Government of **Western Australia**
Department of **Mines, Industry Regulation and Safety**

Regulatory Impact Statement

Proposed State industrial relations reforms relating to equal remuneration and definition of employee

October 2021

Contents

CONTEXT

This document has been prepared by the Department of Mines, Industry Regulation and Safety (DMIRS) to assess the potential impacts of proposed State industrial relations reforms relating to equal remuneration and definition of employee. It explores the likely impact of the changes on specific groups, consultation undertaken with stakeholders and possible costs and benefits of the proposed reforms.

The State Industrial Relations System

There are two industrial relations systems operating in Western Australia - the State industrial relations system and the national industrial relations system. Which system applies to a particular business or organisation and its employees depends on the type of business arrangement under which the employer operates.

Generally, the State system includes:

- businesses (and their employees) that are:
    - sole traders;
    - unincorporated partnerships;
    - unincorporated trust arrangements;
- incorporated associations (and their employees) that are not trading or financial corporations and other not-for-profit organisations that are not trading or financial corporations; and
- Western Australian public sector employees.

The national system covers Western Australian businesses that are constitutional corporations. This includes:

- proprietary limited businesses that are trading or financial corporations; and
- incorporated associations that are trading or financial corporations and other not-for-profit organisations that are trading or financial corporations.

In other State jurisdictions, all private sector employees are covered by the national industrial relations system as all State Governments, except for Western Australia, have referred their remaining industrial relations powers for the private sector to the Commonwealth.

It is difficult to determine exactly how many employees in Western Australia are covered under the State and national industrial relations systems as comprehensive data is unavailable. However, the State system is estimated to potentially cover between 21.7 per cent and 36.2 per cent of employees in Western Australia.

Ministerial Review of the State Industrial Relations System

Prior to its election, the McGowan Government made a commitment to review the State industrial relations system. On 22 September 2017 the Hon. Bill Johnston MLA, then Minister for Commerce and Industrial Relations (the Minister) announced, on behalf of the State Government, a Ministerial Review of the State Industrial Relations System (the Review). The Minister established eight terms of reference which directed the Review to examine particular aspects of the State industrial relations system and to identify means of achieving specified objectives.[1]

The terms of reference which relate to the proposals discussed in this document were as follows:

> 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.

Mr Mark Ritter SC was appointed to undertake the Review, assisted by Mr Stephen Price MLA. The Review was supported by a Secretariat drawn from employees within DMIRS.

The Review involved an extensive consultation process with industrial relations and industry stakeholders. After announcing the Review, the Minister wrote to stakeholders to advise them of the Review and the opportunity to make submissions. Advertisements setting out the terms of reference and inviting written submissions were published in *The West Australian* and *The Australian* on 30 September 2017. The Review also sent 215 letters seeking submissions to parties including employer associations, industrial agents, law firms, not-for-profit organisations, public sector departments and unions.

A number of stakeholders were invited to meet with the Review to discuss the terms of reference and possible submissions. Thirteen such meetings were held between 13 November and 20 December 2017. The Review also corresponded and met with the Chief Commissioner, Senior Commissioner and Registrar of the Western Australian Industrial Relations Commission, and held private meetings with people who have knowledge of, or past or present involvement with, the State industrial relations system.

The Review received 65 initial written submissions from bodies, institutions and individuals.

On 20 March 2018 the Review published an Interim Report to inform the Government, stakeholders and the public of the progress made by the Review and to seek further input on the issues that had emerged from a consideration of the terms of reference, stakeholder meetings, and submissions received by the Review. The Interim Report included a comprehensive analysis of each term of reference and a series of proposed recommendations.

Following publication of the Interim Report, the Review invited interested stakeholders, organisations and individuals to provide submissions in response to the Interim Report and its proposed recommendations. The Review wrote to various stakeholders, including each of the parties which had provided written submissions, to advise them of the publication of the Interim Report and the

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[1] The Terms of Reference are available on the Review's website at: www.dmirs.wa.gov.au/ir-ministerial-review

opportunity to make further submissions. The Review offered to hold further meetings with a number of stakeholders, and 11 such meetings were held between 3 April and 23 April 2018.

The Review received a further 49 written submissions in response to the Interim Report, and 8 submissions in reply to other stakeholder submissions that had been provided and made public on the Review's website.

All public materials relating to the Review, including the complete terms of reference, the Interim Report, and all public submissions have been published on the Review's website at: www.dmirs.wa.gov.au/ir-ministerial-review

The Review considered and analysed the submissions and other information provided in response to the Interim Report before completing a Final Report and making recommendations for reform. The Final Report was completed and provided to Government in June 2018.

As outlined above, extensive consultation with the public and key stakeholders was undertaken throughout the Review process. The two proposals for reform analysed in this Regulatory Impact Statement arise from recommendations of the Review, and the full range of views expressed to the Review are outlined in the 'consultation' sections for each proposal considered in subsequent sections of this document.

PART A: PROPOSED CHANGES TO EMPLOYEE DEFINITIONS

This part examines proposed changes to the definitions of 'employee' in two key Western Australian statutes, including identifying the problems with the current definitions and drivers for reform, outlining changes that are proposed, and identifying potential strategies to assist with implementation of the proposed reforms.

Issue Statement - the problem

There are many competing philosophies as to the appropriate role of the State in regulating labour relations.[2] While debate is ongoing, government regulation of minimum employment conditions in Australia reflects an acceptance that certain aspects of the employment relationship should not be determined by market forces alone.

Acceptance of the need for some government regulation of the employment relationship is largely based on recognition of a fundamental inequality of bargaining power between employers and individual workers. This inequality derives from the greater resources and bargaining skills typically possessed by employers and the limitations that employees may face in finding desirable alternative job opportunities, which are heightened in circumstances in which workers possess fewer specialised skills.[3]

In the absence of government regulation, the social costs of unequal bargaining power in the workplace can be high, particularly for more vulnerable workers who are less able to negotiate adequate rates of pay and reasonable working conditions. Inadequate regulation can lead to negative externalities including poverty, exploitation and industrial conflict.

In the Western Australian State industrial relations system, statutory employment rights and protections are primarily derived from two acts: the *Industrial Relations Act 1979* (IR Act) and the *Minimum Conditions of Employment Act 1993* (MCE Act). In combination, these two statutes provide a safety net for employees and give access to standard employment entitlements such as minimum rates of pay, sick leave and protection from unfair dismissal.

However, there are some employees in Western Australia who are not afforded access to these protections. In order for a worker's employment to be regulated by one or both of these instruments, they must be covered by the definition of 'employee' set out in the legislation. At present, certain types of workers are excluded from coverage under these definitions.

The definition of 'employee' in the IR Act specifically excludes persons engaged in domestic service in private homes (henceforth referred to as 'domestic workers'), unless there are more than six paying boarders or lodgers residing in the premises, or the worker is engaged by someone other than the owner or occupier of the home.[4] The MCE Act defines 'employee' to mean a person who is an employee within the meaning of the IR Act, and so also excludes domestic workers.

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2 Creighton & Stewart's Labour Law, 5th ed, A Stewart, A Forsyth, M Irving, R Johnstone and S McCrystal, The Federation Press, 2016, pp.5-10.

3 Ibid, pp.5-6.

4 See section 7(1)(e)-(f) of the IR Act.

In addition to domestic workers, the MCE Act excludes several other categories of worker from its definition of 'employee', specifically:

- persons paid wholly by commission or percentage reward;
- persons whose services are remunerated wholly at piece rates;
- persons with disabilities in supported employment;
- volunteers; and
- persons appointed to carry out the duties of wardens of National Trust (WA) properties.[5]

Workers in the categories outlined above are thus excluded from coverage under one or both of WA's key industrial relations statutes, with the effect that they have few enforceable employment rights or protections.

The specific effects of these exclusions are set out in detail by category in subsequent sections of this report. However, it is worth highlighting here that several of the excluded groups are known to be particularly vulnerable to exploitation. Piece workers, for example, are often employed in the agricultural industries, which have been the subject of a number of recent reports highlighting poor treatment of workers, particularly those who are in Australia on temporary visas.[6]

The invisibility of work performed in the home makes domestic workers another particularly vulnerable group.[7] As with piece workers, this group is also at higher risk due to its demographic characteristics, with a large proportion known to be from migrant or culturally and linguistically diverse (CALD) backgrounds.[8] Such workers may have limited bargaining power and may find it difficult to negotiate decent wages and conditions in the absence of a supportive regulatory framework.

Given the apparent risks of excluding certain workers from coverage under industrial relations legislation, the question arises as to why these exclusions were included in the legislation in the first place, and why they have remained for so long. The answer lies in changing social mores and a form of 'regulatory drift', in which regulation considered appropriate when adopted ceases to be so over time.

Some of the exclusions were carved out for historical reasons which are no longer considered acceptable in contemporary society. For example, the exclusion of domestic workers from coverage under the IR Act appears to have been based on a particular view about the value of work which was typically done by women.[9] Societal norms have moved on and governments increasingly seek methods to reduce gender-based discrimination rather than to perpetuate it.

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5 Section 3(1) of the MCE Act, and Schedule 1 of the *Minimum Conditions of Employment Regulations 1993.*

6 For example, Senate Education and Employment References Committee, 'A National Disgrace: The Exploitation of Temporary Work Visa Holders, March 2016'; Fair Work Ombudsman, 'A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven', April 2016 and 'A Report on the Fair Work Ombudsman's Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales', June 2015.

7 Macdonald, R and Charlesworth, S. 2016 'Cash for care under the NDIS: Shaping care workers' working conditions?' *Journal of Industrial Relations*, Vol. 58(5) 627–646.

8 International Trade Union Confederation, www.ituc-csi.org/domestic-workers-601.

9 See Review Interim Report pp.288-293; and also 'Theorising the 'gig' economy in home-based service work, Dr Frances Flanagan and Ms Miriam Thompson, paper delivered at the Association of Industrial Relations Academics in Australia and New Zealand Conference, 7 February 2018, University of Adelaide.

Other categories appear to have been excluded for reasons of administrative convenience and the perceived difficulties of reconciling performance-based payment structures with statutory minimum conditions. The Minister responsible for introducing the MCE Act in 1993 told the Parliament at the time that while it was originally intended that the legislation would cover workers on piece rates and commission, "It was difficult. In some areas it simply would not mesh."[10] While it is true that some employers may face challenges in this respect, it is no longer clear that these administrative difficulties constitute adequate justification for the wholesale exclusion of entire categories of workers from the minimum safety net.

Similarly, while it is generally accepted that there should be scope to pay wages below the minimum to persons with a disability who are working in supported employment arrangements, there is no longer any apparent reason that such workers should not be entitled to the other minimum conditions such as sick leave or paid time off on a public holiday.

The lack of access to minimum employment standards in the State industrial relations system for excluded workers might now be seen as a regulatory failure, particularly given the known vulnerabilities of some of the excluded groups, and the costs of this regulatory failure are potentially significant for both the affected workers and society as a whole.

In response to widespread concerns around systemic and deliberate exploitation, there is a national trend towards increasing workplace protections for vulnerable workers. For example, the *Fair Work Act 2009* (Cth) (FW Act) was amended in 2017 to increase penalties for contraventions of national workplace laws and strengthen the powers of the Fair Work Ombudsman.[11] A number of States have moved to regulate operators of labour hire businesses, a sector which has been identified as a particular concern in regard to mistreatment of workers.

There are no exclusions from the minimum standards which apply in the national industrial relations system - the National Employment Standards in the FW Act apply to all national system employees. The exclusions under the IR Act and MCE Act are also inconsistent with other statutes regulating employment in Western Australia, such as the *Long Service Leave Act 1958* (LSL Act), the *Occupational Safety and Health Act 1984* and the *Workers' Compensation and Injury Management Act 1981*, which do not exclude workers on the same basis as the IR Act and MCE Act.

The exclusions in State industrial relations legislation thus distinguish Western Australia on a national and international level, and are preventing Australia from signing an international treaty. The Federal Government is currently seeking to progress Australia's ratification of the International Labour Organization (ILO) Protocol of 2014 to the *Forced Labour Convention, 1930* (the Protocol), which is intended to give new impetus to the global fight against forced labour, including trafficking in persons and slavery-like practices. While the existing *Forced Labour Convention, 1930* 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.

The Protocol requires that labour law applies to all workers and all sectors of the economy. The current exclusions under Western Australian legislation mean that a victim of forced labour who fell within one of the categories excluded from the definitions of 'employee' would have no recourse for recovering unpaid employment entitlements. As such, the exclusions mean that Western Australia is not compliant with the Protocol.

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[10] Western Australia, Parliamentary Debates, Legislative Assembly, 19 August 1993, 3070 (Graham Kierath).

[11] *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017*.

As it is necessary to establish that law and practice in all Australian jurisdictions complies with the Protocol before ratification can proceed, the exclusions under Western Australian legislation are preventing ratification of the Protocol at the national level, and the Minister nominated this situation as one reason for the examination of the definition of employee by the Review.[12]

Proposal for change

As noted above, the fourth term of reference for the Review was to:

> 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 Final Report of the Review proposed a number of recommendations for change with respect to the definition of employee in Western Australian industrial relations legislation. The relevant recommendations are as follows:

> 42. The Amended IR Act is not to exclude from its coverage, any employee whose place of work is the private home of another person, presently referred to as "any person engaged in domestic service in a private home" in s 7(1) of the IR Act.[13]
>
> 43. The Amended IR Act is not to exclude from its coverage persons who are currently excluded from the definition of an employee under s 3 of the *Minimum Conditions of Employment Act 1993* (WA) (MCE Act) and regulation 3 of the *Minimum Conditions of Employment Regulations 1993* (MCE Regulations), as persons remunerated wholly by commission or percentage reward, or wholly at piece rates.
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> 44. The Amended IR Act is not to exclude from its coverage persons:
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> (a) Who receive a disability support pension under the *Social Security Act 1991* (Cth); and
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> (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.
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> 45. The Amended IR Act is not to exclude from its coverage persons appointed under s 22(1) of the *National Trust of Australia (WA) Act 1964* to carry out the duties of wardens, being persons who are currently excluded from the definition of an employee under s 3 of the MCE Act and regulation 3 of the MCE Regulations.
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> 46. The Amended IR Act is to provide that an employee does not include a volunteer, including persons who are not entitled to be paid for work done by them but who receive some benefit or entitlement in relation to the work.

