LG Act.

1453. Division 6 of Part 6 of the LG Act provides for rates and service charges. This includes the basis of rating, the recording of rating, the imposition of service charges, the payment of rates and service charges and their recovery. Subdivision 6 of Division 6 of Part 6 of the LG Act provides that actions may be taken against land where rates or service charges remain unpaid.

1454. Part 7 of the LG Act provides for the auditing of the financial accounts of local governments. Part 8 provides for the scrutiny of the affairs of local governments, and Part 9 is about objections to and the review of decisions made by local governments, legal proceedings and other miscellaneous matters.

1455. It can be seen from this lengthy review that a local government is no ordinary corporation. A local government is part of an arm of government which must act for the benefit of its community. It is controlled by a council which is elected by the

public and governs within its district. As such, it has a variety of legislative, executive and regulatory functions. The way these functions are carried out is, in turn, constrained by the provisions of the LG Act.

1456. Local governments also have numerous functions and powers under other legislation in force in Western Australia. This includes, for example, the *Planning and Development Act 2005* (WA) (under s 72, the preparation and adoption of a local planning scheme); the *Bush Fires Act 1954* (WA) (under Part IV Division 1, controlling bush fires); the *Dog Act 1976* (WA) (under s 9, the administration and enforcement of the Act); the *Dividing Fences Act 1961* (WA) (under s 24, the prescription of a "sufficient fence"); the *Emergency Management Act 2005* (WA) (under s 36, providing for emergency management); the *Fire and Emergency Services Act 1998* (WA) (under s 36J, the determination and assessment of an emergency services levy); the *Health (Miscellaneous Provisions) Act 1911* (WA) (under s 26, the carrying out of the provisions of the Act); the *Heritage of Western Australia Act 1990* (WA) (under s 45, maintaining an inventory of buildings of cultural heritage significance); the *Litter Act 1979* (WA) (under Part V, the enforcement of the *Litter Act*), the *Main Roads Act 1930* (WA) (under s 24, the responsibility for roads in the district) and the *Cemeteries Act 1986* (WA) (under s 5, the control and management of cemeteries as vested by the Governor and under s 54-s 55, making local laws in respect thereof).

1457. The role which local governments have under each of these Acts, including the regulatory, executive and service functions provided for, are all part of what a local government does or can do. They are part of a local government's activities as the governing body for its district.

9.4 The Consequences of Work Choices

1458. As set out in chapter 1, in 2006 Work Choices extended the coverage of the Federal industrial relations system to all employers that are "constitutional corporations". This had an impact on local governments as employers.

1459. Prior to the introduction of Work Choices, two Federal awards - the *Local Government Officers (Western Australia) Award 1999* and the *Municipal Employees*

(Western Australia) Award 1999 - covered almost all local government authorities in Western Australia. Most local governments were operating in the Federal industrial relations system well before 1999, as they had been "roped in" to earlier Federal awards.

1460. As set out in chapter 1, the constitutional power underpinning the FW Act is largely the corporations power of the *Constitution*. Consequently, only a local government that is constitutionally so characterised remains in the Federal system.

1461. A general overview of local government employment arrangements was conducted by the Secretariat for the Review to ascertain which industrial system each local government was operating in. This was done by the necessarily imprecise method of looking at registered agreements and the advertisement of positions for employment with local governments. Based on this analysis, it appears that all 30 local government authorities in the Perth metropolitan area, and many regional local governments, are currently operating within the Federal industrial relations system, whereas a small number of regional councils are currently operating within the State system.

1462. Most local government employees in the State jurisdiction are covered by one of two awards, namely the:

(p) *The Local Government Officers' (Western Australia) Interim Award 2011* – which covers salaried "officers" and largely mirrors the repealed Federal *Local Government Officers (Western Australia) Award 1999*; and

(q) *The Municipal Employees (Western Australia) Interim Award 2011* – which applies to "outside" workers, including construction and maintenance workers, and largely mirrors the repealed Federal *Municipal Employees (Western Australia) Award 1999.*

1463. Both of the above awards were registered on an interim basis by the WAIRC in March 2011, prior to some local government authorities returning to the State jurisdiction. No State awards had existed for local government employees prior to

this time, as local government had been operating exclusively within the Federal industrial relations system.

1464. Most local government employees in the Federal jurisdiction are covered by the *Local Government Industry Award 2010*, which is a national modern award. This award covers a wide range of occupations, both skilled and unskilled.

1465. Many Western Australian councils engage in collective bargaining under the FW Act. At least 70 local government authorities have entered into Federal agreements in recent years, while at least seven regional shires have registered industrial agreements in the State jurisdiction.[837]

9.5 Legal uncertainty

1466. As stated, following the introduction of Work Choices, the most significant determining factor of whether an employer was within the Federal or State system was whether it was a constitutional corporation. That question, of constitutional characterisation, can ultimately only be decided by the High Court. In most cases however, the issue does not present a problem. Under the constitution and the FW Act, a trading corporation or a financial corporation is a constitutional corporation. If then, an employer is a company that engages in commercial enterprises, usually it will be a trading and thus a constitutional corporation.

1467. A local government is different however. This is because of its governmental function.

1468. During the last 10 years there have been applications brought to the WAIRC alleging both unfair dismissal from local government employment and denial of contractual benefits claims to employees. Both of these types of matters may be referred to the WAIRC by an individual employee under s 29 and s 23A of the IR Act. As explained in chapter 2 of the Interim Report an alleged unfair dismissal case may only be referred by an employee not employed by a national system employer, whereas a denial of contractual benefits claim may, now, be brought against any employer; albeit this type of claim could not be made against a national system employer from the time

837 Internal research conducted by the Secretariat for the Review.

of the enactment of the Commonwealth Work Choices legislation up until that Act was repealed and the FW Act commenced.

1469. As stated, despite this, and the jurisdictional confusion that surrounds whether a local government is or is not a trading corporation and hence a national system employer, as described below, unfair dismissal and denial of contractual benefits claims have continued to been made to the WAIRC.

