The Australian Manufacturing Workers' Union – WA Branch

Submission to the Ministerial Review of the State Industrial Relations System – Interim Report

1 May 2018

Australian Manufacturing Workers' Union
(Registered as AFMEPKIU)

Mr Mark Ritter SC
IR Review Secretariat
Department of Mines, Industry Regulation and Safety
Level 4, 140 William Street
PERTH WA 6000

By email: **irreviewsecretariat@dmirs.wa.gov.au**

1 May 2018

Dear Mr Ritter

Ministerial Review of the State Industrial Relations System

The AMWU welcomes the opportunity to provide submissions on the Ministerial Review of the State Industrial Relations System Interim Report (Interim Report).

The AMWU represents over 8,000 members in Western Australia working across major sectors of the Australian economy, in the manufacturing sectors of vehicle building and parts supply, engineering, printing and paper products and food manufacturing. Our members are engaged in maintenance services work across all industry sectors. We cover many employees throughout the resources sector, mining, aviation, aerospace and building and construction industries. We also cover members in the technical and supervisory occupations in engineering and across diverse industries including food technology and construction.

We note the work that has already been invested by the IR Review Secretariat, unions, employer groups and other community groups into this review.

Whilst there are a number of commendable recommendations that should be endorsed by government, the AMWU has concerns with the recommendations made in the Interim Report under Terms of Reference 1, 4, 5, 6 and 7, which can be summarised as follows:

Term of Reference 1

The AMWU is deeply concerned with what appears to be a pattern of recommendations aimed at fundamentally changing the nature of what is – and should remain – a laypersons' jurisdiction. A number of recommendations create a more complex and legalistic WAIRC structure that is less accessible and fair to workers. We urge the Review to strongly consider what sort of WAIRC is best placed to address the needs of the Western Australian employers and employees.

Term of Reference 4

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The Interim Report unfortunately does not extend itself in considering how the gig economy can be regulated and gig economy workers protected. We encourage the Review to look at creative ways of addressing the gig economy.

Term of Reference 5

The AMWU is disappointed that the Interim Report fell short of recommending a portable long service leave scheme, that would be of considerable benefit to Western Australian workers. We urge the Review to reconsider its decision in this regard.

Term of Reference 6

The Interim Report's proposed New Awards modernization process by its inherent structure cannot comply with the Term of Reference and creates an insurmountable resource barrier for unions, and possibly the government and employer groups. We commend to the Review an alternative process that is detailed in our substantive submission.

Term of Reference 7

The Interim Report's suggestion that a fit and proper person test be introduced is unnecessary and does not comply with the relevant Term of Reference.

Should you wish to discuss anything outlined in this submission, please contact Pearl Lim at pearl.lim@amwu.org.au or on (08) 9223 0800.

Yours sincerely,

Steve McCartney
State Secretary
Australian Manufacturing Workers' Union, West Australian Branch

TERM OF REFERENCE 1

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

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

The AMWU does not object to this recommendation.

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

The AMWU does not object to reviewing the 2018 IR Act on a regular basis, however the Interim Report does not provide the following detail:

- How will the review be conducted?
- Who will conduct the review?
- What will the measurables of the review be?

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

The AMWU agrees that the 2018 IR Act should be drafted in gender neutral terms. In principle, the AMWU also agrees that a plain English drafting style should be adhered to where possible, however we note that the current act contains a number of terms that have significant meanings and litigation histories. We would hope that the Government would be cautious of how amendments would impact on these terms.

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

a) Appeals from decisions of single Commissioners of the WAIRC on the basis and grounds set out in s 49 of the IR Act.
b) Appeals from decisions of the Industrial Magistrates Court (IMC) on the basis and grounds set out in s 84 of the IR Act.
c) Appeals under s69(1) of the IR Act.
d) Applications currently heard by the Full Bench under s 84A of the IR Act.
e) Referrals on questions of law, from the Chief Commissioner or any Commissioner, or the Industrial Commission Arbitral Bench, as provided for in proposed recommendation [5] below.

The AMWU does not agree with this recommendation and deals with it along with Recommendation 6 below.