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[12] 'No secrets or alarm bells - WA needs IR update' by Bill Johnston, published on www.thewest.com.au on 6 October 2017; Hansard, Legislative Assembly, 18 October 2017, PQ number 545, p.27.

[13] The Final Report of the Review also proposed that the statutory minimum conditions of employment be incorporated in a new consolidated Industrial Relations Act, referred to as the Amended IR Act – see recommendation 54 in Final Report.

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

This document considers proposals to implement recommendations [42] to [45] as outlined above. Recommendation 46 is not examined, as in effect this recommendation represents a continuation of the status quo. However, it is intended that this recommendation be implemented by way of amendment to the definition of 'employee' in the IR Act, as outlined below.

As noted above, the Final Report of the Review proposed that the statutory minimum conditions of employment be incorporated in a new consolidated Industrial Relations Act, referred to as the Amended IR Act. It is not intended that legislative consolidation of this sort will be pursued at the current time, so the proposals for change to the definition of employee are considered within the existing legislative framework of the IR Act and MCE Act respectively.

The proposed approach is to amend the definitions of 'employee' in the IR Act and the MCE Act to provide that *'employee'* means —

(a) a person who is employed by an employer to do work for hire or reward, including as an apprentice; or

(b) a person whose usual status is that of an employee.

The effect of implementing this approach would be that domestic workers would no longer be excluded from the definition of 'employee' in the IR Act or the MCE Act, and the following categories of worker would no longer be excluded from the definition of 'employee' in the MCE Act:

- Persons paid wholly by commission or percentage reward;
- Persons whose services are remunerated wholly at piece rates;
- Persons with disabilities in supported employment; and
- Wardens of National Trust (WA) properties.

Objectives of the proposal

The primary objective of the proposed changes to the definitions of employee in the IR Act and MCE Act is to ensure comprehensive coverage by these statutes of all employees in the State industrial relations jurisdiction, as specified in the fourth term of reference for the Review.

Removing the specified exclusions would ensure that the workers currently impacted would gain access to the basic safety net of entitlements and protections provided in State industrial relations legislation, and eliminate the manifest inequities in the present system.

In particular, it is intended that the changes would:

- provide greater protection to employees in the horticultural industry, which includes migrant workers, who are typically engaged on piece rates and are currently excluded from statutory minimum conditions of employment;
- with respect to employees engaged in domestic service in a private home (such as employees providing support services to the householder or nannies):

- provide them with statutory protections regarding their minimum conditions of employment;
- treat them consistently with employees performing identical duties who are employed by an external provider or agency and then contracted to the householder;

- ensure consistency in treatment of employees under different Western Australian statutes, including those covering long service leave, occupational safety and health and workers' compensation;
- ensure consistency with all other Australian jurisdictions whereby employees engaged in domestic service in a private home, commission or piece rate employees, and employees in supported employment are covered by the FW Act and the National Employment Standards; and
- ensure that Western Australian laws are compliant with the ILO Protocol of 2014 to the *Forced Labour Convention, 1930*, and remove the last remaining impediment to Australia's ratification of the Protocol.

Necessarily, increasing employment protections for certain types of workers will result in increased obligations for employers of those workers, who will be required to comply with minimum employment standards should these changes be enacted. The following sections explore the likely impact of the changes on specific groups, consultation undertaken with stakeholders and possible means of easing any transition.

Impact analysis by category

The following sections explore in detail each specific change proposed to the definitions of 'employee' in the IR Act and MCE Act, the likely impacts, and the views of relevant stakeholders.

Domestic workers

Proposed change

That the definitions of 'employee' in the IR Act and the MCE Act be amended so that domestic workers are no longer excluded.

Impact summary

The impact of implementing the proposed change would be that employees doing domestic work in private homes would be covered by State industrial relations laws and entitled to the minimum conditions of employment. This impact is explored in detail in the sections below.

Background and current situation

Domestic workers are currently excluded from the definition of 'employee' in the IR Act, and consequently from the definition of 'employee' contained in the MCE Act.[14] This means that domestic workers engaged by householders have no access to the basic entitlements derived from these two acts which apply to most other State system employees in Western Australia, and cannot be covered by an award. Domestic work is not defined in the IR Act but can be assumed to include duties such as cleaning, housekeeping, child care and other forms of personal care work.

[14] Unless there are more than six paying boarders or lodgers residing in the premises, or the worker is engaged by someone other than the owner or occupier of the home - see section 7(1)(e)-(f) of the IR Act and section 3(1) of the MCE Act.

Cleaning and housekeeping jobs typically have low entry requirements and can provide opportunities for people with limited qualifications or language skills. Workers who choose domestic jobs for these reasons are likely to have a limited ability to bargain with employers, and may not be able to negotiate reasonable wages and conditions of their own accord. This vulnerability is exacerbated by the inherent characteristics of domestic work, which by definition is hidden from public view.

Yet the exclusion of domestic workers from key employment protections is not only a problem for the most vulnerable workers. It is a problem for any domestic worker whose employer refuses to treat them decently in the absence of a legislated safety net which compels them to do so.

Au pairs, for example, are often depicted as young, typically European visitors to Australia who benefit from the chance to receive accommodation and a cultural experience in exchange for providing childcare and some light housekeeping to a host family. Yet one of the authors of a study of almost 1,500 au pairs in Australia has observed that "many families are taking advantage of the large supply of working holiday makers to obtain cheap housekeeping services."[15] The research found that a significant proportion of those surveyed had felt compelled to do more or different work than they had expected, and ten per cent reported non-payment of money promised.[16] The study also estimated notional hourly wages for the au pairs, taking into account the value of board and accommodation provided, and found that average rates were well below statutory minimums.[17]

In the national workplace relations system, au pairs in an employment relationship with their hosts would be entitled to the national minimum wage and the National Employment Standards set out in the FW Act.[18] In Western Australia, au pairs would be caught by the exclusion of domestic workers from the IR Act and thus prevented from enforcing any statutory minimums, even where an employment relationship could be established.

The domestic workers exclusion in the IR Act also affects people who perform other kinds of care work in a domestic setting, such as aged care and disability support workers who are engaged directly by householders. The number of employees in this category is set to expand as a result of recent changes to the way care services are delivered in the community. As noted in the Interim Report of the Review, the effect of the implementation of the National Disability Insurance Scheme (NDIS) and other funding programs which enable recipients to directly employ carers and support staff is 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."[19]

By way of comparison, carers employed in private homes in other states are covered not only by the National Employment Standards in the FW Act but by the *Social, Community, Home Care and Disability Services Industry Award 2010*, giving them access to a range of pay rates and conditions in excess of national statutory minimums.[20]

The Final Report of the Review recommended that domestic service workers no longer be excluded from coverage under State industrial relations legislation. A number of arguments in support of this view were stated in the Review's Interim Report, including that:

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15 'Au pairs working in Australia being exploited and abused, report finds', *The Guardian*, 29 November 2018.

16 Berg, L. and Meagher, G. 'Cultural Exchange or Cheap Housekeeper? Findings of a National Survey of Au Pairs in Australia', November 2018.

17 Ibid.

18 Fair Work Ombudsman, April 2016 newsletter 'Consider nannies and au pairs: Is my babysitter actually an employee?'.

19 Interim Report, paragraph [795], p.291.

20 www.fairwork.gov.au/library/k600582_award-coverage-for-attendant-carers-employed-in-private-homes.

(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 [*Employment Law Centre*] 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.

(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.[21]

Recommendation 42 of the Final Report was that "The Amended IR Act is not to exclude from its coverage, any employee whose place of work is the private home of another person, presently referred to as "any person engaged in domestic service in a private home" in s 7(1) of the IR Act." It is proposed that this recommendation be implemented by way of appropriate amendments to the IR Act.

Impact in detail:

Legal effects

Prior to considering the impact of the proposed change, it is useful to consider the situation as it stands currently. While domestic workers in Western Australia are currently excluded from coverage under the IR Act and MCE Act, they do have entitlements derived from other legislative instruments.

Table A below sets out the current entitlements for workers performing domestic duties for:

- Workers who are engaged directly by householders in Western Australia (Column A: Household employer in WA);
- Workers who are employed by a business or another organisation in Western Australia which provides domestic services to households (Column B: Non-household employer in WA);
- Domestic workers employed by any kind of employer in other Australian states (Column C: Employers in any other Australian State or Territory).

The table is not exhaustive, but aims to summarise key employment entitlements under different instruments. It should be noted that entitlements derived from the FW Act do not precisely mirror those in State legislation in each case but are broadly similar.

[21] Interim Report, [820]-[821], pp.297-298.

Table A: Current entitlements for domestic workers and obligations for their employers

	A	B	C
Entitlement/Obligation	**Household employer in WA**	**Non-household employer in WA**	**Employers in any other Australian State or Territory *(based on FW Act unless stated otherwise)***
Entitlements/obligations which in WA State system are derived from MCE Act			
Reasonable hours of work	No	Yes	Yes
Minimum rates of pay	No	Yes	Yes
Other requirements as to pay, such as an employee not being compelled to accept other than money for pay and protection from unauthorised deductions	No	Yes	Yes
Paid leave for illness or injury, which may also be used as paid carer's leave	No	Yes[22]	Yes[22]
Unpaid carer's leave	No	Yes	Yes
Annual leave	No	Yes[22]	Yes[22]
Bereavement leave	No	Yes	Yes[23]
Payment for public holidays not worked	No	Yes[22]	Yes[22]
Unpaid parental leave	No[24]	Yes	Yes
Employer record keeping requirements	No[25]	Yes	Yes
Entitlements/obligations which in WA State system are derived from the IR Act			
Unfair dismissal protections	No	Yes	Yes[26]
Employer record keeping requirements	No[27]	Yes	Yes
Freedom of association protections	No	Yes	Yes ***Continues over page…***

[22] Casual employees are not entitled to paid sick leave, paid carer's leave, paid annual leave or paid public holidays in the State or national industrial relations systems.

[23] Casual employees covered by the FW Act are not entitled to paid compassionate leave, which encompasses leave for bereavement purposes.

[24] No entitlement at present under the MCE Act, but there is an entitlement under the FW Act – see over page.

[25] No entitlement at present under MCE Act but there is under the LSL Act – see over page.

[26] In the national system there are special unfair dismissal rules for employers with fewer than 15 employees.

[27] No requirement at present under IR Act but there is under the LSL Act – see over page.

	A	B	C
Entitlement/Obligation	**Household employer in WA**	**Non-household employer in WA**	**Employers in any other Australian State or Territory *(based on FW Act unless stated otherwise)***
Entitlements/obligations which in WA State IR system are derived from the LSL Act			
Long service leave	Yes	Yes	Depends on legislation in each State or Territory[28]
Employer record keeping requirements	Yes	Yes	Depends on legislation in each State or Territory
Entitlements for all employees in all States, including WA State system employees, which are derived from the Federal FW Act[29]			
Unpaid parental leave	Yes	Yes	Yes
Notice of termination[30]	Yes	Yes	Yes
Other employer obligations not derived from industrial relations legislation			
Superannuation contributions if employee earning over $450 per month	Yes	Yes	Yes, based on Commonwealth *Superannuation Guarantee (Administration) Act 1992*
Withholding of PAYG tax and remittance to ATO	Yes	Yes	Yes, based on Commonwealth taxation laws

Table A can be used to identify the legal changes that will occur if the domestic workers' exclusion is removed from the definitions of 'employee' in the IR Act and, by extension, the MCE Act. Should the change proceed, domestic workers engaged directly by householders in WA will have the same entitlements as domestic workers employed by non-household employers (e.g. third party service providers) in WA.

Removal of the exclusion of domestic workers from the IR Act would also mean that it would be possible for a WA award to cover a domestic employee. Award coverage is based on the type of work an employee performs and the industry of their employer, and each award contains a clause which specifies who that award covers. If an employee is covered by a WA award they must receive award rates of pay and employment entitlements.

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[28] Most employees' entitlement to long service leave comes from long service leave laws in their State or Territory. In some cases these laws don't apply where a federal pre-modern award applies and contains long service leave entitlements, however there are no such awards known to have applied to domestic workers in any State or Territory.

[29] Federal FW Act provisions relating to unpaid parental leave and notice of termination are extended to apply to employees in the State industrial relations system because they are supported by the external affairs power in the Constitution. For the purpose of these provisions, the meaning of 'employee' is defined in s 15 of the FW Act and does not exclude domestic service workers.

[30] Other than casual employees.

For some common types of domestic work, there is not currently any WA award which would apply to an employee employed by a domestic employer, even if the exclusion in the IR Act was removed. For example, there are no WA awards which would apply to disability support workers or childcare workers employed by a domestic employer. However, removal of the domestic workers exclusion in the IR Act would mean that domestic workers employed mainly to perform cleaning duties may be covered by the WA Cleaners and Caretakers Award, and the wages and employment conditions specified in that award would apply in addition to the conditions set out in other relevant legislation.