1470. The following Figure 9A and Table 9A have been very helpfully provided to the Review by the WAIRC.

Figure 9A: Number of Section 29 applications against Local Governments

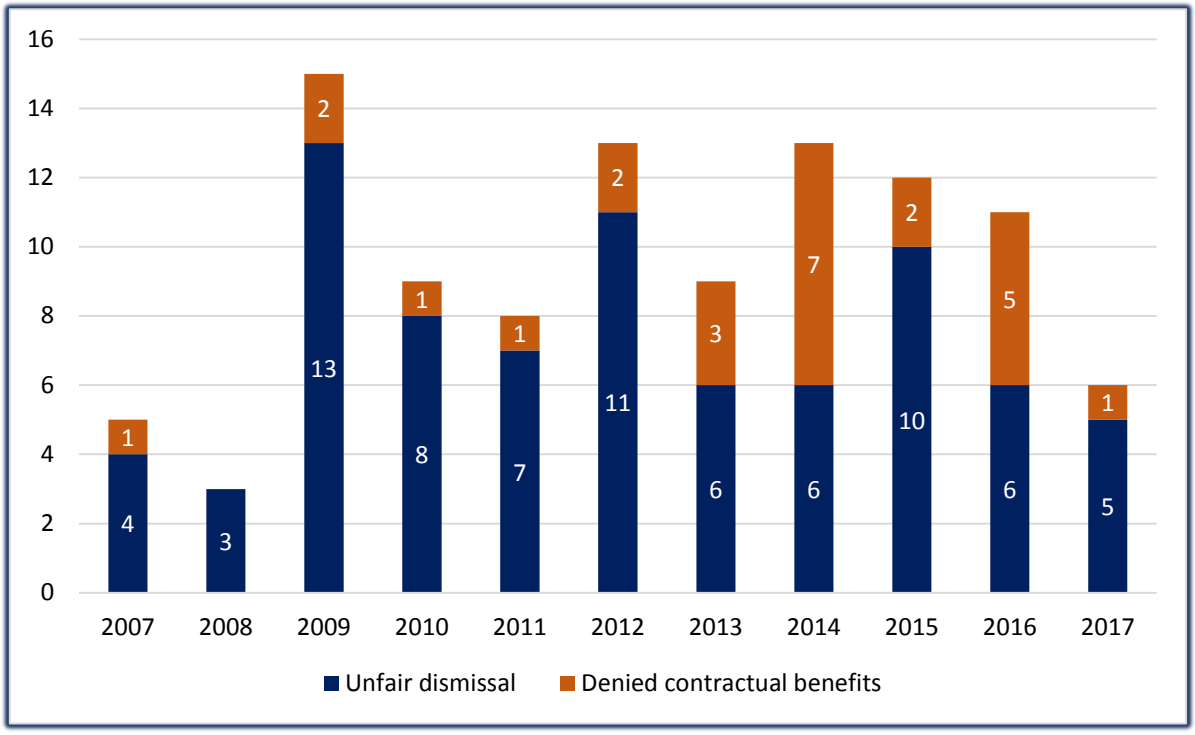

Table 9A Number of Section 29 Applications against Local Governments

Year	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Unfair dismissal	4	3	13	8	7	11	6	6	10	6	5
Denied contractual benefits	1	0	2	1	1	2	3	7	2	5	1

1471. Table 9A was based upon data up to 26 November 2017 and the information was based upon a respondent being correctly named as a "City", "Shire" or "Town". The WAIRC also informed the Review that of the 79 unfair dismissal claims, 53 per cent were subject to a jurisdictional objection, albeit the Review does not know what the outcome of the objection was. The Review surmises that if it had led to a decision on the subject then that would have been reflected in the table of decisions about the issue next set out. On this basis the Review assumes that either the matter proceeded and was settled without the jurisdictional issue being determined, the jurisdictional objection was not persisted with, or the application was discontinued. More information may be able to be obtained from the WAIRC prior to preparing the Final Report of the Review.

1472. As set out in chapter 1 the Work Choices legislation was unsuccessfully challenged in the High Court. The reasons for decision of the High Court did not canvass in any detail the question of what companies were, and were not, trading corporations. Indeed the majority[838] said:

> The challenge to the validity of the legislation enacted in reliance on the corporations power does not put in issue directly the characteristics of corporations covered by s 51(xx). It does not call directly for an examination of what is a trading or financial corporation formed within the limits of the Commonwealth. (Plainly, a foreign corporation is a corporation formed outside the limits of the Commonwealth.) No party or intervener called in question what was said about trading and financial corporations in *R v Federal Court of Australia; Ex parte WA National Football League, Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd, State Superannuation Board (Vic) v Trade Practices Commission or Fencott v Muller* (footnotes omitted).

1473. In the hearing before the High Court however there was some discussion of the issue, relevant to local government bodies. The Commonwealth Solicitor General, Mr David Bennett QC[839] referred to submissions made by the State of South Australia that, he said, assumed certain corporations would be "trading corporations", including local government bodies. Mr Bennett responded to the effect that it could not be assumed that because a corporation engaged in trade it was necessarily a trading corporation.[840] Mr Bennett cited *R v Federal Court of*

838 *NSW v Commonwealth* (2006) 229 CLR 1, Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ, [55].
839 [2006] HCA Trans 233 (10 May 2006).
840 Ibid.

Australia; Ex parte Western Australian National Football League,[841] and read from the reasons of Mason J[842] where his Honour said:

> Not every corporation which is engaged in trading activity is a trading corporation. The trading activity of a corporation may be so slight and so incidental to some other principal activity, viz. religion or education in the case of a church or school, that it could not be described as a trading corporation.

1474. Mr Bennet then said:[843]

> That deals with most of my learned friend's examples. May I add to that this proposition, which we submit is a slight extension to what his Honour says there, that is that if the principal activity is concerned with the exercise of governmental authority, as in the case of a municipal council, in making this judgment one would give even more weight to that activity. So one would not say because it collects the garbage and charges for it a municipal corporation becomes a trading corporation.

1475. In the discussion with members of the Court that followed there was no indication that their Honours thought the analysis was faulty. It is recognised however that little weight can be placed on that, insofar as gleaning whether the Court accepted the proposition or not.

1476. The submission has however been echoed in observations in later cases as is set out below.

1477. The jurisdictional status of local government in Western Australia has been tested on a number of occasions since 2005, with the results set out in the following Table 9B.

841 [1979] HCA 6; (1978-1979) 143 CLR 190.
842 Ibid, 234.
843 [2006] HCA Trans 233 (10 May 2006).

Table 9B Decisions About Local Government Corporate Status in Western Australia

Local Government	Case	Jurisdiction	Outcome
Shire of Cue	*Jacqueline Ann Bysterveld v Shire of Cue*[844]	WAIRC	The WAIRC determined the Shire was not a constitutional corporation
Shire of Dalwallinu	*Eric Bell v Shire of Dalwallinu*[845]	WAIRC	The WAIRC determined the Shire was a constitutional corporation
Shire of Ravensthorpe	*Shire of Ravensthorpe v John Patrick Galea*[846]	WAIRC	The WAIRC determined the Shire was not a constitutional corporation
City of Albany	*William Peter Madigan v City of Albany*[847]	WAIRC	The WAIRC determined the City was not a constitutional corporation
Shire of Yalgoo	*Heather Boyd and Ross Theedom v Shire of Yalgoo*[848]	FWC	The FWC determined the Shire was not a constitutional corporation

1478. The issue has also been considered in the Federal jurisdiction. For example in *Australian Workers' Union of Employees, Queensland v Etheridge Shire Council*[849] Spender J, after reviewing the authorities, including *NSW v Commonwealth*[850] said:

> [20] In essence, the High Court, by a majority, concluded that the Workchoices Act was valid in its application to constitutional corporations. The central question in these two proceedings is whether the Etheridge Shire Council is such a corporation.
>
> [21] If it is, the acceptance by the majority in the Workchoices case of the ambit of the power of the Commonwealth under s 51 (xx) as described by Gaudron J in Pacific Coal would mean that the Commonwealth has power to regulate the activities, functions, relationships and the business of the Etheridge Shire Council; the creation of rights and privileges belonging to the Etheridge Shire Council; the imposition of obligations on it; and, in respect of those matters, the regulation of the conduct of those through whom it acts, its employees, and also the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business.
>
> [22] In my opinion, it is inconceivable that the framers of the Constitution and the parliament which enacted it intended that the Commonwealth should have the powers described above (at [21]) in respect of a local government, which is a body politic of a state government, having legislative and executive functions.
>
> [23] The constitutional framework erected by the Constitution referred to in the majority judgment in the *Work Choices* case set out above (at [12]), including the