5. The position of the President of the WAIRC be abolished and instead:
    a) The Presiding Member of the Judicial Bench be a Supreme Court Justice, allocated on a case by case basis, by the Chief Justice of Western Australia (the Presiding Member).
    b) The jurisdiction currently exercised by the President of the WAIRC under s 49(12) of the IR Act be exercised by the Presiding Member.
    c) The jurisdiction currently exercised by the President of the WAIRC under s 72A(6) of the IR Act be exercised by the Chief Commissioner.
    d) Any other powers or duties of an administrative nature currently exercised by the President under the IR Act be exercised by the Chief Commissioner.

The AMWU has significant concerns about this recommendation. It is our submission that any appointment to the WAIRC, and especially the Presiding Member on WAIRC appeals, should have experience in industrial relations. This is an expectation that appears to be shared by both major political parties, given that all appointments to the WAIRC have been persons with industrial relations experience.

The only current Supreme Court Justice with any notable experience or expertise in industrial relations is Acting Justice Smith, who is the current President of the WAIRC.[1] Recommendation 5 seems to suggest the Presiding Member of the proposed Judicial Bench would not be a fixed Supreme Court Justice, but rather a rotating one, which would mean that there would also be no opportunity for the Supreme Court Justice/s to reliably build up experience in industrial relations.

We note that beyond some commentary at paragraph 303 of the Interim Report,[2] there has been no exploration of how the model in Recommendation 5 would impact listing times in the WAIRC, given the current caseload in the Supreme Court

The AMWU also has concerns over the proposition that the Chief Justice picks the Presiding Member. The head of every other court and tribunal in this state is appointed by the executive; the recommendation would be a significant departure from this practice and would see the judiciary make the appointment. In our view, this would be an inappropriate blurring of the separation of powers.

We note that the recommendation does not detail where s 62 and 66 matters would go, though the body of the Interim Report suggests that they could be allocated to other WAIRC Commissioners by the Chief Commissioner. Given that ss 62 and 66 deal with altering, interpreting and disallowing an organisation's rules, we submit that this is a sufficiently serious power that it merits the attention of the President or Chief Commissioner.

[1] We note that Justice Le Miere and Justice Archer have limited pre-appointment experience in industrial relations.

[2] "…Some submissions expressed concern that if this amendment were made the WAIRC would lose the expertise of a judicial head with industrial relations law expertise, and the jurisdiction of the WAIRC Full Bench could be more formalistic and take longer to resolve. These submissions are noted but in the opinion of the Review, can probably be overcome. As set out above, they are likely to be considered by the Chief Justice when deciding who should sit as the Presiding Member in an individual case, and in co-operation between the Chief Commissioner and the Presiding Member."

The AMWU notes paragraph 300 of the Interim Report:

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

The AMWU recommends that a more suitable solution that would address the issues we have raised and the need to use the President's time more fully would be to make the current situation with Acting President Smith permanent practice: make the President a dual appointee to the Supreme Court. This would guarantee judicial standing and industrial relations experience in WAIRC appeals, with the added benefit of extra Supreme Court Justice to deal with that court's workload.

An alternative solution would be to review whether there is a need for a judicial head in the WAIRC at all, and whether there is a need to have a President in addition to the Chief and Senior Commissioners. By way of comparison, there is currently no distinction in the FWC between an 'administrative head' and a 'judicial head', and full benches are convened by presiding members who may or may not be legally qualified.

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

a) To hear and determine the State Wage Case, applications for a General Order, and other matters presently heard by the CCS.
b) To exercise the jurisdiction currently exercised by the Full Bench under sections 53, 54, 55, 58, 59, 60, 62, 71, 72, 72A and 73 of the IR Act.