Before considering the likely costs and benefits of ending the domestic workers' exclusion in more detail, it should be noted that the proposed change will only affect *employment* relationships. Employment relationships are a specific type of contractual arrangement. Whether a relationship can be characterised as an employment contract is determined by reference to the common law, not industrial relations legislation.

In some cases, parties may reach an agreement for work to be performed in exchange for payment, but this will not constitute an employment contract. An example is independent contracting arrangements. If a householder engages someone to perform domestic duties in their home as a contractor, the IR Act and the MCE Act will not apply, because these statutes apply only to workers who are employees at common law.

Courts and industrial commissions have identified a number of factors to distinguish employment from independent contracting arrangements, including:

- the degree of control over how work is performed;
- the way working hours are determined;
- the nature of the engagement – whether for a specific task or ongoing work;
- the ability to delegate or sub-contract tasks;
- whether there is freedom to accept and perform work for other businesses once engaged;
- who bears the financial risk and liability for work performed; and
- who provides tools, materials and equipment.

In practice, determining whether a worker is a subcontractor or employee can be a complex matter, but changing the definition of 'employee' in the IR Act and MCE Act would not of itself alter a particular worker's employment status - if the worker is currently an employee, rather than a contractor (or vice versa), they would remain an employee. The threshold question of whether a person is engaged under a contract of service as an employee, or contract for service as a contractor, would continue to be determined by reference to the common law tests.

Costs and benefits

The costs of removing the domestic workers' exclusion cannot be reliably estimated in monetary terms. This is because there is no information available as to the number of workers affected by the exclusion, or the pay and conditions that they currently receive. However, as noted above, should the change be implemented, all domestic workers would be entitled to at least the minimum wage, which is currently $779.00 per week for full time employees, $20.50 per hour for part time employees, and $24.60 per hour for casual employees.

Domestic workers covered by the Cleaners and Caretakers Award would be entitled to the relevant minimum rates set out in that award, which for cleaners are currently $796.20 per week for full time employees, $20.95 per hour for part time employees, and $25.14 per hour for casual employees. The

Cleaners and Caretakers Award also provides for a range of allowances and loadings to be paid in certain circumstances.

All domestic workers would also be entitled to other workplace entitlements specified in the MCE Act, depending on their particular circumstances (see column B of Table A). This may result in additional costs for employers who are not currently paying workers and providing entitlements in line with statutory minimums.

Similarly, it not possible to reliably estimate the monetary benefits of the change for domestic workers. It is however likely that access to the minimum conditions of employment would represent a material improvement for some workers.

Household employers of domestic workers may face additional administrative costs in ensuring that they comply with the requirements of both the MCE Act and IR Act. However, as these employers already have obligations under other legislative instruments, such as the LSL Act, it is not anticipated that the change would generate a significant additional burden. For example, whilst the proposed change would mean that householders would be required to maintain time and wage records under the MCE Act and the IR Act, they are currently required to maintain time and wage records for these employees under the LSL Act. Assuming that a householder is compliant with their existing obligations, a requirement to keep time and wage records under the MCE Act or the IR Act should have minimal impact on them. Implementing the proposed change to the IR Act may have the additional benefit of raising awareness in the community of existing obligations under other legislation.

Though it is not possible to identify precisely how many workers would be affected by the proposed change, it can be said that it would result in an increased number of workers in the State jurisdiction being covered by statutory employment protections. This could lead to greater demand for the compliance and enforcement functions performed by the DMIRS Private Sector Labour Relations Division. Additional resources may be required to meet any increased public demand for DMIRS services.

At the macro level, it is not possible to accurately model the potential effects of the proposed change on the State's economy. There is a lack of data available regarding current employment levels of domestic workers and associated labour costs, and in any case, there is presently no consensus amongst theorists as to the effect of changes in wage costs upon employment.

The proposed change would have a number of qualitative benefits in achieving the objectives outlined above, being statutory protection of a potentially vulnerable group of workers, consistent treatment of domestic workers irrespective of the nature of their employer, greater consistency with the national jurisdiction, and facilitating WA's compliance with the ILO Forced Labour Protocol.

Consultation

A number of submissions to the Review addressed the exclusion of domestic workers from the definitions of employee in the IR Act and MCE Act.

The Chamber of Commerce and Industry of Western Australia (CCI) opposed removal of the exclusion on the grounds that being required to comply with employment legislation would place a serious burden on households, and that the state would have difficulty in monitoring compliance.[31] The CCI described the proposed removal of the domestic workers' exclusion as "a simply untenable and unworkable proposition" and said "Doubtless the broader WA community would find this recommendation and its implications unpalatable." It further submitted that "Any change that creates

[31] CCI initial submission to the Review.

a home owner as an employer would simply end domestic services", to the detriment of both householders and those who provide services as a source of "additional income".[32]

Master Builders Western Australia similarly asserted that domestic employers would be unlikely to be aware of their obligations and argued that "any move down this path would require the Western Australian Government to, at the very least, embark on a public education campaign to appraise the public of what these changes mean to them given the consequences of failing to meet their obligations."[33] It also suggested that "A reasonable transition period be adopted to allow home owners as employers to make the necessary arrangements to meet these new obligations."

Particular concerns as to how the removal of the domestic workers' exclusion would impact upon people engaging workers to provide care services in the home were raised by two organisations which provide support to people with disabilities and their families and carers.

My Place Foundation stated that "hundreds of examples exist of families and people with disabilities in WA directly engaging domestic workers in order to provide support within the family home and, by natural extension, the community. At the heart of these arrangements are the principles of trust and mutual benefit". It was argued that the non-monetary benefits of such arrangements "are simply not captured in the regulatory framework of the current industrial system". My Place argued that removal of the domestic workers' exclusion would erode flexibility and place an unreasonable compliance burden on homeowners.[34]

Western Australia's Individualised Services (WAiS) expressed similar views and suggested that removal of the exclusion would "Potentially prohibit a large number, if not all, of highly individualised living arrangements that enable people with disability to live good lives in as natural a home environment as possible (for example, in their own private homes as compared to residential group homes)." WAiS suggested that if the exclusion was to proceed, that private households should be exempted from unfair dismissal, redundancy and long service leave laws, and be provided with flexibility in the application of minimum conditions of employment.[35]

A number of submissions addressing the domestic workers' exclusion were in favour of its removal. The Employment Law Centre (ELC) (now Circle Green Community Legal) argued that, "it is 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" and further noted that "research conducted by the ILO has indicated that domestic work is one of the industries in which forced labour is more likely to be present worldwide."[36] The ELC argued that "any attempt to tackle modern slavery and human trafficking in Australia must include efforts to protect domestic workers".[37]

This point was echoed by the Salvation Army, which referred to international research on domestic workers and stated that "Globally, domestic workers are among the most marginalised and exploited workers on the planet, despite their economic and social value to households and society in general."[38] The submission described the Salvation Army's experience in providing assistance to exploited migrant domestic workers in Australia, and argued that the Western Australian Government

[32] CCI submission on Interim Report.
[33] Master Builders submission on Interim Report.
[34] My Place Foundation submission on Interim Report.
[35] WAiS submission on Interim Report.
[36] ELC initial submission to the Review.
[37] ELC initial submission to the Review.
[38] Salvation Army initial submission to the Review.

could reduce the vulnerability of such workers by including them in the definition of employee in the IR Act.

The Ethnic Communities Council of WA (ECCWA) also noted that people of CaLD backgrounds are disproportionally represented in vulnerable sections of the workforce, including among workers in private homes, and supported removal of the domestic workers' exclusion.[39] The Western Australian Council of Social Service (WACOSS) argued that the current exclusion of domestic workers is not desirable and leaves them at significant risk of experiencing negative and unsafe working conditions.[40]

Those unions which addressed the issue in their submissions to the Review consistently supported the removal of the domestic workers' exclusion.[41] UnionsWA said, "Given the heightened potential for exploitation of these workers, who are often low paid, work in isolation and have little bargaining power, it is remarkable that WA has retained this exclusion for so long."[42] United Voice observed that Western Australian industrial legislation is unique in Australia in excluding domestic workers and argued that "As other jurisdictions have clearly managed to cope with the legal implications of this, there is no reason why Western Australia would find this so burdensome as to justify the retention of the exclusion in the IR Act."[43]

Both United Voice and WACOSS submitted that the expansion of consumer-directed care in the disability and aged care sectors, such as the roll-out of the NDIS, would increase the incidence of direct employment relationships in the domestic sphere and that legislative protections for such arrangements are now imperative.[44]

The Small Business Development Corporation (SBDC) stated that it was "generally supportive" of the proposal to address domestic workers' exclusion from the definition of employee and to provide them with an entitlement to minimum employment standards, but suggested, "The challenge will be to capture the non-monetary remuneration that is often provided to these workers, such as accommodation, food and utilities, particularly for workers (such as au pairs) who may live in a family's home."[45]

Analysis

It is evident from the consultation undertaken for the Review that there is both support for and opposition to the proposed elimination of the domestic workers exclusion. Of those submissions primarily concerned with the welfare of employees, there was clearly a view that removal of the exclusion is a long overdue reform which would boost protection for a vulnerable group of workers. Of those submissions representing the views of employers, it was apparent that there are significant concerns around how householders would manage their compliance obligations under industrial relations legislation. Necessarily, the introduction of increased protections for employees would result in increased obligations for employers.

However, it is apparent that options do exist for implementing the proposed change. The adoption of some or all of the measures suggested during consultation may go some way towards mitigating community concerns. A public education program would be helpful in raising awareness of any change

[39] ECCWA submission on Interim Report.
[40] WACOSS submission on Interim Report.
[41] Australian Manufacturing Workers' Union; Health Services Union of WA; UnionsWA; United Voice; Western Australian Municipal, Administrative, Clerical and Services Union of Employees; WA Prison Officers Union.
[42] UnionsWA submission on Interim Report.
[43] United Voice submission on Interim Report.
[44] United Voice and WACOSS initial submissions to the Review.
[45] SBDC initial submission to the Review.

undertaken. DMIRS already provides advice to the community on State industrial relations legislation via its Wageline telephone and website services, and it would implement a targeted campaign in the event of change proceeding.

These and other options for implementing change, and means of easing the transition, are likely to be considered should the Taskforce proposed in Recommendation 51 of the Final Report be implemented.[46]

Persons paid wholly by commission or percentage reward

Proposed change

That the definition of 'employee' in the MCE Act be amended so that employees paid wholly by commission or percentage reward are no longer excluded.

Impact summary

The impact of implementing the proposed change would be that employees paid wholly by commission or percentage reward would be entitled to the minimum conditions of employment in the State system. These employees are already covered by the IR Act.

Background and current situation

Persons paid wholly by commission or percentage reward (henceforth referred to as 'commission-only workers') are currently excluded from the definition of 'employee' in the MCE Act.[47] This means employees paid on this basis in the State system have no entitlement to the minimum conditions outlined in the MCE Act, including the minimum wage and leave entitlements.

Commission-only workers are not, however, excluded from the definition of 'employee' in the IR Act. This means that they are covered by the unfair dismissal provisions set out in the IR Act and may potentially be covered by an award. If an award applies to a commission-only worker's employment, they will be entitled to the conditions outlined in that award.

Award coverage is determined largely by the scope provisions of awards themselves, which are typically delineated by reference to specific occupations and industries. One State award which makes provision for commission-only employees is the *Commercial Travellers and Sales Representatives' Award 1978,* which applies to travelling sales representatives in nominated industries. The award provides that a worker who is engaged on a commission-only basis must not be paid less than the relevant weekly minimum rate of pay prescribed in the award, and also provides for public holidays, various leave entitlements and a range of other conditions. Commission-only workers covered by this award are therefore entitled to a range of minimum conditions as specified in the award.

However, many workers likely to be employed on a commission-only basis in Western Australia, such as people selling real estate and motor vehicles, are not covered by any State award and in practice have no minimum entitlements in the State system.[48]

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

[47] See s 3 of the MCE Act and regulation 3 of the MCE Regulations.

[48] The *Commercial Travellers and Sales Representatives' Award 1978* specifically excludes persons selling motor vehicles. At one time the *Licensed Car Salesmen's Award 1979* provided minimum conditions for the car sales industry, but this award was cancelled in 1992.

Although persons paid by commission are not typically thought of as a vulnerable or low paid group, under the current law it is possible that commission-only arrangements could be used by unscrupulous employers as a means of evading standard employment obligations. Furthermore, while commission payment structures have obvious potential benefits in motivating and rewarding performance, it is no longer apparent that commission-only workers should not be entitled to a minimum rate of pay and other basic conditions such as sick leave, carer's leave and bereavement leave.

In the national workplace relations system, there is no exclusion of commission-only workers from coverage by the NES in the FW Act. There is also no exclusion of commission-only workers from the minimum wage provisions of the FW Act, but payment is allowed on a commission-only basis where an award or registered agreement provides for this. For example, the national *Real Estate Industry Award 2010* allows for payment on a commission-only basis under certain conditions, including that employee earnings meet a minimum income threshold.[49]

The Final Report of the Review recommended that:

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

Whilst there is no intention at this stage to proceed with the recommendation to consolidate the existing provisions of the IR Act and the MCE Act in one statute, it is proposed that this recommendation be implemented by amending the definition of 'employee' in the MCE Act so that employees remunerated wholly by commission or percentage reward would no longer be excluded.

Impact in detail:

Legal effects

The key impacts of the proposed change in legislative obligations for employers of commission-only workers in the State system can be identified in **Table B** below. Column A of Table B shows the current legislated entitlements of workers presently excluded from coverage under the MCE Act by means of the MCE Regulations. Column B shows the entitlements which would apply to any employees currently excluded as a result of the MCE Regulations if the proposed changes to the definition of employee under the MCE Act were adopted.[50] Column C shows the entitlements which currently exist for similar employees in the national system.