844 *Jacqueline Ann Bysterveld v Shire of Cue* (2007) WAIRC 00941, 87 WAIG 2462.
845 *Eric Bell v Shire of Dalwallinu* (2008) WAIRC 01269, 88 WAIG 1867.
846 *Shire of Ravensthorpe v John Patrick Galea* (2009) WAIRC 01149, 89 WAIG 2283.
847 *William Peter Madigan v City of Albany* (2013 WAIRC 00367) 93 WAIG 590.
848 *Heather Boyd and Ross Theedom v Shire of Yalgoo* [2016] FWC 2190.
849 *Australian Workers' Union of Employees, Queensland v Etheridge Shire Council* (2008) 171 FCR 102, [2008] FCA 1268.
850 *New South Wales v Commonwealth* [2006] HCA 52; 81 ALJR 34; 231 ALR 1 (14 November 2006), "the WorkChoices case".

observation from *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; [1947] ALR 377 , emphatically denies that possibility.

1479. His Honour's conclusion was that the local council in question was not a constitutional corporation. The decision was endorsed on appeal, albeit the primary issue for the court was one of costs.[851]

1480. In coming to his conclusion, Spender J took the following steps:

(a) Set out his Honour's understanding of the issue in the context of the Work Choices case.

(b) Made the observation in paragraph [22] and [23], quoted above, about the framers of the Constitution and the "constitutional framework" erected by the Constitution.

(c) Said, at [42], that it was important to the resolution of the case that the Council had the capacity to make local laws for the "goodwill and government" of an area of far north Queensland, that by virtue of the *Local Government Act* (Qld) have the "force of law of the State of Queensland".

(d) Noted at [44] that the Council had numerous other powers and responsibilities under the *Local Government Act* (Qld) including the making of a local law which creates an offence and fixing a penalty for an offence.

(e) Referred, at [48] to the High Court decision in *R v Trade Practices Tribunal; Ex parte St George County Council*[852] which his Honour said was "not directly on point" but "is of assistance on the question of characterisation, when one contrasts the powers and activities the subject of consideration in that case with the powers and activities of the Etheridge Shire Council in the present case".

(f) Spender J noted at [49] that although the St George County Council was established under the *Local Government Act 1919* (NSW) for "local

851 [2009] FCAFC 95.
852 (1974) 130 CLR 533.

government purposes" its only "activities" were, to "within its district to supply electricity and to supply and install electrical fittings and appliances and these were its only activities". His Honour also noted that the Local Government Act provided that the county council should "endeavour so to conduct each trading undertaking that without any loss being incurred the service, product, or commodity of the undertaking may be supplied to the consumer as cheaply as possible".

(g) Spender J then reviewed the judgments in St George County Council, and then briefly discussed the subsequent decision of the High Court in *R v Federal Court of Australia; Ex parte WA National Football League*[853], as well as other High Court and inferior court decisions that had decided whether a corporation was or was not a trading or financial corporation, including *E v Australian Red Cross Society*[854] and the reasons of Toohey J in the Federal Court in *Hughes v Western Australian Cricket Assn (Inc)*[855], in which his Honour had summarised the position "up until 1986".

(h) Spender J found important an observation that Toohey J made about the activities of grade cricket clubs, in deciding that these clubs were not trading corporations, as opposed to the WACA, which was. At [73], Spender J said the "trading activity of the Etheridge Shire Council is quite insignificant in relation to the overall consideration of the activities of the Etheridge Shire Council, which, as a local government, exercises extensive legislative and executive functions in the local government area, and is its raison d'être."

(i) His Honour's reasons then moved to a section headed, "What is the proper test". In doing so, his Honour said:

> **[85]** I therefore proceed to inquire 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 trading, whether in goods or services", or whether "the predominant and characteristic activity of the Etheridge Shire Council is in finance".

853 (1979) 143 CLR 190.
854 (1991) 27 FCR 310.
855 (1986) 19 FCR 10.

> **[86]** In that inquiry, it is necessary to have regard not only to whether the predominant and characteristic activity of the council is trading or finance, but also, as Barwick CJ indicated in *St George County Council* (at CLR 543; ALR 377–8), the extent of that activity and its relative significance in the affairs of the Etheridge Shire Council.

(j) Spender J then looked at the established powers and activities of the Council as governed by the *Local Government Act* (Qld). His Honour reviewed the relationship between local government and the State and the variety of funding sources of a local government, including from the Commonwealth. Spender J then considered the governance of local government, the operation of local governments, financial accountability, business activity obligations, "competitive neutrality" business activities, water and drainage services, local government infrastructure, including roads, rates and charges, the fixing of fees, enforcement and the investigation of offences, including special provisions for local laws about dogs, staff and superannuation as provided for in the *Local Government Act* (Qld). His Honour summarised at [129] that the Etheridge Shire Council "has extensive legislative and executive functions of a governmental kind in relation to the relevant local government area".

(k) Spender J then looked at the trading activities of the Council, commenting that it "engages in some activities which might be described as 'trade' as broadly defined". In particular, his Honour referred to and discussed the operation of a "terrestrial centre", road works for the Department of Works, "private works", hostel accommodation, a child care centre, office space rental, residential property rental, sale of land, hire of halls, sale of water and service provided to the Federal government.

(l) His Honour then reviewed some of the constitutional debates about the "trading corporations" power of the Commonwealth before returning to the observations of Mason J in *Adamson* and the comments of Mason, Murphy and Deane JJ in *State Superannuation Board v Trade Practices*

Commission[856] to the effect that "the purpose of the formation of a corporation is not irrelevant in that process" of deciding if it is a "trading corporation". His Honour then reviewed the trading activities of the Council again, saying, "are all directed, in my view, to public benefit objectives within the shire. Their scale, even in monetary terms (putting to one side the non-monetary significance of the legislative and executive activity of the shire council), are so inconsequential and incidental to the primary activity and function of the council as to deny to the council the characterisation of a "trading corporation" or a "financial corporation".

(m) His Honour concluded that applying the "activities test", it overwhelmingly pointed to the conclusion that the Council was not a "trading corporation".

(n) In concluding his reasons, Spender J said:[857] "If, contrary to my view, the Etheridge Shire Council was a trading corporation, the Commonwealth government would have the powers that I have set out above: at [21]. Such powers would annihilate any concept in the Constitution of a Federal balance, and in a very significant way, permit the Commonwealth to nullify the right of the state to govern in its local government areas." Paragraph [21], including the powers his Honour was incorporating by reference into these concluding remarks, has been quoted above.

1481. It could be said that the decision of Spender J involved a combination of looking at the locus of local government in the Constitutional and Federal framework, the nature of local government as a part of the body politic of the State of Queensland, and the activities of the particular local government as part of the determination of the activities test.

1482. The Full Bench of AIRC, in a 2009 Award Modernisation Case, cited the views of Spender J with approval.[858] The WAIRC said:

856 (1982) 150 CLR 282, 303.
857 [2008] FCA 1268, [153].
858 2009 AIRCFB 865, [145].