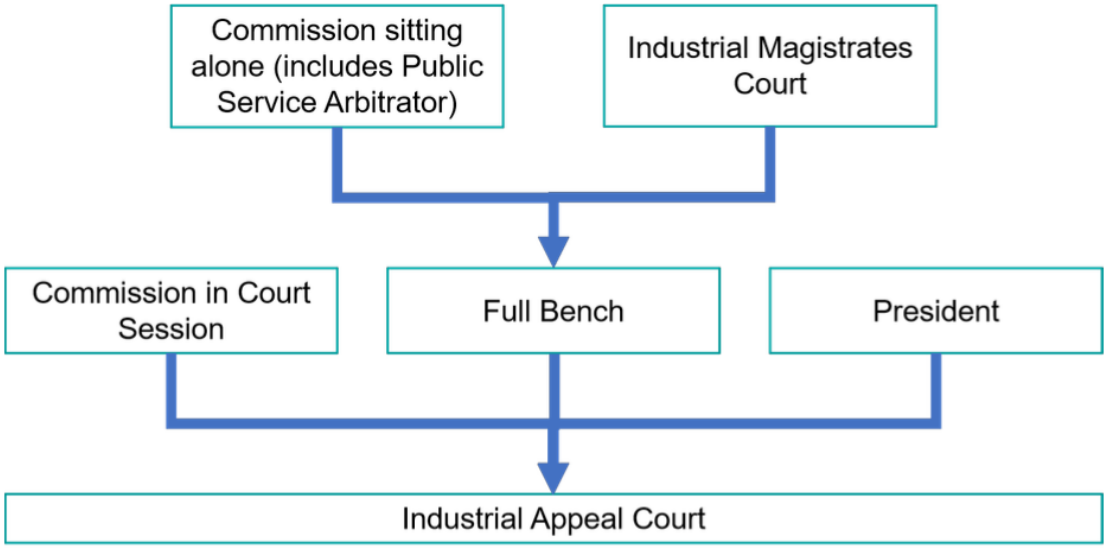
Recommendations 4 and 6 effectively propose the creation of two "full bench" bodies in the WAIRC, with the division of jurisdiction as follows:

Section	**Industrial Commission Judicial Bench**	**Section**	**Industrial Commission Arbitral Bench of the WAIRC** (three Commissioners, Chief Commissioner or Senior Commissioner presiding)
49	Appeals from a Commissioner		State Wage Case
69(1)	Election for an office in an organisation		Applications for a General Order
84	Appeals from the IMC		Any other matter currently heard by the CCS
84A	Contraventions of the Act	53	Registration of employee organisations
		54	Registration of employer organisations

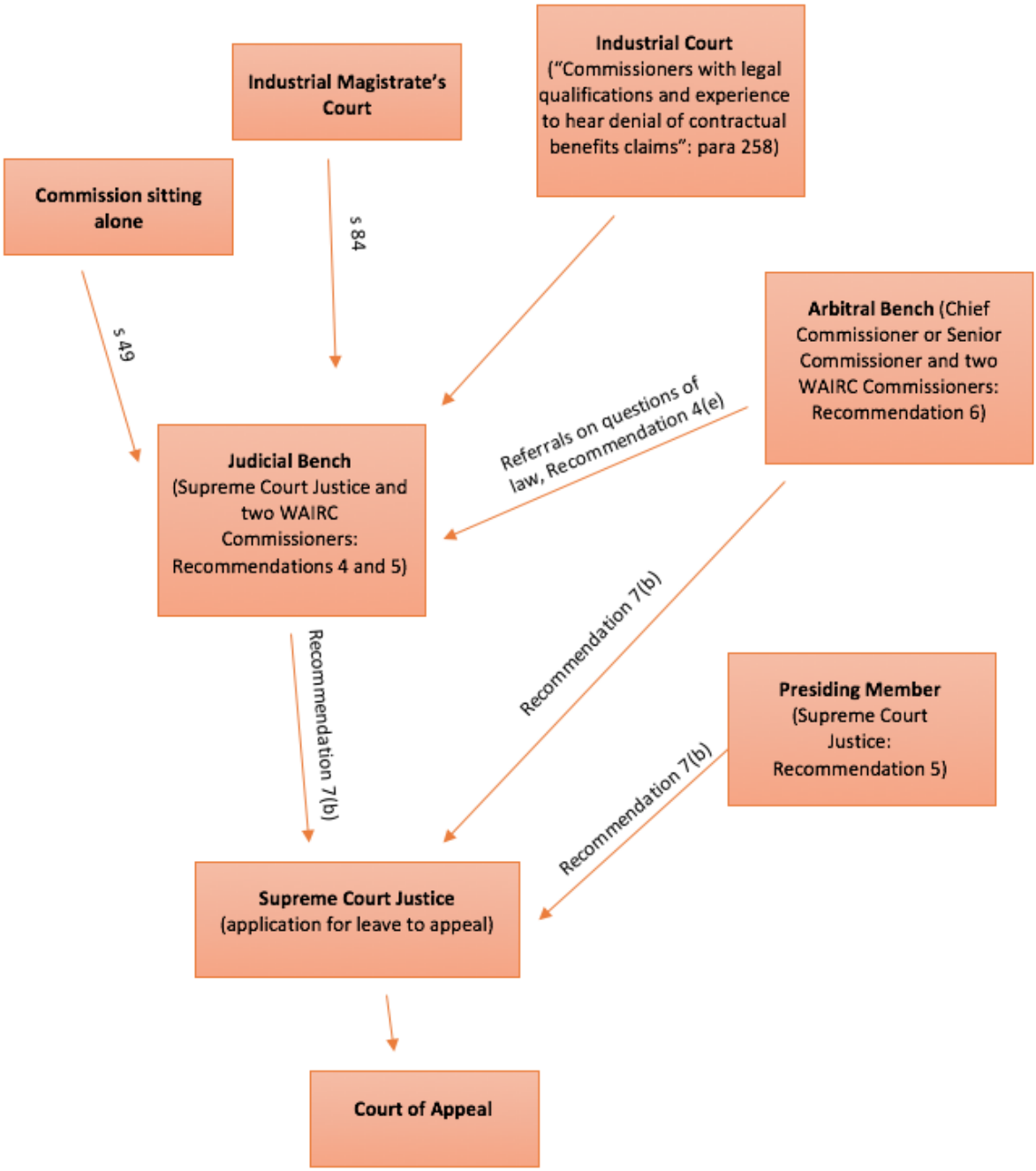
	55	Applications under ss 53 and 54
	58	Registering an organisation's rules
	59	Restrictions on an organisation's name
	60	Incorporation of an organisation
	62	Altering an organisation's rules
	71	Dealing with State and Federal organisation counterparts
	72	Organisation amalgamations
	72A	Organisation representation orders
	73	Cancelling/suspending an organisation