[49] See: https://www.fairwork.gov.au/my-account/my-news/work-in-real-estate-are-your-commission-payments-lawful.

[50] With the exception of minimum wage rates, which it is not intended would apply to persons in supported employment – please see discussion pp.30-36.

Table B – Current and proposed entitlements for employees presently excluded from the MCE Act by the MCE Regulations

	A	B	C
Entitlement	**Current**	**Proposed**	**Current in any other Australian State or Territory *(based on FW Act unless stated otherwise)***
Entitlements which in WA State system are derived from MCE Act			
Reasonable hours of work	No	Yes	Yes
Minimum rates of pay	No	Yes[51]	Yes[52]
Other requirements as to pay, such as an employee not being compelled to accept other than money for pay and protection from unauthorised deductions	No	Yes	Yes
Paid leave for illness or injury, which may also be used as paid carer's leave	No	Yes[53]	Yes[52]
Unpaid carer's leave	No	Yes	Yes
Annual leave	No	Yes [52]	Yes[52]
Bereavement leave	No	Yes	Yes[54]
Payment for public holidays not worked	No	Yes[52]	Yes[52]
Unpaid parental leave	No[55]	Yes	Yes
Employer record keeping requirements	No[56]	Yes	Yes
Entitlements/obligations which in WA State system are derived from the IR Act			
Unfair dismissal protections	Yes	Yes	Yes[57]
Employer record keeping requirements	Yes	Yes	Yes
Freedom of association protections	Yes	Yes	Yes

Continues over page…

[51] Persons in supported employment would not be entitled to standard minimum rates of pay if proposed changes are implemented – see discussion pp.30-36.

[52] The national system allows for supported employment arrangements and for payment by piece rate or commission under certain conditions – details provided in relevant sections.

[53] Casual employees are not entitled to paid sick leave, paid carer's leave, paid annual leave or paid public holidays in the State or national industrial relations systems.

[54] Casual employees covered by the FW Act are not entitled to paid compassionate leave, which encompasses leave for bereavement purposes.

[55] No entitlement at present under the MCE Act, but there is an entitlement under the FW Act – see over page.

[56] No entitlement at present under MCE Act but there is under the LSL Act – see over page.

[57] In the national IR system there are special unfair dismissal rules for employers with fewer than 15 employees.

	A	B	C
Entitlement	**Current**	**Proposed**	**Current in any other Australian State or Territory *(based on FW Act unless stated otherwise)***
Entitlements which in WA State IR system are derived from the LSL Act			
Long Service Leave	Yes	Yes	Depends on legislation in each State or Territory[58]
Employer record keeping requirements	Yes	Yes	Depends on legislation in each State or Territory
Entitlements for all employees in all States, including WA State system employees, which are derived from the Federal FW Act[59]			
Unpaid parental leave	Yes	Yes	Yes
Notice of Termination[60]	Yes	Yes	Yes
Other employer obligations not derived from IR legislation			
Superannuation contributions if earning over $450 per month	Yes	Yes	Yes, based on Commonwealth *Superannuation Guarantee (Administration) Act 1992*
Withholding of PAYG tax and remittance to ATO	Yes	Yes	Yes, based on Commonwealth taxation laws.

Costs and benefits

It is not possible to reliably estimate the costs of ending the exclusion of commission-only workers under the MCE Act in monetary terms. This is because there is no information available as to the number of workers affected by the exclusion, or the pay and conditions which they currently receive. However, as noted above, should the change be implemented, commission-only workers will be entitled to the minimum wage, which is currently $779.00 per week for full time employees, $20.50 per hour for part time employees, and $24.60 per hour for casual employees. Commission-only workers would also be entitled to other workplace entitlements as specified in the MCE Act, depending on their particular circumstances (see column B of Table B).

Similarly, it is not possible to reliably estimate the monetary benefits of the change for commission-only workers. It is likely that gaining access to coverage by the minimum conditions of employment would represent a material improvement for some workers.

Employers of commission-only workers may face additional administrative costs in ensuring that they comply with the requirements of the MCE Act. While employers of commission-only workers already have obligations under other industrial relations statutes, including the IR Act and LSL Act, the Interim Report of the Review referred to representations made to the previous State Government that extending coverage of the MCE Act to commission-only employees would create significant

[58] Most employees' entitlement to long service leave comes from long service leave laws in their State or Territory. In some cases these laws don't apply where a federal pre-modern award applies and contains long service leave entitlements.

[59] Federal FW Act provisions relating to unpaid parental leave and notice of termination are extended to apply to employees in the State industrial relations system because they are supported by the external affairs power in the Constitution.

[60] Other than casual employees.

impediments to the retention of performance-based pay systems [detailed further in 'consultation' section below].[61] There are, however, possible mechanisms for overcoming these difficulties, including the creation of new State awards which facilitate commission-only payments, as has occurred in the national system.

Though it is not possible to identify precisely how many workers would be affected by the proposed change, it can be said that it would result in an increased number of workers in the State jurisdiction being covered by statutory employment protections. This could lead to greater demand for the compliance and enforcement functions performed by the DMIRS Private Sector Labour Relations Division. Additional resources may be required to meet any increased public demand for DMIRS services.

At the macro level, it is not possible to accurately model the potential effects of the proposed change on the State's economy. There is a lack of data available regarding current employment levels of commission-only workers in the State jurisdiction, and in any case, there is presently no consensus amongst theorists as to the effect of changes in wage costs upon employment.

The proposed change would have a number of qualitative benefits in granting commission-only workers access to the same basic protections afforded to most other workers in the State system, and bringing the State system's treatment of commission-only workers into line with the national workplace relations system. The change would also facilitate WA's compliance with the ILO Protocol of 2014 to the *Forced Labour Convention, 1930*.

Consultation

While a number of submissions to the Review addressed the definition of 'employee' in the MCE Act in general terms, only a few directly engaged with the specific question of whether or not commission-only workers should continue to be excluded.

UnionsWA supported the Review's proposal to end the exclusion, but did not elaborate as to why.[62] A number of other unions indicated that they adopted the submissions of UnionsWA on this matter.

The ELC stated that it could "see no reason why pieceworkers and commission-only workers should continue to be excluded from the definition of an 'employee' under the MCE Act or the MCE Regulations."[63]

WACOSS supported all of the Review's proposals to remove exclusions under the IR and MCE Acts, stating, "The current exclusion of these people is not desirable and leaves them at significant risk of experiencing negative and unsafe working conditions."[64] ECCWA said it "strongly supports the view that the 2018 IR Act should not exclude piece workers and commission only employees from its coverage."[65] The Salvation Army supported all employees being covered by minimum conditions.[66]

The Australian Mines and Metals Association (AMMA) submitted that the definition of 'employee' should not be expanded beyond its current scope, save consideration being given to removing the

61 Interim Report at [834], p.301.
62 UnionsWA submission on Interim Report.
63 ELC submission on Interim Report.
64 WACOSS submission on Interim Report.
65 ECCWA submission on Interim Report.
66 Salvation Army submission on Interim Report.

exclusion of persons employed in domestic service. AMMA did not explain its reasons for taking this position.[67]

CCI submitted that, in principle, it did not oppose the minimum conditions being applied to those persons whose services are remunerated wholly by commission or percentage reward. However, CCI stressed that "wider industry consultation would be required where commission-only or piece-rates are an essential component of operating business models" and identified the real estate industry as one such sector. CCI suggested that commission-only remuneration practices in the real estate industry could be maintained through the establishment of a new State award which includes provisions similar to clause 16 of the national *Real Estate Industry Award 2010*, which allows for the engagement of commission-only employees.[68] CCI emphasised that "Maintaining the competitiveness of real estate businesses operating in the same market despite being within different workplace relations regulatory environments is critical to ensure the stability of the WA Real Estate industry."

Analysis

It is evident from the consultation undertaken for the Review that there is both support for and opposition to coverage of the MCE Act for commission-only employees. Of those submissions primarily concerned with the welfare of employees, the prevailing view was that commission-only workers should be treated on a similar basis to other workers and that their current exclusion from coverage under the MCE Act is inequitable. Employer representatives were primarily concerned with the potential difficulties of reconciling commission-based payment arrangements with the statutory minimum conditions.

As with the other proposals discussed in this document, there are few options available to policy makers to satisfy these opposing viewpoints. The choice is a binary one between removing the exclusion for commission-only employees under the MCE Act or continuing it.

However, should coverage of the MCE Act be extended to commission-only employers, those employers who wish to maintain performance-based pay structures will have the option of pursuing new State awards which facilitate payment on a commission-only basis. The submissions made to the Review by CCI indicate that this option represents a viable strategy for employers.

As with the other proposals, assistance will be provided to employers and employees in understanding and responding to the impact of this change via the DMIRS Wageline service, and via any strategies developed and implemented by the Taskforce proposed in Recommendation 51 of the Final Report.

Piece workers

Proposed change

That the definition of 'employee' in the MCE Act be amended so that piece workers, that is, employees paid wholly by piece rates, are no longer excluded.

Impact summary

The impact of implementing the proposed change would be that piece workers would be entitled to the minimum conditions of employment in the State system. These employees are already covered by the IR Act.

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[67] AMMA initial submission to Review.

[68] CCI submission on Interim Report.

Background and current situation

Persons whose services are remunerated wholly at piece rates (piece workers) are another category of worker that is currently excluded from the definition of 'employee' in the MCE Act.[69] They are, however, covered by the definition of 'employee' in the IR Act. Similar to commission-only employees, this means that piece workers have no entitlement to the minimum conditions contained in the MCE Act, including the minimum wage and standard leave entitlements, but are covered by the unfair dismissal provisions set out in the IR Act and potentially by a State award.

Piece work is known to be commonly utilised in the agricultural and horticultural sectors. The *Fruit Growing and Fruit Packing Industry Award* applies to employees in the State jurisdiction who are engaged in a range of activities related to growing, picking and packing fresh fruits, and establishes minimum rates of pay and other entitlements for such workers. However, this award is restricted to work activities related to fruit production. At present, there is no similar award for workers in the vegetable growing sector, or for dairy farm workers or flower pickers. Piece workers in the State jurisdiction who are not covered by a State award have no minimum entitlements.

Piece workers are recognised as a vulnerable group, and the potential for exploitation of such workers has been highlighted in a number of recent inquiries.[70] For example, in 2018 the Fair Work Ombudsman (FWO) released a report outlining the findings of an extensive investigation into compliance with national workplace laws in the horticulture and viticulture industries. The 'Harvest Trail Inquiry' report identified widespread non-compliance among employers and misuse of piece rate arrangements.[71] Similar issues are known to arise in the context of the State industrial relations system. Given the known characteristics of the workers typically employed on piece rates, it is concerning that they are excluded from the minimum conditions which apply to other workers in the State jurisdiction.

In the national industrial relations jurisdiction, there is no exclusion of piece workers from coverage by the NES in the FW Act. There is also no exclusion of piece workers under the minimum wage provisions of the FW Act, but payment by piece rate is allowed where an award or agreement provides for this. For example, under the national *Horticulture Award 2010*, an employee can enter into a written agreement to be paid piecework rates and is not guaranteed a minimum hourly or weekly rate. However, the agreed piecework rate must be set at a level which would allow the average competent employee to earn at least 15 per cent more per hour than the relevant minimum hourly rate in the award.

The Final Report of the Review recommended that:

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

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[69] See s 3 of the MCE Act and regulation 3 of the MCE Regulations.

[70] For example, Senate Education and Employment References Committee, 'A National Disgrace: The Exploitation of Temporary Work Visa Holders, March 2016'; Fair Work Ombudsman, 'A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven', April 2016 and 'A Report on the Fair Work Ombudsman's Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales', June 2015.

[71] Fair Work Ombudsman, 2018, 'Harvest Trail Inquiry – A Report on Workplace Arrangements along the Harvest Trail'.

Whilst there is no intention at this stage to proceed with the recommendation to consolidate the existing provisions of the IR Act and the MCE Act in one statute, it is proposed that this recommendation be implemented by amending the definition of 'employee' in the MCE Act so that employees paid wholly by piece rates would no longer be excluded.

Impact in detail:

Legal effects

The effects of the proposed change on legislated entitlements for piece workers would be identical to those proposed for commission-only workers, which are outlined in Columns A and B in **Table B** on pages 20-21.

Costs and benefits

It is not possible to reliably estimate the costs of ending the exclusion of piece workers under the MCE Act in monetary terms. This is because there is no information available as to the number of workers affected by the exclusion, or the pay and conditions which they currently receive. However, should the change be implemented, piece workers would be entitled to the minimum wage, which is currently $779.00 per week for full time employees, $20.50 per hour for part time employees, and $24.60 per hour for casual employees. Piece workers would also be entitled to other workplace entitlements as specified in the MCE Act, depending on their particular circumstances (see column B of Table B). This may result in additional costs for employers who are not currently paying workers in line with statutory minimums.

Similarly, it is not possible to reliably estimate the monetary benefits of the change for piece workers. It is likely that access to the minimum conditions of employment would represent a material improvement for some workers.

Employers of piece workers may face additional administrative costs in ensuring that they comply with the requirements of the MCE Act. However, as these employers already have obligations under other legislative instruments, such as the IR Act and the LSL Act, it is not anticipated that the change would generate a significant additional burden.

Though it is not possible to identify precisely how many workers would be affected by the proposed change, it can be said that it would result in an increased number of workers in the State jurisdiction being covered by statutory employment protections. This could lead to greater demand for the compliance and enforcement functions performed by the DMIRS Private Sector Labour Relations Division. Additional resources may be required to meet any increased public demand for DMIRS services.