> [145] We should also note that there is some uncertainty as to what, as a matter of law, constitutes a trading corporation within the meaning of s 51 (xx) of the Constitution (constitutional trading corporation). In Australian Workers' Union of Employees, Queensland and Others v Etheridge Shire Council and Another Spender J undertook a comprehensive review of the High Court authorities and concluded that the local government council in that case was not a constitutional trading corporation and was therefore unable to make a collective agreement under the WR Act. We note his Honour's analysis was endorsed by the Full Court of the Federal Court in an appeal against a costs decision by Spender J in the same matter. Nevertheless, until the High Court considers the position some uncertainty will remain. We recognise that a different view may ultimately be taken by the High Court. On the current state of the authorities, however, a "typical" local council, at least, is not a constitutional trading corporation.
>
> [146] As we have noted, it has been relatively common for local government entities to establish companies for the purpose of undertaking particular activities. Depending upon the nature of the activities undertaken by such companies, they may be constitutional trading corporations and therefore within the reach of the WR Act and the FW Act and amenable to coverage under a modern award made as part of the current award modernisation process. (Footnotes omitted.)

1483. Despite the fact most local councils in Western Australia are currently operating within the Federal industrial relations system, there remains, therefore, differing opinions about the constitutional status of local government. The two main opinions are:

(a) It is unlikely that local government authorities are constitutional corporations, due to the nature of local government as a constitutionally required tier of government, that is a government body even though it may also undertake "trade".

(b) Local government authorities may be constitutional corporations, depending on the nature and extent of their trading activities.

1484. The first opinion is supported by the view of Spender J in *Etheridge Shire Council* [859] quoted above and a majority of the Full Bench in *Shire of Ravensthorpe*. This view places a significant emphasis on the particular characteristics and functions of local government. For example:

[859] *Australian Workers' Union of Employees, Queensland v Etheridge Shire Council* [2008] FCA 1268, [22]-[23] and [153].

> The Shire, as a local government body, is distinguishable from other corporations…its function is to govern a local district. This, in my opinion, stamps the character of the Shire. The activities which it engages in which do or might constitute trading, do not change this. They are incidental to what the Shire does.[860]

1485. The second opinion focuses less on the characteristics and functions of local government, and more on the activities of the particular local government employer at the particular point in time. Following this approach, if a corporation trades, and its trading activities are "substantial" or "significant", it is said to be a constitutional corporation.[861] The fact that the trading activities are conducted in the public interest or for a public purpose is, so the argument goes, not necessarily exclusive of the categorisation of the local government as a trading or financial corporation.[862] This view was favoured by Senior Commissioner Smith, in minority, in *Shire of Ravensthorpe.*[863]

1486. In *City of Albany*, Commissioner Harrison applied the "activities test" to determine whether the council was a trading corporation for the purposes of the FW Act. After examining the City's financial operations, Commissioner Harrison concluded that just over 10 per cent of its annual income was derived from trading activities, and that this was insubstantial and insufficient to warrant it being characterised as a trading corporation. Commissioner Harrison also found that the trading activities that were found to constitute trading were "peripheral and incidental to the respondent's primary activities as a local government body and that overall the respondent does not exist for or conduct activities which are of a commercial character."[864]

1487. It is relevant to note that, notwithstanding the ruling of Commissioner Harrison, the City of Albany continues to operate in the Federal industrial relations system, and it registered a new enterprise bargaining agreement with the FWC in 2016.

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860 *Shire of Ravensthorpe*, [151].

861 *Aboriginal Legal Service of Western Australia (Inc) v Lawrence [No 2]* [2008] WASCA 254, at [76].

862 Ibid, at [68(5)]. See also *Shire of Ravensthorpe* at paragraph 235, where Senior Commissioner Smith found the Commissioner at first instance "erred in law by wrongly having regard to or giving weight to the fact that most of the activities were carried out for the public benefit."

863 It is clear Senior Commissioner Smith would have been prepared to find that the Shire was a constitutional corporation, had the evidence supported this conclusion – see [231].

864 *City of Albany*, at [38].

1488. More recently, the FWC itself determined that the Shire of Yalgoo was not a constitutional corporation for the purposes of the FW Act. This decision was made despite the fact that the Shire of Yalgoo had a Federal enterprise agreement in place at the time, which was registered by the FWC.

1489. Applying the "activities test", the FWC found that the Shire of Yalgoo's trading activities were inconsequential and incidental to the primary activity and function of the Shire, so as to deny it the characterisation of a "trading corporation" or a "financial corporation".[865]

1490. In the decisions that examine the trading activity of the local government, they turn on the particular trading functions carried out by the councils; the proportion of total income that is derived from trading activities; the total amount of trading income received; as against the underlying purpose of local government to carry out services for the benefit of the community, as part of the body politic of the State.

1491. In the City of Burnside,[866] Anderson DP of the FWC had to determine whether a local government was a trading and therefore a constitutional corporation for the purpose of determining if the FWC had jurisdiction under the anti-bullying provisions of the FW Act. The City of Burnside is a local council situated in Adelaide's eastern suburbs.

1492. Anderson DP quoted, at [59], from the reasons of Steytler P in *Aboriginal Legal Service (WA) Inc v Lawrence (No 2),*[867] where his Honour said (original footnotes omitted):

> (1) A corporation may be a trading corporation even though trading is not its predominant activity: *Adamson* (239); *State Superannuation Board* (303 - 304); *Tasmanian Dam case* (156, 240, 293); *Quickenden* [49] - [51], [101]; *Hardeman* [18].
>
> (2) *However*, trading must be a substantial and not merely a peripheral activity: *Adamson* (208, 234, 239); *State Superannuation Board* (303 - 304); *Hughes v Western Australian Cricket Association Inc* [1986] FCA 357; (1986) 19 FCR 10, 20; *Fencott* (622); *Tasmanian Dam case* (156, 240, 293); *Mid Density* (584); *Hardeman* [22].

865 *Shire of Yalgoo*, at [63].
866 Cited as *Mr Martin Cooper* [2017] FWC 5974.
867 (2008) 37 WAR 450, [2008] WASCA 254; (2008) 252 ALR 136, [68].

(3) In *this* context, 'trading' is not given a narrow construction. It extends beyond buying and selling to business activities carried on with a view to earning revenue and includes trade in services: *Ku-ring-gai* (139, 159 - 160); *Adamson* (235); *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* [1982] HCA 23;(1982) 150 CLR 169, 184 - 185, 203; *Bevanere Pty Ltd v Lubidineuse* [1985] FCA 134; (1985) 7 FCR 325, 330; *Quickenden* [101].

(4) The *making* of a profit is not an essential prerequisite to trade, but it is a usual concomitant: *St George County Council* (539, 563, 569); *Ku-ring-gai* (140, 167); *Adamson* (219); E (343, 345); *Pellow* [28].

(5) The ends which a corporation seeks to serve by trading are irrelevant to its description: *St George County Council* (543, 569); *Ku-ring-gai* (160); *State Superannuation Board* (304 - 306); *E* (343). Consequently, the fact that the trading activities are conducted is the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as 'trade': *St George County Council* (543) (Barwick CJ); *Tasmanian Dam case* (156) (Mason J).