The Interim Report contains a diagram of the current structure of the WAIRC, which is reproduced below:

Figure 2A – Structure of the WAIRC



The Interim Report proposes a number of significant changes to this structure. We have mapped out what we interpret to be the proposed new structure, based on the Interim Report:



It is the AMWU's view that the proposed new structure is contrary to the direction of the Term of Reference, which calls for a more streamlined and efficient structure.

It appears that part of why the Interim Report has seen the need for two separate full bench bodies is the presumption that some matters require a judicial head. We refer to our suggestion on Recommendation 5, that there be consideration as to whether a judicial head is required at all. This would significantly simplify the structure of the WAIRC.

7.

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

The AMWU does not object to this recommendation. We note that having the check of the Court of Appeal as an appellate body should provide peace of mind to anyone who would be concerned about the possible removal of a judicial head from the WAIRC.

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

The AMWU does not agree with this recommendation. This recommendation does not appear to be explained in the Interim Report, so we are unaware of the rationale behind it.

However our concern is that respondents to a claim will be able to utilise counter-claims and set-offs to put pressure on the claimant. Workers are particularly vulnerable to this pressure, as they are generally not sophisticated litigants.

The other concern is that this would in effect open up defences and counter-claims to breach of enterprise agreements. As a matter of policy, there should not be legal defences available for breaches of enterprise agreements.

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

The AMWU agrees with this recommendation.

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

The AMWU agrees with this recommendation.

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

The AMWU does not object to this recommendation. However it is worth noting that the compulsory retirement age for FWC members is 65 years of age, which would raise the question of how to treat dual appointments.

12. The 2018 IR Act specify that any section equivalent to the current s26(1)(a) of the IR Act is not to apply if the WAIRC is deciding a question of law in any matter and upon any issue it is required to decide.

The AMWU disagrees strongly with this recommendation. For reference, s 26(1)(a) of the IR Act reads:

> ***26. Commission to act according to equity and good conscience***
> *(1) In the exercise of its jurisdiction under this Act the Commission —*
> *(a) shall act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms; and*

At paragraph 146 the Interim Report notes that s 26(1)(a), "…do[es] not sit happily with all of the jurisdiction to be exercised by the WAIRC". This echoes earlier comments at paragraph 142 that the WAIRC's exercise of certain jurisdictions "runs counter" to the IR Act's objective to prevent and settle industrial disputes with the maximum of expedition and minimum of legal form and technicality.[3]