At the macro level, it is not possible to accurately model the potential effects of the proposed change on the State's economy. There is a lack of data available regarding current employment levels of piece workers in the State jurisdiction, and in any case, there is presently no consensus amongst theorists as to the effect of changes in wage costs upon employment.

The proposed change would ensure that piece workers have access to the same basic protections afforded to other workers in the State jurisdiction. This would be particularly beneficial for those vulnerable workers who may be at elevated risk of exploitation and who currently have no recourse to minimum standards of employment. It would also bring the State system's treatment of piece workers into line with the national workplace relations system, which does not exclude piece workers from coverage of the NES in the FW Act, and further facilitate WA's compliance with the ILO Protocol of 2014 to the *Forced Labour Convention, 1930*.

Consultation

The exclusion of piece workers from the definition of 'employee' in the MCE Act was considered as part of the Review, but few submissions directly addressed the topic.

A number of submissions favoured expanding the definitions of employee in both the MCE Act and the IR Act to provide comprehensive coverage of employees, but did not specifically address coverage of piece workers.

Of those submissions which did directly engage with the piece work issue, most were supportive of piece workers being covered.

UnionsWA stated that piece workers should be included in any new definition of employee[72] and were supported by several individual unions in this view.[73]

The Salvation Army said that "To ensure equal and adequate protections for all employees, an expanded and clarified definition of 'employee' should include 'piece' workers, or those working in the horticulture, viticulture and similar industries earning pay based on the amount of produce harvested."[74]

The ELC recommended that the MCE Regulations be amended so as not to exclude pieceworkers and commission-only workers from the definition of an 'employee' under the MCE Act,[75] and said it "can see no reason why pieceworkers and commission-only workers should continue to be excluded from the definition of an 'employee' under the MCE Act or the MCE Regulations."[76]

WACOSS argued that a number of the current exclusions under the MCE Regulations, including that of piece workers, are "not desirable and leaves them at significant risk of experiencing negative and unsafe working conditions."[77]

ECCWA strongly supported the view that piece workers and commission-only employees should not be excluded from entitlement to the minimum conditions of employment.[78]

CCI submitted that, in principle, it did not oppose the coverage of piece workers, but said that "wider industry consultation would be required where commission-only or piece-rates are an essential component of operating business models" and "current practices would need to be accommodated." CCI's further comments on this issue related to commission payment structures in the real estate industry, and did not include any additional commentary with respect to piece rates.

AMMA submitted that the definition of employee should not be expanded beyond its current scope, other than to domestic workers, but did not explain its reasons for this position.

Analysis

Submissions to the Review indicate that there is widespread support for coverage of piece workers by the MCE Act. No submissions provided any reasons as to why coverage should not be extended to

[72] UnionsWA submission Interim Report.
[73] AMWU, HSU, WAPOU, WASU.
[74] Salvation Army initial submission to Review.
[75] ELC initial submission to Review.
[76] ELC submission on interim report.
[77] WACOSS submission on interim report.
[78] ECCWA submission on interim report.

piece workers, though as stated above, CCI suggested further consultation should be undertaken with industry where piece rates are an essential component of operating business models.

It appears that no issues emerged during consultation for the Review which would provide a compelling reason not to proceed with the change.

As with the other elements of the proposal for reform to the definition of employee in State employment law, there are not a series of options available with respect to the proposal to extend coverage of the MCE Act to piece workers. The choice is a binary one between removing the exclusion for piece workers under the MCE Act or continuing it.

As with the other proposals, assistance would be provided to employers and employees in understanding and responding to the impact of this change via the DMIRS Wageline service, and via any strategies developed and implemented by the Taskforce proposed in Recommendation 51 of the Final Report.

National Trust wardens

Proposed change

That the definition of 'employee' in the MCE Act be amended so that National Trust wardens are no longer excluded.

Impact summary

It appears unlikely that implementing the proposed change would have any material impact.

Background and current situation

The definition of 'employee' in the MCE Act currently excludes wardens appointed by the National Trust of Western Australia (National Trust), specifically:

> 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.).[79]

Section 22 of the *National Trust of Australia (W.A.) Act* is as follows:

> **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.

[79] See s 3 of the MCE Act and regulation 3 of the MCE Regulations.

The exclusion of National Trust wardens was included in the MCE Regulations in response to concerns expressed by the National Trust, which had indicated that it could not afford to pay the minimum wage to "a group of workers who had the task of looking after heritage buildings".[80]

The Interim Report of the Review noted that:

> 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".

In its submission to the Review, the National Trust provided information that there are over 300 volunteers registered with the National Trust. Of those volunteers, nine are volunteer wardens and all of these volunteer wardens are at National Trust places in regional or remote areas of Western Australia.[81]

According to the National Trust, volunteer wardens at National Trust properties "facilitate public access during opening hours and assist in keeping the places presentable to the public. Volunteers and volunteer wardens are not responsible for conducting operational maintenance and conservation works."[82] The National Trust provided submissions to the Review that:

> It is the National Trust's submission that it does not appoint wardens as "employees" under section 22(l)(a). Rather, in practice in relation to volunteer wardens, they are either volunteers in the traditional sense and/or they are being engaged as "agents" under section 22(l)(b) of the *National Trust of Australia (WA) Act* when performing their role of volunteer warden.

The Final Report of the Review states that it is clear that the wardens' exclusion applies to employees and not volunteers, and states that "A volunteer would not need a specific or separate exclusion as they would be covered by the volunteers' exclusion referred to earlier", being the exclusion of volunteers under the MCE Regulations.

The Final Report noted that there is no exclusion for employees of the National Trust in any other State of Australia, and stated that it "does not accept there is a need for a class of employees, engaged by the National Trust, who should be removed from the protections of the minimum conditions of employment in Western Australia." It concluded, "If the people referred to in the submission from the National Trust are in fact and law volunteers and not employees, then the removal of the exclusion will have no impact upon its operations." In DMIRS' view the same outcome would apply if the wardens were in fact and law agents i.e. the removal of the exclusion would have no impact.

The Review recommended that the National Trust wardens' exclusion be removed, and it is proposed that this occur along with the removal of the other exclusions from the definition of employee under State employment laws.

Impact in detail

Legal effects

As the National Trust states that wardens are engaged as volunteers or agents, there would be no effect of removing the exclusion of National Trust wardens under the MCE Act.

There is only an impact if the National Trust wardens were found at law to be employees rather than volunteers or agents, in which case the impact of the proposal would be that they would gain access

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80 Western Australia, *Parliamentary Debates,* Legislative Assembly, 19 August 1993, 3070 (Graham Kierath).

81 National Trust submission on the Interim Report of the Review.

82 National Trust submission as quoted in the Final Report of the Review [634].

to entitlements under the MCE Act as set out in Table B on pages 20 and 21. Further, if they were to be found to be employees currently or after this proposed amendment, they would be covered by the IR Act.

Costs and benefits

As noted above, the National Trust submitted to the Review that wardens are not employees, but are agents or volunteers. If this is correct, there is no cost to this proposal.

Consultation

Few submissions to the Review addressed the exclusion of National Trust wardens from coverage under the MCE Act.

CCI indicated that it would provide "no further submissions" on the Interim Report's recommendation to remove the exclusion. Its initial submission to the Review had recommended that there be no change to the definition of employee, but did not directly address the exclusion of National Trust wardens.

UnionsWA indicated that it "generally supports the expansion of the definition of employee to cover those who perform work duties", and that submission was supported by the WASU, WAPOU, AMWU and the HSUWA.

The National Trust expressed its views on the exclusion of wardens under the MCE Act as follows:

> Properly understood, this is not a process of exempting these persons from the operation of the law. These provisions simply clarify that the Act does not apply to the persons described. As discussed above, there are good reasons why the law should not be changed. National Trust volunteers and volunteer wardens are in truth appointed, not as employees under S 22 (1) (a) of the *National Trust of Australia (WA) 1964 Act,* but under S 22 (1) (b) of that Act, as "agents" of the National Trust when performing their duties as volunteers or volunteer wardens.
>
> The National Trust notes the observations of the Review at paragraph 876 that it believes the exemption only applies to "employees" appointed by the National Trust under section 22(1) of the *National Trust of Australia (WA) Act.*
>
> It is the National Trust's submission that it does not appoint wardens as "employees" under section 22(l)(a). Rather, in practice in relation to volunteer wardens, they are either volunteers in the traditional sense and/or they are being engaged as "agents" under section 22(l)(b) of the *National Trust of Australia (WA) Act* when performing their role of volunteer warden.
>
> To avoid any uncertainty with respect to the status of wardens the National Trust submits that an exclusion should be maintained as these persons are not accurately considered to be employees. In light of the observation of the Review as to the use of the words "appointed under section 22(1)", perhaps the ongoing exclusion could be clarified to refer to volunteers performing the role of volunteer wardens and/or to refer to persons engaged under subsection 22(l)(b) instead.

Analysis

The conclusion reached by the Review was that the present exclusion of National Trust wardens under the MCE Act has no practical effect, and that in any case there is no reason that any employees who may be engaged by the National Trust should be removed from the protections of the minimum conditions of employment in Western Australia.

As the submissions of the National Trust to the Review confirm that the present exclusion of wardens has no meaningful purpose or effect, it is recommended that it be removed.

Persons with disabilities in supported employment

Proposed change

That the definition of 'employee' in the MCE Act be amended so that persons with disabilities in supported employment are no longer excluded.

Impact summary

The impact of implementing the proposed change would be that those persons with disabilities in supported employment who are currently excluded from the MCE Act would become entitled to the minimum conditions of employment. With respect to the minimum wage, employees with a disability employed in supported employment who have been assessed under the Supported Wage System will be entitled to a proportion of the minimum wage rate determined according to their independently assessed productive capacity to perform their particular job under the Supported Wage System. An employee with a disability employed in supported employment may also be assessed under a wage assessment tool in an industrial instrument and paid a wage based on this assessment.

The problem

The definition of 'employee' in the MCE Act currently excludes persons with disabilities who work in supported employment, specifically, those 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.[83]

The Commonwealth *Disability Services Act 1986* defines "supported employment" services to mean services to support the paid employment of persons with disabilities, being persons:

> (a) for whom competitive employment at or above the relevant award wage is unlikely; and
>
> (b) who, because of their disabilities, need substantial ongoing support to obtain or retain paid employment.

Supported employment has its origins in operations established in the 1950s to provide job opportunities for people with a disability. In the contemporary context, supported employment refers to employment in Australian Disability Enterprises (ADEs), which are generally not for profit organisations which provide supported employment opportunities to people with disability.[84] Examples include Activ, Good Samaritan Industries and ParaQuad Industries.

At the time of the enactment of the MCE Act in 1993, employees with a disability employed in an enterprise such as Activ may have received a wage which was less than the minimum wage rate. In 1994, the Commonwealth Supported Wage System was introduced. This is a wage assessment tool

[83] See s 3 of the MCE Act and regulation 3 of the MCE Regulations.

[84] https://www.dss.gov.au/disability-and-carers-programs-services-for-people-with-disability/employment-for-people-with-disability

which determines the minimum wage rate for an employee with a disability based on an independent assessment of their productive capacity to undertake a particular job compared to a non-disabled employee.

As the Supported Wage System was not in place at the time of enactment of the MCE Act, there was no mechanism to enable the payment of a rate less than the MCE Act minimum wage to an employee with a disability. It is likely that workers in supported employment were therefore excluded from the definition of 'employee' in the MCE Act to accommodate this practice. Discussing the exclusions from the definition in Parliament at the time of introducing the legislation, the responsible Minister said that "groups of people with disabilities have pointed out the difficulties". Though not explicitly stated, this presumably refers to difficulties that would arise if workers in supported employment were subject to the minimum wage.[85]

As with the other groups excluded from the definition of 'employee' in the MCE Act, the exclusion of persons in supported employment means that they are not entitled to the minimum conditions of employment outlined in the MCE Act such as annual leave, personal leave, bereavement leave and public holidays. They are, however, still covered by the provisions of the IR Act and thus can be covered by a State award or agreement.

Since 1988, there has been a *Supported Employees Industry Award* in the State jurisdiction, which applies to all employees working in supported employment. The award does not contain minimum wage rates but does contain entitlements relating to hours of work, overtime, public holidays, annual leave, sick leave and maternity leave.

Given that the *Supported Employees Industry Award* applies to any worker in supported employment regardless of exclusion from coverage under the MCE Act, there are no workers in supported employment in the State industrial relations jurisdiction whose employment is not subject to some minimum standards relating to annual leave, sick leave, bereavement leave and public holidays.

However, it appears that the clauses in the *Supported Employees Industry Award* have not been updated for a considerable period of time, and as noted above, the award does not contain minimum wage rates. As such, there remains a need to clarify the legal position of workers in supported employment in the State industrial jurisdiction.

Furthermore, while there is a readily apparent logic to promoting the employment of disabled people by means of mechanisms to facilitate reduced wages if the employee's productive capacity is reduced, it is not clear why workers in supported employment should be deprived of other statutory minimum entitlements. This inequity is particularly concerning given that in some cases people with a disability may be more vulnerable to exploitation than other employees.

It should be noted that there is a distinction between employees with a disability employed in supported employment and those employed in what is termed 'open employment'. The latter term relates to employment in the open labour market, for example, employment in the WA public service. These employees are not excluded from the definition of 'employee' in the MCE Act. Whilst they may be paid less than the minimum wage for a particular job, this can only be enabled if an industrial instrument includes a wage assessment tool (such as the Supported Wage System) that facilitates this. If there is no such instrument or wage assessment tool, the employee is entitled to the relevant minimum wage. Consequently, the current exclusion of persons with a disability employed in

[85] Western Australia, *Parliamentary Debates,* Legislative Assembly, 19 August 1993, 3070 (Graham Kierath).

supported employment from the MCE Act is inequitable when compared with employees with a disability employed in open employment.