(6) Whether the trading activities of an incorporated body are sufficient to justify its categorisations as a 'trading corporation' is a question of fact and degree: *Adamson* (234) (Mason J); *State Superannuation Board* (304); *Fencott* (589); *Quickenden* [52], [101]; *Mid Density* (584).

(7) The current activities of the corporation, while an important criterion for determining its characterisation, are not the only criterion. Regard must also be had to the intended purpose of the corporation, although a corporation that carries on trading activities can be found to be a trading corporation even if it was not originally established to trade: *State Superannuation Board* (294 - 295, 304 - 305); *Fencott* (588 - 589, 602, 611, 622 - 624); *Hughes* (20); *Quickenden* [101]; E (344); *Hardeman* [18].

(8) The commercial nature of an activity is an element in deciding whether the activity is in trade or trading: *Adamson* (209, 211); *Ku-ring-gai* (139, 142, 160, 167); *Bevanere* (330); *Hughes* (19 - 20); *E* (343); *Fowler*; *Hardeman*[26].

1493. Anderson DP referred to the principal role of a council under the *Local Government Act 1999* (SA), and then said:

[64] It is evident from section 6 and the overall scheme of the *Local Government Act 1999 (SA)* that a council is established for purposes associated with the provision of local representative decision-making and local community services. Trading in goods or services is not a purpose for which council exists. The purpose test is not met. The City of Burnside is not established for purposes that would enable it to be characterised, at law, as a trading corporation.

1494. Anderson DP then considered the activities of the council, within the statutory framework of the *Local Government Act* (SA). His Honour said:

[68] I conclude from these provisions that the City of Burnside is vested with power to undertake activities which have trading characteristics. The question which arises is whether, as a matter of fact, such activities are conducted and if so, to a degree sufficient for the council to be characterised as a "trading corporation".

1495. The sources and amounts of revenue raised by the council were then examined. Anderson DP then concluded on the issue as follows:

> [86] There is no doubt that trading activities are not a predominant activity of the City of Burnside; but that need not be so for it to be classed as a trading corporation. Further, the City of Burnside does not return a profit of any significance from its trading activities but again that need not be so for it to be a trading corporation. The test is whether the trading activities are substantial rather than peripheral.
>
> [87] Ultimately this is a question of fact and degree. There is no bright line that delineates the character of the City of Burnside, other than the bright line that safely characterises it as a local government authority providing services overwhelmingly funded by mandated rate revenue. I take into account that revenues from trading activities undertaken in its own name are only 5.66% of total revenue and that when activities of regional subsidiaries are included it is, at best, 7.1% of total revenue. I also take into account the overall character of the entity. As a local government body its activities primarily concern community services and local representation rather than trade in goods or services. In that sense, its trading activities are incidental and supplementary to its purposes as well as its operations. Although that is not decisive, it places the revenue received from trading activities into a context which is non-commercial. In terms of quantum the contribution to revenue from those activities are small. I also take into account Exhibit E9 and the evidence of Mr Spearman on E9 that the level of contribution to revenues in 2016 from the categories I have identified as trading activities is not dissimilar to 2015 and is not projected to materially increase over the ten years of the Long Term Financial Plan. Hence the current percentages are not an aberration.
>
> [88] Having regard to these considerations, I conclude that the trading activities of the City of Burnside, at least as currently undertaken, are peripheral. They are neither substantial nor sufficiently significant for the local council to be reasonably characterised as a trading corporation within the meaning of section 51 (xx) of the Australian Constitution.

1496. The Review notes this analysis of the most recent consideration by the FWC of the issue with respect to a local government in South Australia.[868] It might be said that although the FWC looked at all aspects of the activities of the council, it did so through the prism of the test of Steytler P in the *Aboriginal Legal Service* case, which could be said to not purport to set down a test that was applicable to a local government, but to non governmental corporations. Be that as it may, the council was found not to be a constitutional corporation; setting off another warning bell to councils in Western Australia that act as though, or assume, that they are.

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[868] Interestingly, the City of Burnside has been declared not to be a national system employer for the purposes of the FW Act: https://www.legislation.gov.au/Details/F2009L04697. The Review supposes however it could still have theoretically been a "constitutionally-covered business" for the purposes of the FW Act's anti-bullying provisions.

1497. Without High Court, or even IAC authority on the issue, it is likely that there will be continuing uncertainty as to the constitutional status of local government employers in Western Australia.

9.6 Submissions to the Review

1498. Of the people and organisations that made submissions to the Review, 17 made submissions specifically about this Term of Reference, although some of those submissions were confidential.

1499. Of those 17 sets of submissions, nine were strongly in favour of the State Government legislating, so far as is possible, to ensure local governments and their employees are covered by the State industrial relations system. Within this group there were five unions who all favoured coverage by the State industrial relations system.

1500. Two local governments made submissions. One was within the metropolitan area, the other was a country local government. They were divided on the issue of whether there should be State or Federal coverage. The Shire of Wiluna submitted it was time to end the confusion that continues to prevail in the Western Australian local government sector by enacting legislation to bring all local governments within the State industrial relations system. It was submitted this would be an appropriate exercise of the State's powers because local governments are creatures of the State and the State has the power to create rights and privileges and impose obligations on local governments.

1501. The metropolitan local government, that wished its submissions to remain confidential, was staunchly of the view that local government should not be regulated by the State industrial relations system. It submitted the present jurisdictional uncertainty could be more effectively addressed in other ways. It was submitted that being regulated by the State industrial relations system would not assist the local government to continue its transformation towards being a flexible, innovative and responsive organisation. It was submitted that the referral of the industrial relations powers of the State government to the Commonwealth would be

a more sensible and logical approach to addressing jurisdictional uncertainty. The local government also illustrated its submission by pointing out some difficulties it had when matters were heard by the WAIRC.

1502. The Liberal Democrats Western Australia political party provided a submission that local government bodies should be regulated at a State level if they could be.

1503. Solicitors Ms Agnes McKay and Mr Ray Andretich, in their separate submissions both favoured the same system being able to cover all local government industrial matters. Ms McKay put the argument that this would save the costs that parties currently spend on jurisdictional hearings to determine whether the WAIRC or the FWC has authority to deal with a particular matter.

1504. Of the unions, the one with most coverage over local government workers is the Western Australian Municipal, Administrative, Clerical and Services Union of Employees (WASU). It rejected any suggestions the State government should refer its residual powers regarding industrial relations either generally or specific to local government, to the Commonwealth. It recommended urgent steps be taken to remove the current jurisdictional ambiguity.

1505. The main peak body for local governments, the Western Australian Local Government Association (WALGA), provided a lengthy submission setting out its position. Its recommendation was that legislation not be imposed prescribing local government to be exclusively regulated by the State industrial relations system. WALGA submitted that of the 148 local government employers in Western Australia, 131 currently operated under the Federal industrial relations system including the two Federal territories of the Shire of Christmas Island and the Shire of Cocos (Keeling) Island. Only 17 local governments were currently governed by the State system. The submission said the terms and conditions of approximately 96 per cent of local government employees were supported by the Federal industrial relations system. The WALGA submission noted the present jurisdictional uncertainty and said, whilst WALGA members would welcome jurisdictional certainty, the current Review does not allow for sufficient exploration of the available options to resolve

this dilemma; and it is restricted to a single proposed solution, being industry-wide State regulation. The latter aspect of the submission is noted and accepted.