The AMWU does not agree that the WAIRC cannot decide questions of law in a way that is consistent with equity, good conscience and substantive merit. The Interim Report appears to equate legal technicality with substantive law, giving the example at paragraph 142:

> *…That is because, axiomatically, determining what is effectively a claim for a breach of contract is all about legal technicality: [what] the issues are, what were the terms of the contract of employment and did the employer fail to provide a benefit the employee was entitled to under the contract.*

We respectfully disagree with this characterisation. The issues identified in the Interim Report's example are more than just mere legal technicality; they form the substantive tests of the denial of contractual benefits jurisdiction. We say it would be more appropriate to equate legal technicality to examples of more pedantic issues, such as the correct identification of a respondent in a situation where there are related corporate entities; deadlines for lodging materials; lodging an application under the correct section of the Act, and other such technical formalities that a lay person would have difficulty navigating.

The AMWU refers to the comments made by Ritter AP in Health Services Union of Western Australia (Union of Workers) v Director General of Health[4] at [163]-[164]:

> *a) section 26(1)(a) is not a source of jurisdiction;*
> *b) section 26(1)(a) applies only to the exercise of jurisdiction conferred by legislation; and*
> *c) the Commission cannot ignore the substantive law in the exercise of its jurisdiction.*

This was recently affirmed in *Sandra Tye v Care Services Administration Pty Ltd*[5] *(Sandra Tye)*. In that matter, the Chief Commissioner at first instance dismissed the appellant's claim for a

[3] IR Act, s 6(c).
[4] [2008] 00215; (2008) 88 WAIG 543.
[5] [2017] WAIRC 689

denied contractual benefit on the basis that it was so untenable it could not succeed. The Full Bench unanimously found that the Chief Commissioner's exercise of s 27(1)(a) was appropriate, with Kenner ASC noting at [61]:

> *Whilst the Commission should always approach the exercise of the power to dismiss a matter or refrain from further hearing a matter under s 27(1)(a) of the Industrial Relations Act 1979 with caution, that does not mean that in a clear case where a claim is without merit, the power should not be exercised. On the contrary, to not exercise the statutory power in s 27(1)(a) in those circumstances, would be inconsistent with equity, good conscience and the substantial merits of the case, as required by s 26(1)(a). This is because the party against whom such unmeritorious proceedings have been brought, would be put to the time and expense of defending such a claim when it had no reasonable prospect of success.*

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

The AMWU does not object to this recommendation.

14. The 2018 IR Act contain:
    a) A "slip rule" for orders made by the WAIRC.
    b) An amendment to the current requirement for a "speaking to the minutes" of orders, to give discretion to the WAIRC to dispense with a speaking to the minutes in a particular case if it is warranted in the opinion of the WAIRC.
    c) An amendment to the requirement for a "speaking to the minutes" of orders that would permit the WAIRC to specify that unless parties indicate by a specified time that a speaking to the minutes is requested, that the WAIRC may issue the order in the terms of the minutes.
    d) Power for the WAIRC to conduct conciliations by telephone.

The AMWU does not object to Recommendation 14(a).

The AMWU is unsure as to the basis for Recommendations 14(b) and 14(c), in that we are not sure what the ill the recommendation is trying to remedy. We understand that as a matter of practice, parties in a matter can already waive speaking to the minutes should they so wish.

The AMWU does not agree with 14(d). The AMWU does not object to the WAIRC using telephone conciliations to deal with uncontested procedural matters or the WAIRC using telephone or video conferencing technology to assist parties who are in regional areas or unable to attend WAIRC matters in person.

However, the AMWU submits that emphasis should remain on conducting conciliations in person. We have significant experience in the FWC where both Commissioners and Conciliators routinely hold conciliations on substantive matters in the unfair dismissal, general protection and

dispute resolution jurisdictions. It is our experience that conducting these matters by telephone instead of in person disadvantages all parties, including the Commissioner or Conciliator.

Conciliations often involve complex and emotional issues. Telephone is an impersonal way of dealing with such issues. It is also more difficult for the Commissioner and the parties to 'read' each other over the phone and respond appropriately.

It is our experience that conciliations held in person progress more effectively and reach mutually satisfactory resolutions more regularly compared telephone conciliations. One of the notable features of the WAIRC is the speed with which it convenes conciliations in person compared to the FWC, and it would be a shame for the WAIRC to substitute these with telephone conciliations.