In the national workplace relations system, persons in supported employment are entitled to the NES in the FW Act. This includes annual leave, personal leave and compassionate leave. The NES does not include a minimum wage. However, employees who are not covered by an award or agreement are entitled to a minimum wage set by the Fair Work Commission. Employees with a disability which affects their productive capacity and who meet the impairment requirements for receipt of the disability support pension are entitled to a 'special national minimum wage' rate. This rate is calculated as a percentage of the national minimum wage which is linked to an assessment of the employee's productive capacity conducted in accordance with the Supported Wage System.[86] Many awards in the national system make provision for employment under the Supported Wage System, as do some State awards and agreements. There is also a national Supported Employment Services Award which provides for a number of approved wage assessment tools, in addition to the Supported Wage System.

As noted, the Supported Wage System provides a process that allows employers to pay a productivity-based wage for people whose disability has reduced their productive capacity to perform a particular job. Under the Supported Wage System, an employee's minimum wage is determined according to their assessed productive capacity with the associated proportion applied to the relevant minimum wage (be this the national minimum wage or the minimum rates in an industrial instrument).[87] For example, if an employee's productive capacity is assessed at ten per cent, they are entitled to ten per cent of the applicable minimum wage rate.

The Supported Wage System provides for a minimum weekly amount payable which all employees with a disability assessed under the Supported Wage System must at least receive. This amount is set by the Fair Work Commission each year in the national wage case as discussed above. This rate is currently $90 per week.[88]

The Supported Wage System can only be utilised if the job under consideration is covered by an industrial instrument or legislative provisions which permit the payment of productivity wages under the Supported Wage System.[89] The MCE Act does not presently provide for this.

Having examined the approach to supported employment in the national industrial relations system, the Interim Report of the Review concluded:

> 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 covered by the minimum conditions of employment, and to make provision for payment of special wage rates to those employees

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[86] Further information regarding the Supported Wage System can be obtained from the current (July 2018) Supported Wage System Handbook, available at www.jobaccess.gov.au/sites/default/files/documents/06_2018/Supported%20Wage%20System%20in%20open%20employment%20Handbook.pdf#page=5&zoom=100,0,80

[87] The Supported Wage System does not itself determine the classification which applies to a particular job. This determined by the industrial instrument that applies to the employee,

[88] See A.3.2 in Schedule A of the National Minimum Wage Order 2021 - https://www.fwc.gov.au/documents/wage-reviews/2020-21/decisions/pr729671.pdf.

[89] See, Department of Jobs and Small Business website, *Supported Wage System* - https://www.jobs.gov.au/supported-wage-system.

with a disability whose productive capacity has been assessed as being reduced by means of an appropriate assessment method.[90]

The relevant recommendations in the Final Report were as follows:

> 44. The Amended IR Act is not to exclude from its coverage persons:
>
> (a) Who receive a disability support pension under the *Social Security Act 1991* (Cth); and
>
> (b) Whose employment is supported by "supported employment services" within the meaning of the *Disability Services Act 1986* (Cth), being persons currently excluded from the definition of an employee under s 3 of the MCE Act and regulation 3 of the MCE Regulations.
>
> 54. The Amended IR Act include a Part that provides for minimum conditions of employment for employees covered by the State system to be called the Western Australian Employment Standards (WAES).
>
> 55. The WAES include:
>
> (a) The minimum wage (including for employees who have a disability that has been assessed to affect their productive capacity to perform their particular job).

Whilst there is no intention at this stage to proceed with the recommendation to consolidate the existing provisions of the IR Act and the MCE Act in one statute, or to transform the provisions of the MCE Act into a new part in the IR Act known as the Western Australian Employment Standards, it is proposed that the Final Report's proposed recommendations be implemented by way of:

- amendment to the MCE Act so that persons in supported employment who receive a disability support pension will no longer be excluded from the definition of 'employee' under section 3;
- amendment to the MCE Act to provide that a person with a disability may be employed under the provisions of the Supported Wage System or a wage assessment tool in an industrial instrument; and
- amendment to the IR Act to require the WAIRC to set the minimum weekly amount payable under the Supported Wage System to employees with a disability (other than those in supported employment) each year.

It is intended that the Supported Wage System be the wage assessment tool that may be used by an employer to pay a productivity based wage for an employee with a disability where there is no wage assessment tool in an industrial instrument that applies to the employee.

Under the Supported Wage System, an employee's minimum wage is determined according to their assessed productive capacity and the associated proportion of the applicable minimum wage.

The wage rate payable under the Supported Wage System to an employee is to be the percentage of the rate referred to in s 12 of the MCE Act (minimum weekly rate of pay for employees aged 21 or more) in effect at that time, which corresponds to the employee's assessed productive capacity. This is to be rounded up to the nearest 10 cents.[91]

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[90] Interim Report at [868], pp. 307-8.

[91] In accordance with the rounding principles contained in the *Supported Wage System in Open Employment Handbook July 2018*, 23.

It is intended that s 50A(1)(a) of the IR Act also be amended to require the WAIRC to set, for the MCE Act, the minimum weekly amount payable under the Supported Wage System to employees with a disability each year and for this to be the same as the amount set by the FWC in the most recent annual national wage case. It is also intended that s 50A(1)(b) of the IR Act be amended to require the WAIRC in a State Wage order to adjust the minimum weekly amount paid under awards which use the Supported Wage System. It must order the payment of the higher of the amount in the previous State Wage order, or the amount set by the FWC in the most recent annual national wage case.

The MCE Act will also be amended to provide that the minimum weekly amount payable at a particular time to:

- an employee with a disability who is not covered by an industrial instrument and whose productive capacity has been assessed under the Supported Wage System; or
- an employee with a disability whose rate of pay is provided for in an industrial instrument which uses the SWS as its wage assessment tool

must not be less than the amount that is set by the WAIRC under s.50A(1)(a) of the IR Act.

Impact in detail

Legal effects

Under this proposal, persons in supported employment would become entitled to all of the minimum conditions of employment included in the MCE Act.

Employees with a disability in supported employment whose productive capacity is assessed as being reduced under the Support Wage System or a wage assessment tool in an industrial instrument will be entitled to a minimum wage based on the assessment, which may be less than the MCE Act minimum wage.

The proposal will also have no legal effect on employees with a disability who are employed in open employment as they are not currently excluded from the MCE Act.

People affected

Western Australian Disability Enterprises (WADE) comprises eight organisations which provide commercial products and services via the employment of employees with a disability. WADE states on its website that collectively, these organisations provide employment to more than 2,000 Western Australians.[92] WADE also states that most employees of these enterprises are covered by an award or agreement and are paid wages based on the Supported Wage System.[93] All WADEs are regulated by the Commonwealth Department of Social Services.

It is not possible to say how many of these workers are covered by the State industrial relations jurisdiction. WADEs which are constitutional corporations will be covered by the FW Act. It is noted that, of the eight organisations listed on the WADE website, five currently have enterprise agreements registered in the Fair Work Commission and therefore appear to be operating in the national jurisdiction. One enterprise, Westcare Incorporated, has an agreement registered in the WAIRC for staff who are engaged to work in the employer's Supported Employment Services.[94]

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92 http://wade.org.au/about-us/

93 http://wade.org.au/faqs/

94 Westcare Incorporated Supported Employment Services Enterprise Agreement 2018 – 2022, available at: http://forms.wairc.wa.gov.au/Agreements/Agrmnt2018/WES324.pdf

As noted above, persons employed in supported employment who are covered by the State industrial relations system are also currently covered by a State award which provides for a number of minimum entitlements akin to those in the MCE Act.

Costs and benefits

If the proposed changes for workers in supported employment were implemented, workers who are not covered by the FW Act or an industrial instrument which contains an alternative wage assessment tool may be entitled to a minimum wage rate based on an assessment of their productive capacity under the Supported Wage System.

There will be no effect on the wages of employees in supported employment who are currently paid in accordance with the Supported Wage System or under a different wage assessment tool contained in an award or industrial agreement.

It is possible that for any workers in supported employment who are not already covered by an industrial instrument, the proposed change could result in an increase in their minimum wage rate if an assessment indicates they should be paid a higher proportion of the minimum wage. However, given that an employee's minimum wage rate is to be determined in accordance with an independent assessment of the worker's productive capacity, there is an argument that the employee's previous wage rate was inequitable and indefensible. The Supported Wage System is a long standing wage assessment tool accepted by governments, unions, employers and disability advocates.

Furthermore, it seems likely that most workers in supported employment in WA already receive minimum leave entitlements, whether through application of the State *Supported Employees Industry Award,* coverage of an industrial agreement, coverage of the FW Act (with respect to parental leave) or by virtue of being covered by the national system. Extending coverage of the MCE Act to all workers in supported employment in the State system is therefore likely to have minimal impact on employers. Workers gaining access to a minimum wage based on their independently assessed productive capacity is, however, a significant benefit.

The proposed changes:

- put beyond doubt that the minimums in the MCE Act are implied into the Supported Employees Industry Award;
- ensure employees with a disability employed in supported employment in the State system receive the same conditions as employees with a disability employed in open employment;
- ensure employees with a disability in supported employment in the State system are entitled to minimum conditions in the same fashion as employees with a disability in supported employment in the national system;
- provide for a long standing and widely accepted wage assessment tool to independently assess an employee's capacity to undertake a particular job;
- help facilitate WA's compliance with the ILO Protocol of 2014 to the *Forced Labour Convention, 1930*.

Consultation

Various submissions to the Review addressed the exclusion of workers in supported employment from the definition of 'employee' in the MCE Act.

CCI stated that in principle, it would support people with disabilities engaged in employment being included in the definition of employee where they are so engaged. However, CCI indicated that one

critical issue would be with respect to wages payable where the wage rate is proportional to the assessed capacity of the individual. CCI argued:

> There are significant considerations to be addressed, for example, the approved assessment methodology, the assessment instruments to be utilised, accreditation of assessors, the application of the Commonwealth system to support those who cannot work at full award wages because of a disability, and the relationship with the criteria and requirements of the disability support pension.[95]

AMMA submitted that the definition of 'employee' should not be expanded beyond its current scope, save consideration being given to removing the exclusion of persons employed in domestic service. AMMA did not explain its reasons for taking this position.[96]

Unions were supportive of the recommendation made in the Review's Interim Report to include workers in supported employment within the definition of employee in the MCE Act, as were the ELC, ECCWA and WACOSS. The ELC stated that, in its view, people with disabilities in supported employment should receive the same basic employment protections as other employees in WA.

Changes similar to those proposed here were also considered by the previous Government and included in the draft *Labour Relations Legislation Amendment and Repeal Bill 2012* (the Green Bill). No organisation expressed opposition to those proposals at that time.

Analysis

The initial assessment of the changes proposed for workers in supported employment was that any impact is likely to be minimal. Based on the consultation undertaken for the Review, and the lack of significant concerns identified, there does not appear to be any reason to reconsider that view.

CCI raised legitimate issues regarding the need to consider the wages to be paid in supported employment and appropriate methods of assessing the productive capacity of the workers involved. It is anticipated that the proposals for reform as outlined will satisfy those concerns, by facilitating use of both the Supported Wage System and other methods of assessment that may be incorporated in industrial instruments.

The proposed reforms will be of benefit in treating all employees with a disability equitably, both between those in supported employment and those in open employment, and between those in the State industrial relations system and those in the national system. It appears unlikely that the proposals would have any significant negative impact on current employment practices given that employees in supported employment are currently covered by either the State or federal supported employees' awards. As such, there does not appear to be any reason that the proposed reforms relating to workers in supported employment should not proceed.

Preferred options

As has been stated above in relation to the detailed analysis of the proposals for each group of workers currently excluded from State industrial relations legislation, there are few options in addressing the present exclusions. In each case, the only option is to maintain an existing exclusion, or to abolish it.

[95] CCI submission on Interim Report

[96] AMMA initial submission to Review.

Based on the analysis and consultation undertaken for the Review and for this Regulatory Impact Assessment process, it is apparent that removal of the present exclusions would generate clear benefits to the community in terms of:

- reducing the potential for exploitation of vulnerable workers, especially those groups known to face elevated risks such as migrant workers employed in domestic service or those earning piece rates in the agriculture sector;
- more equitable treatment of different categories of workers within the State industrial jurisdiction;
- increased consistency with the other State employment laws, such as the LSL Act;
- increased consistency with the national industrial relations jurisdiction; and
- facilitation of Western Australia's compliance with the ILO Protocol of 2014 to the *Forced Labour Convention, 1930*, an important international convention which the Federal Government is seeking to ratify.

The implementation of the proposed changes may in some cases increase employment costs for some employers, however this cost is unable to be quantified. These impacts are outweighed by the positives for the community and individuals of strengthening the employment safety net in the State industrial relations system and providing employees with access to minimum wages and other minimum employment entitlements.

The preferred option is to proceed with the removal of the specified exclusions from the definitions of 'employee' in the IR Act and MCE Act.

Implementation and evaluation

Implementation

Should the proposals for changes to the definitions of 'employee' in the IR Act and MCE Act be adopted, there will be an increased number of employers and employees covered by the provisions of these statutes.

One issue that emerged during consultation around these proposals as part of the Review was the importance of informing the public of the changes, and of educating employers and employees as to their obligations and entitlements under the legislation. It is evident that implementation of the proposals would be very likely to increase public demand for information as to how the MCE Act and IR Act operate, and may also result in a need for increased enforcement activity by DMIRS as the regulator.

The Private Sector Labour Relations Division of DMIRS already provides free advice and educational materials on the State industrial relations jurisdiction via the Wageline website and contact centre.