1506. WALGA recommended the State government broaden the scope of the Review to enable consultation with the local government sector about how industrial relations jurisdictional certainty is best achieved. The WALGA submission discussed the position under the Western Australian Constitution and submitted that the Constitution did not require local government to be covered by the State industrial relations system. The Review also notes and accepts this proposition.

1507. WALGA then submitted that some aspects of the FW Act will continue to apply to local government even if local government was generally subject to State regulation. Particular reference was made to unpaid parental leave, notice of termination (to the extent that any State entitlements would be less beneficial), and lawful termination of employment. It was submitted that this meant, even if local governments were covered by the State, there would continue to be some dual coverage between the two systems. This is also accepted but, as later set out, the same applies if there was any move towards maximising Federal coverage.

1508. The WALGA submission also canvassed aspects of the application of the State industrial relations system to the public sector, and noted local government, although created by State legislation, was a separate sphere of government and not all public sector requirements could or should be applied to both sectors. Therefore, so it was submitted, it was not necessary for both sectors to be covered by the State system.

1509. The WALGA submission then referred to the scope of the State industrial relations system. It submitted it had not been adequately reviewed or amended in recent years so that there was "an antiquated system" that does not address the contemporary landscape of employment and industrial relations that Australian workplaces operate within. It was submitted the State industrial relations system could benefit from modernisation to improve accessibility and efficiencies. Some aspects of the suggested modernisation were then set out.

1510. The WALGA submission also went on to discuss the operational implications of State system regulation of local government. It was submitted that a move to the State industrial relations system may have a significant impact upon the sustainability of services provided by local government. The assertion is significant and noted. This point is somewhat countered however as the Review understands that the majority of the local governments who are in the State system currently would have transferred back to the State system at the end of the Work Choices transitional period. The submission recommended the State Government consult with WALGA about the financial and service delivery implications of State industrial relations regulation before any decision was made.

1511. The WALGA submission then referred to transitional considerations, if the State were to determine that local government employers and employees should be regulated by the State industrial relations system including consideration of the destabilisation of the local government workforce, employment conditions, award modernisation and resourcing of the WAIRC to provide for a modern award. Reference was also made to issues relating to enterprise agreements, industrial claims, government support for the role of a changing local government and timeframe issues. Overall it was recommended the State Government in consultation with WALGA and other stakeholders develop a robust set of transitional provisions and project timelines to transition to the State industrial regulations. The submission concluded with a request for further consultation with the Review as it progresses.

1512. The Review considers the WALGA submission deserving of very serious consideration.

1513. However, even if the State were to follow what WALGA contended for and refer power to the Commonwealth, there would remain a duality of systems. This is because some areas of industrial regulation are not fully covered by the FW Act, including occupational health and safety, long service leave, equal opportunity issues and denial of contractual benefits claims.

1514. The CCI noted in its submission that the coverage of employment of local governments in all States is a hybrid of Federal award regulation, through the *Local Government Industry Award 2010* (a Federal modern award) and State awards and jurisdictions. It was submitted that because some local governments were trading corporations and some were not, it was not possible for the State industrial relations system to capture blanket coverage of local government in Western Australia.

1515. As to that submission, the Review has cause to question it. The issue of whether local governments are or are not trading corporations has not been considered by the High Court and unless and until that occurs it is not something upon which there can be a definitive answer. There are cases which suggest that local governments are not trading corporations, irrespective of their trading activities and therefore the State system may already have more coverage of local government employees than the submission anticipates. Also, the State can legislate to attempt to deal with the issue, as is later set out.

1516. Overall CCI submitted that any regulation of local government employment under a modernised State system should be harmonised with employment regulation under the applicable FW Act modern award. It was submitted there should be objects and directions to the WAIRC, or any successor, in this area which should prioritise harmonisation and consistency to the extent possible, and only allow departures from national standards where specifically merited.

1517. The ELC was neutral on the policy position of whether local government should or should not be regulated by the State industrial relations system. It noted however that the dual system of employment laws that exist in Western Australia can be very difficult for local government employers and employees because of the lack of certainty.

1518. A submission from the Law Society of Western Australia was to the effect that due to the uncertainty, local governments in effect make an educated guess as to whether they are covered by the State or Federal system and act accordingly. The shortcomings of such a "system" are obvious.

1519. There were also many submissions received by the Review that discussed the legal issues associated with this Term of Reference. The Department of Local Government, Sport and Cultural Industries (DLGSCI) provided a summary of relevant case law and legal issues. It noted the contrasting decisions and inconsistencies can be costly for local governments, as they "have to" spend money challenging jurisdiction before the substance of a matter is heard. The DLGSCI noted that in other jurisdictions there has been clarification of the status of local government by either referring industrial relations powers to the Commonwealth or legislating to bring local government within their respective State industrial relations systems, with Commonwealth endorsement. These matters are later discussed.

1520. The Western Australian Municipal Road Boards, Parks and Racecourse Employees Union of Workers, Perth, submitted that given the purpose for which local governments are established under the LG Act, they do not meet and cannot be characterised as being trading or financial corporations. It also noted the significant jurisdictional uncertainty at the present time. The submission referred to the recent decision of the FWC in the City of Burnside whereby a medium sized council in South Australia was determined not to be a constitutional corporation. It was also noted that the FWC does not "fact check" whether an organisation is a constitutional organisation before registering an enterprise agreement. Therefore, the fact that there is an agreement covering a particular local government provides no certainty as to whether it is or is not a trading corporation, as a matter of law. The submission also noted that a council's "trading activity" can fluctuate from year to year which, if the activities test of whether a company is a trading corporation prevails, a local government would either be or not be of that status, from year to year. The unacceptability of that approach is apparent to the Review.

1521. In its submission the WASU also referred to the *Local Government Industry Award 2010* as providing inferior employment conditions to the comparable State award and those that apply as industrial instruments under the laws of other States not covered by the Federal system. It submitted there was a bare minimum standard of wages and conditions for employees in local government under the Federal award.

1522. The WASU also set out difficulties it has had in engaging with the Federal system over enterprise agreement negotiations involving the City of Albany, the City of Wanneroo and the Shire of Mundaring. It also submitted the Federal industrial system had provided uncertainty when changes occur to a local government; in particular during an amalgamation or boundary change. It was submitted the difficulty was created by the Federal transmission of business principles.

1523. The WASU referred to the Shire of Ravensthorpe decision and said it added weight to the case for "excising" local government in Western Australia from the Federal system.

1524. One of the confidential submissions provided a lengthy and helpful submission about jurisdictional issues. The point was reiterated that even having a Federal enterprise agreement registered by the FWC was no guarantee that a local government is a constitutional corporation as the FWC does not test the jurisdictional status of employers when registering agreements. The submission canvassed a number of authorities in support of the proposition that whether a particular local council is a trading corporation or not, has occupied a considerable amount of time of the WAIRC and the parties to those decisions. This theme was reiterated in another confidential submission.