As the proposed changes to the definition of employee would not actually involve changes to standard employment entitlements, existing educational resources would be of significant benefit to those employers and employees that would become covered by these entitlements should the proposed amendments proceed. DMIRS would also develop new resources specifically to assist those groups.

To promote the changes, DMIRS would undertake a communication and education campaign to promote awareness of resources to those employers required to implement changes as a result of the proposed changes.

This could comprise provision of electronic information and seminars to industry or stakeholder groups.

Should the proposed recommendations for change with respect to the definition of 'employee' be implemented, the associated recommendation of the Review to establish a taskforce to assist employers and employees with the changes to regulation may also be progressed. It is intended that this taskforce would comprise representatives from DMIRS, CCI and UnionsWA. DMIRS would also consult with other private and community services which assist individuals in relation to employment matters, for example, the ELC. It is anticipated that the potential taskforce would generate additional ideas and initiatives to assist in easing the transition to expanded coverage of the State's industrial legislation.

Some additional resources may be required to ensure that DMIRS can meet increased demand for information as to the operation of State industrial laws, and to effect appropriate compliance measures should a significant increase in demand for enforcement functions emerge after the changes are enacted. However, given the uncertainty as to the number of employees likely to be affected by the changes, and the nature of employment practices which currently apply to the workers not presently covered by standard employment entitlements, it is difficult at this point to predict the costs of implementation to Government.

Evaluation

The primary objective of removing the specified exclusions from the MCE Act and IR Act is to ensure that workers in the nominated categories are protected by these statutes. The passage of relevant legislation through the Parliament and its becoming operative would achieve this, and also ensure that Western Australia is compliant with the ILO Protocol of 2014 to the *Forced Labour Convention, 1930*, which is another objective of the proposed changes.

Assessing whether legislative change has materially improved the circumstances of the affected groups would present some challenges. As discussed elsewhere in this document, there is no data to reliably indicate the numbers of employees likely to be affected by the changes or to identify the wages and conditions they currently receive. These uncertainties preclude the possibility of any quantitative measurement of the effectiveness of the proposed reforms. Similar uncertainty exists with respect to the practices of employers of these workers, and their current levels of awareness of and compliance with existing legal obligations. However, DMIRS Private Sector Labour Relations Division would monitor the impact of the amended laws in the course of performing normal compliance and enforcement functions, and liaising with stakeholders on behalf of the Minister.

PART B: EQUAL REMUNERATION MEASURES

This chapter analyses regulatory impact of the proposed establishment of an equal remuneration framework for the State industrial relations system via the proposed insertion in the *Industrial Relations Act 1979* (IR Act) of an equal remuneration provision and a requirement for the Western Australian Industrial Relations Commission (WAIRC) to develop an equal remuneration principle.

Issue statement - the problem

The State industrial relations system does not currently contain any specific legal framework for parties to seek redress on the basis that the remuneration attached to their occupation or industry is undervalued on a gender basis.

A legislative equal remuneration framework has been widely recognised as an important strategy to assist in reducing the gender pay gap.[97]

WA currently has the highest gender pay gap in the country. At 21.9 per cent, WA's gender pay gap is significantly higher than the national gender pay gap of 14.2 per cent, and higher than any other State or Territory.[98] The gender pay gap is widely recognised as the key measure of pay inequity.[99]

A useful overview of the gender pay gap and its causes, including analysis of the larger gender pay gap in Western Australia, was provided at Attachment 4A of the Interim Report of the Ministerial Review of the State Industrial Relations System.[100]

Inequality in pay rates in occupations which for sociological, financial and cultural reasons may have had gender based undervaluation could be considered a significant market failure.

The introduction of an equal remuneration provision in the IR Act is one strategy to help address the gender pay gap. While there are limits as to how much a State-based equal remuneration framework can achieve in this regard, it is considered that a modern, equitable and fair industrial relations framework should contain a method through which gender-based undervaluation can be addressed.

In the past 20 years there have been two major studies of the gender pay gap undertaken in WA, as well as extensive research into the issue at the national and international level.

In 1999, Associate Professor Geoffrey Crockett and Dr Alison Preston from Curtin University were commissioned by the then Department of Productivity and Labour Relations to undertake a research project to identify and analyse the causes and reasons for the earnings gap between WA male and female workers, and the gap between WA female workers and their national counterparts, and to identify how these gaps may be reduced.[101]

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97 See, *Report on the Review of the Gender Pay Gap in Western Australia*, Dr Trish Todd and Dr Joan Eveline, School of Economics and Commerce, The University of Western Australia, November 2004; House of Representatives Standing Committee on Employment and Workplace Relations *Making it Fair Report* 2009; and the Senate Finance and Public Administration References Committee Report - *Gender segregation in the workplace and its impact on women's economic equality*, June 2017.

98 Workplace Gender Equality Agency, *Australia's Gender Pay Gap Statistics*, August 2021.

99 *Equal Pay – An Introductory Guide*, International Labour Organisation Chapter 2. See also *Australia's gender pay gap statistics August 2017* produced by the Commonwealth Workplace Gender Equality Agency.

100 Available at www.commerce.wa.gov.au/labour-relations/ministerial-review-state-industrial-relations-system

101 *Pay Equity for Women in Western Australia Research Report*, Associate Professor Geoffrey Crockett and Dr Alison Preston, Department of Economics, Curtin University, 1999.

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 gender pay gap in WA.

The *Report of 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 gender pay gap.[102]

A major theme of the Todd & Eveline Review recommendations was that both voluntary and regulatory strategies should be used to address the gender pay gap. A key recommendation of the Todd & Eveline Review was the inclusion of an Equal Remuneration Part in the IR Act to allow the WAIRC to hear applications to achieve gender pay equity in awards.

The 2019 Ministerial Review of the State Industrial Relations System also examined this issue in detail, as discussed in subsequent sections of this document.

Current legislative framework

While the objects of the IR Act include "to promote equal remuneration for men and women for work of equal value"[103], there are currently no specific provisions relating to equal remuneration applications in the IR Act.

Section 50A of the IR Act, under which the WAIRC determines annual increases to minimum and award wages through the State Wage Case, requires the WAIRC to take into consideration the need to "provide equal remuneration for men and women for work of equal or comparable value" when setting minimum and award wages.[104]

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 *Minimum Conditions of Employment Act 1993* 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. The current Statement of Principles (applicable from 1 July 2021) is at Schedule 2 of the 2021 State Wage Order.[105]

An application to vary an award under the State Wage Fixing Principles can currently only be made by a party to the relevant award, which is the relevant union or unions, and any employer or employer organisation bound by the award. The State Wage Fixing Principles cannot be used to vary remuneration for employees covered by industrial agreements. The current Statement of Principles is therefore of limited benefit to an employee group seeking an equal remuneration order, where that group is paid under an industrial agreement (or enterprise order).[106]

The State Wage Fixing Principles have not yet been used to bring a specific equal remuneration application in the State jurisdiction, and no legislative or case law criteria currently exist to guide the WAIRC in determining the process or merits of an equal remuneration matter.

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[102] *Report on the Review of the Gender Pay Gap in Western Australia*, Dr Trish Todd and Dr Joan Eveline, School of Economics and Commerce, The University of Western Australia, November 2004.

[103] Section 6.

[104] Subsection (3)(a)(vii) of section 50A.

[105] Available at: www.wairc.wa.gov.au

[106] Enterprise Orders are arbitrated outcomes determined by the WAIRC where negotiations for an industrial agreement are at an impasse and cannot be resolved.

Additional provisions in the IR Act concerning public sector wages

In 2014 the IR Act was amended to include additional provisions that must be taken into consideration whenever the WAIRC makes a public sector determination, including adjustments to rates of pay.[107]

Section 26(2A) of the IR Act 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."

A 'public sector decision' is defined in section 26 (2B) 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)."

It should be noted that the WAIRC is not bound by these matters when making a public sector determination – it is only required to give them due consideration. Further:

- s26(2A) does not apply to Schedule 1 entities as identified in the PSM Act; and
- the annual State Wage Order made under section 50A of the IR Act is not considered to be a 'public sector decision'.

[107] See the *Workforce Reform Act 2014*.

Equal remuneration provisions in other jurisdictions

Under Part 2-7 of the *Fair Work Act 2009* (FW Act) the Fair Work Commission (FWC) can make an equal remuneration order requiring certain employees to be provided equal remuneration for work of equal or comparable value.[108] 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.[109]

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.[110] The FW Act also specifies that an equal remuneration order must not provide for a reduction in an employee's rate of remuneration.[111]

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.[112]

Since 2009 there have been three equal remuneration cases completed under the FW Act provisions. None have related to the public sector.

An outline of the major equal remuneration matters that have been heard in other Australian jurisdictions since 2000 is provided in **Table C** below.

A summary of the only equal remuneration case concerning public sector employees in any Australian jurisdiction since 2000, the New South Wales "Crown Librarians" Case is provided in **Appendix A**.

[108] FW Act section 302(1).
[109] FW Act section 302(3).
[110] FW Act section 302(5).
[111] FW Act section 303(2).
[112] FW Act section 302(4).

Table C - Equal remuneration cases in Australia 2000 - 2021

Jurisdiction	Case	Outcome	Consent or contested
Public Sector			
NSW	Crown Librarians	Successful - increases of up to 37% awarded (the average increase was 16%)	Consent that the librarian occupations were undervalued, NSW IRC to determine the quantum of increase.
Private sector / not for profit			
Federal	Social, community and disability support (SACS) workers	Successful – increases of between 19% and 41% awarded, plus a 4% loading to compensate for an inability to engage in enterprise bargaining (increases phased in over 8 years)	Not contested by employer groups in the SACS industry, as the Federal Government committed to funding any increases. Opposed by other (non-SACS) employer groups.
Federal	Child care	Unsuccessful	Contested
Federal	Early Childhood Education	Unsuccessful[113]	Contested
Queensland	Dental assistants (private sector)*	Successful – wage increases of approx. 11% awarded, plus an 'equal remuneration component'	Contested
Queensland	Childcare workers*	Successful – increases of between 14% and 29% awarded	Contested
Queensland	Community services and crisis assistance workers*	Successful – increases of between 18% and 37% awarded	Partially contested – employer groups agreed that some increase was warranted, although they opposed the amounts claimed by the union.
Queensland	Disability support workers*	Successful – increases of between 15% and 20% awarded	Not contested that work was undervalued – QIRC to determine quantum of increase.
New South Wales	Employees working in kindergartens and child care centres*	Successful – increases of between 20% and 53% awarded	Contested

***These claims were made in the relevant State industrial jurisdiction prior to all States other than Western Australia referring their industrial relations powers for the private sector to the Commonwealth.**

[113] In April 2021, the Fair Work Commission dismissed the application of the Independent Education Union for an equal remuneration order for early childhood teachers, however the FWC considered that an adjustment to pay rates could be justified on a work value basis.

Proposal for change

Term of Reference 3 for the Ministerial Review of the State Industrial Relations System (the Review) was to:

> *"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 Final Report of the Review proposed the following recommendations below in response to Term of Reference 3.

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

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

The Final Report's recommendations were informed by submissions made by stakeholders, as well as an examination of equal remuneration models that have been implemented in other Australian jurisdictions.

The opinion of the Review was that an equal remuneration provision ought to be included in the IR Act to enhance the prospect of the making of equal remuneration orders by the WAIRC.

The Final Report also recommended an equal remuneration provision be introduced because of the nature and extent of the gender pay gap in WA, and because to date there have been inadequate procedures, or use of procedures, within the WAIRC to facilitate doing something about it.

Additionally, it was considered that 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 WA.

The opinion of the Review was that the provision ought to be based upon the model operating in Queensland – that is, a legislative provision be included in the IR Act, including a requirement that the WAIRC establish and maintain an equal remuneration principle. This was largely supported by the stakeholder submissions made to the Review, which are later summarised.

It is proposed that the Review recommendations be implemented by way of amendment to the IR Act to insert specific legislative provisions giving the WAIRC power to make equal remuneration orders. The proposed equal remuneration provision in the IR Act would establish the framework and criteria through which equal remuneration cases can be determined by the WAIRC, and would include details of:

a) who could make an application for an equal remuneration matter;

b) what the criteria for making an equal remuneration order would be; and

c) the interaction of equal remuneration orders with other industrial instruments.

The IR Act would also be amended to establish a requirement for the WAIRC to issue and maintain an equal remuneration principle to guide the consideration of any equal remuneration applications, be they an equal remuneration order application or an application to vary an award under the State Wage order Statement of Principles. The IR Act would provide that this equal remuneration principle will

apply to all equal remuneration order applications regardless of the type of industrial instrument employees are being paid under.

Objectives of the proposal

The primary objective of the proposal is to establish a robust framework for facilitating equal remuneration cases in the State industrial relations jurisdiction.

It is hoped that this will assist in correcting a market failure for select groups of workers who do not currently enjoy equal remuneration for work of equal or comparable value, largely due to sociological, financial and cultural factors that have led to the undervaluation of certain female-dominated occupations and industries.

A legislative equal remuneration provision has been widely recognised as an important strategy to assist in reducing the gender pay gap.[114]

Establishing a separate equal remuneration provision in the IR Act would allow a broad scope of parties to make application for an equal remuneration order, including an individual or a group of employees, an industrial organisation or association, the Minister for Industrial Relations, or the Commissioner for Equal Opportunity.

Impact analysis

Costs

The establishment of an equal remuneration framework through a legislative amendment to the IR Act and the development of an equal remuneration principle will not automatically create an additional cost for State system employers in the private or public sectors.

Should an equal remuneration order application be made under the new legislative provisions, potential additional employment costs may arise if and when the WAIRC makes an equal remuneration order that increases wage rates to rectify gender-based undervaluation.