1525. The Shire of Wiluna in its submission also summarised the relevant case law and noted the varying policy positions taken, over time, by WALGA on whether local governments were or were not constitutional corporations. In particular, the Shire said that in December 2016, following the FWC decision in *Boyd v Shire of Yalgoo*, WALGA changed to a policy position of providing information and advice for local governments to make their own assessments of the appropriate jurisdiction within which to operate. It also noted that although the WALGA website information page said that over 85 per cent of Western Australian local governments identified as being constitutional corporations, that was not the same thing as actually being a constitutional corporation. As the Shire of Wiluna submitted, that is not a matter of choice but one of constitutional law.

1526. The submission of Ms McKay also pointed to the question of jurisdictional uncertainty, citing the decision involving the City of Albany. Ms McKay submitted the case confirms that a local government of any significant size with several trading activities and genuinely believing itself to be a trading corporation is no guarantee that the WAIRC will find it to be a trading corporation.

9.7 Access to the WAIRC for Local Government Employees

1527. Presently, under s 80C of the IR Act, the industrial matters of "government officers" are dealt with by the PSA.

1528. As set out in chapter 3, the term "government officer" is defined to include a range of salaried government employees, including public service officers, employees of the Governor's Establishment, employees working for the State Parliament, electorate officers, and other persons employed on the salaried staff of a public authority. The term "public authority" is however defined in s 7 of the IR Act to exclude a "local government, regional local government or regional subsidiary".

1529. As a local government is not a "public authority" for the purposes of the IR Act and local government employees do not fall within any other category of worker prescribed as "government officers", all local government employees (whether salaried or otherwise) can have access to the general jurisdiction of the WAIRC, if they are employed by a non-constitutional corporation. That of course is the critical jurisdictional issue.

9.8 Mobility between State and Local Government Employment

1530. A review of the LG Act is currently being conducted, and one of the issues being examined is the portability of entitlements and the ability of employees to transfer between State and local government.

1531. A discussion paper accompanying the Review of the LG Act notes that local government employees are defined in Western Australian legislation as "public officers" but have a unique status that complicates recognition of service and the

ability of employees to transfer between State and local government.[869] These complications can make movement between State and local government less appealing for employees, and limit the opportunity for transfers and secondments that currently give greater flexibility within State government agencies.

1532. The discussion paper suggests that removing some of the barriers that restrict movement between State and local government (in particular the portability of entitlements) has the potential to greatly increase the skills and capacity of both sectors. Stakeholders have been invited to provide public comment on this issue. In the opinion of the Review, employee portability is something that is relevant to the issues to be considered in this Term of Reference.

9.9 Options for Moving all Local Government into the State jurisdiction

1533. All other States in Australia have provided certainty for the industrial regulation of local government authorities by one of two methods:

(a) Referring powers to the Commonwealth so as to place all local government employers and employees into the Federal system. This has occurred in Victoria and Tasmania.

(b) Enacting State-based legislation to declare a local government body not to be a national system employer, which has been endorsed by the Federal Minister. This has occurred in New South Wales, Queensland and South Australia, where local governments operate in their respective State jurisdictions.[870]

1534. The Review is of the preliminary opinion that the State Government ought to also now make a decision and end the uncertainty of the issue.

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869 Department of Local Government, Sport and Cultural Industries, *Local Government Act 1995 Review * Agile * Smart * Inclusive – Local governments for the future, Phase 1: Consultation Paper*, 8 November 2017, pp.78-79.

870 *Fair Work (State Declarations – employers not to be national system employers) Endorsement 2009* (which covers local government in New South Wales, South Australia and the Brisbane City Council in Queensland). It is noted that the 2009 Endorsement was made as part of a package, in which the States referred their private sector industrial relations powers to the Commonwealth. That is not presently under contemplation in Western Australia. Whether that would mean the Commonwealth would be less likely to make such an endorsement in relation to Western Australian local government authorities is unknown by the Review at this point in time. A further endorsement was made for the remainder of Queensland local government authorities in 2012, the *Fair Work (State Declarations – employer not to be national system employer) Endorsement 2012 (No. 3)*.

1535. The Review considers there are two main options available if the State wants to try to bring all local government employers and employees within the State industrial relations system. These are:

(a) Legislating to exempt local governments and their employees from the FW Act, and then seeking endorsement of that from the Commonwealth. This is permitted under the FW Act.

(b) Enacting legislation to remove the corporate status of Western Australian local government authorities.

1536. Any proposals regarding jurisdictional arrangements for Western Australian local government would also need to consider the unique position of the Shire of Christmas Island and the Shire of Cocos (Keeling) Islands. While these jurisdictions are governed by State legislation (including the LG Act) they are defined as "territories" for the purposes of the FW Act, meaning all employees, including local government employees, are subject to the Federal industrial relations system.[871]

9.9(a) Seek an Exemption from the Fair Work Act

1537. Section 14 of the FW Act provides a mechanism to declare, under a State or Territory law, that a body established for a local government purpose is not a national system employer.[872] To come into effect such a law and declaration needs to be endorsed by the Federal Minister.[873] The Federal Minister has discretion as to whether to make such an endorsement[874] and an endorsement is a legislative instrument.[875]

1538. The FW Act also contains provisions that could be used to exempt the Shires of Christmas and Cocos (Keeling) Islands from the Federal industrial relations system.[876] The Commonwealth could enact Regulations to exclude these local government authorities from the FW Act. Whether it could be persuaded to do so, for external

871 FW Act s 14 (1).
872 FW Act s 14 (2).
873 FW Act s 14 (2)(c).
874 FW Act s 14 (4).
875 FW Act. S 14 (5).
876 Section 32 of the FW Act provides that the Regulations may modify the application of that Act in relation to all or part of the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands.

territories that have long been subject to the Federal industrial relations jurisdiction, is another matter.

9.9(b) Removing the Corporate Status of Local Governments

1539. The second option to bring local government authorities within the State jurisdiction is for the State to legislate to remove the corporate status of local government authorities under the LG Act.

1540. This option would require careful consideration of the legal ramifications. As a body corporate, local government authorities have perpetual succession and are able to enter into contracts and sue and be sued. It may be legislatively difficult to remove the corporate status of local government, while at the same time preserving their legal powers, protections and obligations.

1541. In response to Work Choices, both New South Wales and Queensland legislated in 2008 to remove the corporate status of local government authorities, in order to ensure local government employees were subject to their respective State industrial relations jurisdictions.

1542. In New South Wales, legislation was passed to specifically change the status of local government authorities from "bodies corporate" to "bodies politic". The *Local Government Act 1993* (NSW) was also amended to clarify that, despite not being a body corporate, a local council retained the powers of a corporation, including perpetual succession and legal capacity.[877]

1543. In Queensland, the legislation to remove the corporate status of local government authorities clarified that nothing affected a local government's assets or rights and liabilities, and that local government officers retained protection from personal liability in the performance of their official functions and powers.[878]

1544. Following the commencement of the FW Act in 2009, the New South Wales Government negotiated an exemption for local government employers and

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877 See the *Local Government Amendment (Legal Status) Act 2008* (NSW).