Equal remuneration cases undertaken in other jurisdictions have highlighted that each case is a long and time intensive matter which requires significant input from all parties.

This proposal seeks to establish a framework to facilitate equal remuneration order applications and to provide guidance on how such matters should be progressed in the WAIRC. It does not seek to achieve any particular outcome in terms of the number of applications made or the level of remuneration received by various employee groups.

Private Sector

Private sector businesses in the State industrial relations system are primarily small businesses. It is not anticipated that a significant number of private sector equal remuneration applications would be lodged relating to private sector small businesses in the State system.

[114] See, *Report on the Review of the Gender Pay Gap in Western Australia*, Dr Trish Todd and Dr Joan Eveline, School of Economics and Commerce, The University of Western Australia, November 2004; House of Representatives Standing Committee on Employment and Workplace Relations *Making it Fair Report* 2009; and the Senate Finance and Public Administration References Committee Report - *Gender segregation in the workplace and its impact on women's economic equality*, June 2017.

Not for Profit / Community Sector

Many not for profit organisations in the community sector are fully or partially funded by the State Government. A successful equal remuneration application in this sector could result in greater costs for community organisations, potentially affecting service levels.

Public sector

The public sector represents approximately ten per cent of the total Western Australian workforce, and is the largest user of the State industrial relations system.

It is not possible to identify (a) which public sector occupational groups might pursue equal remuneration orders or (b) the future cost of such orders to government as employer.

Benefits

Gender equity

It is considered that a modern, equitable and fair industrial relations system should contain a method through which gender-based undervaluation can be addressed. Should the proposal to amend the IR Act not be implemented, WA will remain one of the few jurisdictions in the country without a legislative framework to guide equal pay matters.

WA currently has the highest gender pay gap in the country (and has done so for quite some time) and it is appropriate to implement a legislative equal remuneration framework as part of a range of strategies to reduce the gender pay gap.

The proposed reform provides a legislative option for correcting inequality in pay rates in occupations which for sociological, financial and cultural reasons may have had historic gender based undervaluation.

International obligations

The introduction of a pay equity framework in the State jurisdiction also assists with Australia's implementation of International Labour Organization (ILO) Convention C100 – *Equal Remuneration Convention, 1951* (the Equal Pay Convention), which it has ratified.

Article 2 of the Equal Pay Convention requires member states to take active steps to promote and ensure the application of the principle of equal remuneration for men and women for work of equal value.

Consultation

Extensive stakeholder consultation was undertaken on the establishment of a legislative equal remuneration framework under Term of Reference 3 of the Ministerial Review of the State Industrial Relations System. In the initial submissions made to the Review, the inclusion of an equal remuneration provision in the IR Act was supported by the majority of stakeholders.

In its submission United Voice provided detailed information on the gender pay gap, the reasons supporting an equal remuneration provision and workforce gender segregation issues generally. The submission said that unequal pay outcomes between women and men is an 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.

United Voice submitted that from its experience as the union representing workers in a number of historically gender based and low paid industries, it 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 WA.

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.

While the majority of submissions were in favour of an equal remuneration framework being established, there were some exceptions.

The CCI, in principle, supported the desire and the commitment of the Government to improve pay equity in WA. 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. The CCI was 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 equity outcomes through organisation driven changes rather than imposed outcomes.

WACOSS, whilst fully supporting the principle of equal remuneration, raised the difficult choices its members sometimes faced 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 organisations were forced to cut services and staff if they were unable to afford to pay a fair and just wage as a result of Government contracting and funding decisions.

A full copy of the submissions made to the Ministerial Review of the Industrial Relations System is available at www.dmirs.wa.gov.au/ir-ministerial-review.

Preferred option

The proposal is that the IR Act is amended to formally establish an equal remuneration order framework based on the model in Queensland's *Industrial Relations Act 2016* and to require the WAIRC to issue and maintain an equal remuneration principle.

Whether or not the IR Act is amended to provide for an equal remuneration framework is a binary option – either this is implemented or it is not.

With regard to the proposal to amend the IR Act to require the WAIRC to develop an equal remuneration principle, it should be noted that as part of the 2018 State Wage Case proceedings the WAIRC, of its own motion, commenced proceedings to establish an equal remuneration principle. As part of the 2019 State Wage Case proceedings, a new equal remuneration principle was established and inserted into the State Wage Fixing Principles that were issued as part of the 2019 State Wage Order.

The equal remuneration principle was developed with the agreement of UnionsWA, and the Chamber of Commerce and Industry WA and the Minister for Industrial Relations (represented by DMIRS in his statutory role under the IR Act).

The equal remuneration principle has not yet been used to bring an equal remuneration application in the State jurisdiction.

Without the proposed legislative amendment to the IR Act this equal remuneration principle can only apply to applications made to vary State awards and orders[115] and not have applicability to the many State system employees working under industrial agreements.

The preferred option is that the IR Act is amended to formally establish an equal remuneration order framework and to require the WAIRC to issue and maintain an equal remuneration principle.

The preferred option is considered beneficial to the community for a number of reasons, as it:

(a) is consistent with the recommendations of the Final Report of the *Ministerial Review of the State Industrial Relations System*, which followed extensive consultation with stakeholders;

(b) assists with Australia's implementation of International Labor Organisation (ILO) Convention C100 – *Equal Remuneration Convention, 1951* (in particular Article 2); and

(c) implements 'best practice' reforms with regard to gender pay equity.

Implementation and evaluation

The preferred option would be implemented at the same time as other select recommendations from the Ministerial Review of the State Industrial Relations System are being legislated.

Enabling legislation will amend the IR Act to specifically enable the WAIRC to make equal remuneration orders; and to outline who may apply for such an order, the criterion for doing so and how such an order interacts with other industrial instruments.

The IR Act will also require the WAIRC to set out a statement of principles as part of each annual State Wage order to ensure employees receive equal remuneration i.e. an equal remuneration principle.

As the State Wage Case occurs every 12 months, the equal remuneration principle is subject to review on an annual basis. Any issues that arise with the principle can therefore be addressed as part of the State Wage Case proceedings.

The effectiveness of any amendments to the IR Act with regard to equal remuneration will be monitored by DMIRS on an ongoing basis.

[115] Excluding enterprise orders.

GLOSSARY

ACRONYM	FULL TITLE
AMMA	Australian Mines and Metals Association
AMWU	Australian Manufacturing Workers Union (WA Branch)
CALD	Culturally and Linguistically Diverse
CCI	Chamber of Commerce and Industry of Western Australia
Commission only employees	Employees who work on commission only are paid when they make a sale or achieve a specific target.
Common Law	That part of law that is derived from custom and judicial precedent rather than as prescribed in statutes
Constitutional Corporation	A financial or trading corporation formed in Australia or a foreign corporation. A business is usually a constitutional corporation if it has 'Pty Ltd' or 'Ltd' within its business name.
Disability Services Act	*Disability Services Act 1993 (WA)*
DMIRS	Department of Mines, Industry Regulation and Safety
Domestic worker	For purposes of this document a domestic worker is someone engaged to carry out domestic services (however defined) in a private home by the owner of occupier of that private home and in which less than 6 paying boarders or lodgers reside. It is this category of employee that is currently excluded from industrial protections provided by the *Industrial Relations Act 1979* and the *Minimum Conditions of Employment Act 1993*
ECCWA	Ethnic Communities Council of Western Australia
ELC	Employment Law Centre of Western Australia Inc
FWC	Fair Work Commission
Fair Work system	'Fair Work system' refers to the laws and agency bodies that were created by the *Fair Work Act 2009*. It is the national workplace relations system.
Final Report	The Final Report of the Ministerial Review of the State Industrial Relations System June 2018
FW Act	*Fair Work Act 2009 (Cth)*
Green Bill	Labour Relations Legislation Amendment and Repeal Bill 2012 (WA)
HSUWA	Health Services Union of Western Australia
ILO	International Labour Organization
Interim Report	The Interim Report of the Ministerial Review of the State Industrial Relations System March 2018
IR Act	*Industrial Relations Act 1979 (WA)*
LSL Act	*Long Service Leave Act 1958 (WA)*
MCE Act	*Minimum Conditions of Employment Act 1993 (WA)*
MCE Regulations	*Minimum Conditions of Employment Regulations 1993 (WA)*
Minister	Minister for Industrial Relations

ACRONYM	FULL TITLE
Modern slavery	As defined in Section 4 of the *Modern Slavery Act 2018* (Cth). The term broadly refers to any situations of exploitation where a person cannot refuse or leave work because of threats, violence, coercion, abuse of power or deception.
National Trust Act	*National Trust of Australia (W.A.) Act 1964*
NDIS	National Disability Insurance Scheme
NES	National Employment Standards contained in the *Fair Work Act 2009* (Cth)
OSH Act	*Occupational Safety and Health Act 1984 (WA)*
Piece rate workers	Piece rate workers are paid per unit of production or per task they finish – for example, for each basket of fruit picked**.**
Public Sector Management Act	*Public Sector Management Act 1994 (WA)*
Review	The Ministerial Review of the State Industrial Relations System 2018 by Mr Mark Ritter SC assisted by Mr Stephen Price MLA
Social Security Act 1991	*Social Security Act 1991 (Cth)*
State system	The Western Australian State industrial relations system
State Wage Case	The State Wage Case is held pursuant to section 50A of the *Industrial Relations Act, 1979*. This obliges the Western Australian Industrial Relations Commission before 1 July in each year to make a General Order (the State Wage Order).
State Wage Order	An Order issued every year by the Western Australian Industrial Relations Commission that sets out the minimum wages applicable under the *Minimum Conditions of Employment Act 1993* and adjusts rates of pay under awards.
Statement of Principles	The State Wage Order sets out a statement of principles to be applied and followed in relation to the exercise of jurisdiction under the *Industrial Relations Act 1979* to set wages, salaries, allowances and other remuneration of employees, or the prices to be paid in respect of their employment.
Superannuation Act	*Superannuation Guarantee (Administration) Act 1992* (Cth)
Supported employment/Supported wage system	The Supported Wage System is a process that allows employers to pay a productivity-based wage for people with disability that matches an independently assessed productivity rate.
The Protocol	International Labour Organization Protocol of 2014 to the *Forced Labour Convention, 1930*
WACOSS	Western Australian Council of Social Service Inc
WAIRC	Western Australian Industrial Relations Commission
WAPOU	Western Australian Prison Officers' Union
WASU	Western Australian Municipal, Administrative, Clerical and Service Union
Workers' Compensation Act	*Workers' Compensation and Injury Management Act 1981 (WA)*

Appendix A – Summary of New South Wales Crown Librarians Case

On 28 March 2002 the Full Bench of the New South Wales Industrial Relations Commission (NSW IRC) handed down a significant equal remuneration decision concerning librarians, library technicians and archivists in the public sector (the "Crown Librarians Case").[116]

The *Crown Librarians Case* was the first equal remuneration matter to be brought before the NSW IRC since it established an Equal Remuneration Principle in 2000 to guide such matters.[117]

The Equal Remuneration Principle allows the NSW IRC to review awards and adjust wage rates or other conditions of employment on the basis that the work, skill and responsibility required or the conditions under which the work is performed have been undervalued on a gender basis.

In the *Crown Librarians Case* the NSW IRC found that the work of librarians, library technicians and archivists (herein referred to collectively as "librarians") had been undervalued on a gender basis. However a significant issue in this case was the fact that all parties agreed there had been historical undervaluation of librarians in the NSW public sector.

In 1998 the Minister for Industrial Relations commissioned the NSW IRC to conduct a Pay Equity Inquiry,[118] which included an examination of previous case studies that had been conducted on the subject.

One of the case studies examined in the Pay Equity Inquiry was a 1996 project involving the State Library that was carried out by the NSW Office of the Director for Equal Opportunity in Public Employment. This earlier project compared the work value of librarians in the NSW public sector (a female dominated profession) with that of government geologists (a male dominated profession).

The Pay Equity Inquiry followed up on the work of the earlier 1996 project and adduced significant additional evidence regarding the work value of librarians, eventually determining that the value of their work had been historically undervalued when compared to geologists (as well as other public sector professions requiring similar levels of education and responsibility). Gender was found to have played a role in the undervaluation of the library profession.

The extensive work value research undertaken during the earlier Pay Equity Inquiry therefore played a significant role in the *Crown Librarians Case*, as it established that librarians in the NSW public sector had been historically undervalued on the basis of gender, and there was consensus between the employing authorities and the relevant union (the Public Service Association) on this point from the outset.

The main issue in contention was the size of the wage adjustment required to remedy the undervaluation and how it was to be applied.

In applying the Equal Remuneration Principle in the *Crown Librarians Case*, the NSW IRC identified that its principal task was to conduct a traditional work value assessment, but in a gender neutral way and in the absence of assumptions based on gender.

Following extensive hearings, the NSW IRC created a new award with modern classification structures and transitional provisions concerning the old wage structure. The new award provided for wage

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[116] Re Crown Librarians, Library Officers and Archivists Award Proceedings – Applications under the Equal Remuneration Principle [2002] NSWIRComm 55.

[117] Re Equal Remuneration Principle [2000] NSWIRComm 113.

[118] *NSW Pay Equity Inquiry* (1998).

increases, including an average rise of 16% across classifications, and up to 25% for some classifications.

In regard to funding for the outcome of the *Crown Librarians Case*, additional funding was made available to the State Library (the largest public sector employer of librarians). However, not all government agencies received supplementary funding.

Budget papers from the NSW Treasury indicate that funding allocations for employee expenses at the NSW State Library were increased by a total of $2.5 million between 2001-02 and 2003-04, as a result of salary increases flowing from the pay equity decision.