878 See the *Local Government and Industrial Relations Amendment Act 2008* (Qld).

employees from the Federal industrial relations system, as part of its negotiations with the Federal Government to refer private sector industrial relations powers to the Commonwealth. The Queensland Government negotiated an exemption for the Brisbane City Council, which had not been de-corporatised unlike other Queensland local government authorities at that time.

1545. In 2012, the Queensland Government legislated to reinstate the corporate status of local government, amidst concerns about the personal liability of individual councillors and taxation issues associated with the removal of corporate status.[879] As Queensland had by then negotiated for local government to be exempt from the FW Act using the mechanism in s 14 of the FW Act, there was also no compelling rationale for local governments not to have corporate status.

1546. Despite New South Wales also negotiating for local government to be exempt from the FW Act, the New South Wales Government has not legislated to reinstate the corporate status of local government in that State.

1547. Of note however, in *Queensland Rail*[880] the High Court cast doubt as to whether removing the corporate status of local government would succeed in bringing all local government authorities within the State jurisdiction. The High Court was required to determine whether the Queensland Rail Transit Authority (QRTA) was a constitutional corporation and therefore covered by the FW Act.

1548. The QRTA was established under the *Queensland Rail Transit Authority Act 2013* (Qld), which specifically stated that the QRTA was not a body corporate, so as to bring it under the Queensland industrial relations system. Under the legislation, the QRTA could create and be made subject to legal rights and duties, could sue and be sued in its name, and it could own property.

1549. The High Court decided however that the QRTA was a constitutional corporation. In reaching this decision, the Court noted that:

879 See the *Local Government and Other Legislation Amendment Act 2012* (Qld).

880 *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union v Queensland Rail* [2015] HCA 11.

(a) The "labelling" of an artificially created legal entity by Parliament provides no satisfactory criterion for determining the content of Federal legislative power (in this case the corporations power of the *Constitution*). A State Parliament cannot determine the limits of Federal legislative power.

(b) The QRTA had the "full character of a corporation". It could own, possess and deal with real or personal property and had perpetual succession.[881]

1550. The Court also decided the QRTA was not part of the "body politic which is the State of Queensland". Had the QRTA been considered part of the "body politic", the Court may have reached a different conclusion.[882]

1551. If the State Government legislated to remove the corporate status of local government authorities, the effectiveness of this strategy could well depend on whether local governments could be properly characterised as "bodies politic".

1552. Given the High Court decision in *Queensland Rail*, there are doubts as to whether the Western Australian Government could unilaterally bring all local government authorities within the State industrial relations jurisdiction by legislating to remove their corporate status.

1553. Concerns that arose in Queensland regarding the personal liability of individual councillors and taxation issues associated with the removal of corporate status would also need to be addressed in Western Australia if this approach was to be adopted.

9.10 Methods to Transfer Employee Entitlements Between Jurisdictions

1554. As set out earlier, and in particular in the WALGA submission, a move to bring all local government employers and employees within the State jurisdiction would involve significant change for many local councils, given that the majority of them are currently operating in the Federal system and have done so for a number of years.

881 Ibid, [23].
882 Ibid, [38].

1555. In the event the Western Australian Government was able to declare local government authorities not to be national system employers and obtain an endorsement from the Federal Minister, it would be necessary to legislate transitional arrangements for local government authorities returning to the State system.

1556. The details of any such transitional arrangements would require careful consideration and could be broadly based on the transitional arrangements that were implemented in New South Wales, South Australia and Queensland. In summary, the transitional arrangements would need to ensure continuity in the terms and conditions of employment of local government employers and employees moving to the State system for an appropriate period of time.

1557. Similar to what occurred in the other jurisdictions, the transitional arrangements could:

(a) Deem Federal industrial instruments to be equivalent State instruments for a specified period of time.

(b) Enable the WAIRC to vary or revoke any term of a deemed State instrument if it was "fair and reasonable to do so in the circumstances".

(c) Provide capacity for a deemed State instrument to be rescinded or terminated earlier.

(d) Clarify the application of State minimum conditions of employment to deemed State instruments.

(e) Recognise the State counterpart of any federally registered organisation that is a party to, or named in, the deemed State instrument.

9.11 The Interim Position of the Review

1558. As set out in chapter 1, one of the benefits of publishing an Interim Report is to put forward possible or proposed recommendations and receive additional submissions about them. Within this Term of Reference, the Review thinks that process may be

of particular significance. This is because, despite the significant submission of the WALGA, the Review presently tends towards recommending the State make the efforts set out above to legislate for local governments not to be covered by the FW Act and therefore be covered by the State system. The Review considers the best way to achieve this would be for the legislative method specified in s 14 of the FW Act, together with the deeming of Federal instruments to be State instruments as also set out above.

1559. This is reflected in the draft proposed recommendations. The draft proposed recommendations also include the creation of a taskforce to assist with some of the difficulties that will inevitably occur in the transition process.

1560. In arriving at this interim position the Review notes that WALGA and its union counterparts have a contrary position. The Review has noted and places weight upon the WALGA submission but in the end considers it would be preferable to try and end the jurisdictional uncertainty by bringing all local governments within the State system to the extent possible. This can be achieved if the legislation referred to earlier is enacted, and receives Federal Ministerial endorsement. Whether the Commonwealth would do so cannot be predicted. It is noted that a Federal Labor government so cooperated in the instances of New South Wales, South Australia and Queensland; albeit that was part of a package that saw the transfer of the legislative powers of the State over private sector employees being referred to the Federal system. That is, as set out earlier, not on the agenda for the present State government; in the same way as it was not for its governmental predecessor.

1561. The Review places some weight on the submission of the WASU that there have been difficulties in dealing with the Federal system in registering enterprise agreements and that the Federal modern local government award does not contain any terms and conditions that are particularly advantageous to Western Australian employees. On the other hand the Review does not discard the submissions made by others that show some insight into difficulties in dealing with the State system over local government matters.

1562. It is noted that 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, and that the IMC may enforce Federal as well as State based awards and industrial instruments.

1563. The Review also takes into consideration that local government is part of the Western Australian system of government. The Constitution contains a duty for the State to provide for local government, which it has carried into effect. Local government forms part of the body politic of Western Australia. Accordingly, if there is to be a State industrial relations system it seems appropriate that local government be part of that.

1564. The Review notes that the majority of local governments are currently operating within the Federal system. That however is based upon a particularly shaky premise; that the local governments are constitutional corporations. There is, in the absence of High Court authority, no certainty that they are. The Review considers there is strength in the collective views propounded by Mr Bennett in his High Court submission in the Work Choices case, in the reasons of Spender J in *Etheridge Shire Council*, the reasoning of the FWC in the *Award Modernisation Case* decision and the majority in the *Shire of Ravensthorpe*, to the collective effect that they are not constitutional corporations. In the interim position of the Review, that strongly supports the view the State should attempt to provide jurisdictional certainty, by way of a recommendation that local governments and their employees be regulated by the State system.

1565. The Review welcomes, however, further submissions about the proposed recommendation, and whether it ought to be made as part of the final report of the Review and, if so, whether there ought to be any amendment to what is currently contained in the proposed recommendation about the efforts to be made to try and make any transitions as smooth as can be.

9.12 Proposed Recommendations

1566. The Review of the State Industrial Relations System proposes the following recommendations in relation to Term of Reference 8:

Proposed Recommendations

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.