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

The AMWU does not object to this recommendation.

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

The AMWU submits that any matter relating to the structure and administration of awards should be considered in the context of Term of Reference 6.

Issues arising from Term of Reference 1 – Additional Submissions Sought

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

a) Continue to be exercised by the WAIRC as currently provided for under the IR Act; or
b) Continue to be exercised by the WAIRC but only by Commissioners of the WAIRC who, before their appointment, had practised law for not less than five years as an Australian lawyer, as defined in s 4 of the *Legal Profession Act 2008* (WA) (LP Act); or
c) Be exercised by the IMC; or
d) Be exercised by members of an Industrial Court to be established under the 2018 IR Act, and where the qualification for appointment to the Industrial Court be limited to people who, before their appointment, had practised law for not less than five years as an Australian lawyer, as defined in s 4 of the LP Act.

The AMWU submits that there is no justification to change the way the WAIRC deals with the denial of contractual benefits, interpretation of awards, orders and industrial agreements jurisdictions.

Item 17(b) proposes that only Commissioners who were practicing lawyers prior to appointment exercise the above jurisdictions. And to varying degrees, sub-(c) and (d) are in a similar vein, based on a proposition that only individuals who were lawyers prior to appointment to their relevant positions should exercise the jurisdiction.

The AMWU strongly disagrees with this suggestion. A strength of industrial tribunals likes the WAIRC is that the Commissioners are experienced in industrial relations, and come from a variety of backgrounds, such as government, employer representatives and the trade union movement. As previously mentioned, the major political parties when in government highlight prior industrial experience as a prerequisite when making appointments to the WAIRC.

Sub-(b) would have the effect of restricting non-lawyer Commissioners, so that they in effect would only be 'half-Commissioners'. This would provide significant disincentive to the government of the day to appoint non-lawyers to the Commission, as they would not be able to exercise the full jurisdiction of the WAIRC. This would unfairly prejudice industrial relations specialists who work in the trade union movement, and to a lesser extent, employer representatives.

A notable number of current and recent WAIRC Commissioners were not lawyers prior to appointment. This includes the current Chief Commissioner, former Chief Commissioner Beech, former Chief Commissioner Coleman, Commissioner Harrison and Commissioner Mayman. The AMWU is unaware of any complaints or inquiries about the qualifications of these Commissioners and whether they were capable of properly exercising the jurisdictions, and nor are such concerns raised by the Interim Report. On the contrary, Chief Commissioner Scott, Chief Commissioner Beech and Chief Commissioner Coleman were all recognised as being exceptional and were accordingly appointed to the role of Chief Commissioner.

Sub-(c) proposes that the jurisdiction be exercised by the IMC. The AMWU also disagrees with this suggestion. It is our experience of the IMC that resource-wise, they are already at capacity, and would not be well placed to take on such a significant increase in jurisdiction and corresponding workload. This recommendation is also in the same vein as sub-(b), in that only someone who is legally qualified should exercise the denial of contractual benefits jurisdiction and/or the interpretation of awards, orders and industrial agreements jurisdiction.

The AMWU similarly objects to sub-(d). The Interim Report suggests at paragraph 258:

> *"…Thirdly, and as suggested in the article referred to earlier by Ms Brown, the IR Act could be amended to set up an industrial court consisting of Commissioners with legal qualifications and experience to hear denial of contractual benefits claims, leaving the discretionary jurisdiction in the WAIRC for unfair dismissal claims, as well as the other industrial matters before the WAIRC. Such an industrial court, as stated by Ms Brown could encompass the existing jurisdiction of the IMC."*

This proposed Industrial Court is based on the previously objected narrative that only legally qualified persons should hear certain matters. It is also not clear where exactly the Industrial

Court would fit in the appeal structure of the WAIRC, and we are not convinced that it complies with the term of reference's directive to create a more streamlined and efficient WAIRC.

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

The AMWU submits that sections 31(1) and 31(4) should remain unchanged. As identified, parties already have the ability to request permission to be represented by a legal practitioner, which in our experience is very rarely denied outside of the conciliation stage, where a legal practitioner is best placed to assist.

We also note that this would be a departure from the FW Act, where the parties must also request permission to be represented by a paid agent under s 596.

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

a) In any matter before the WAIRC, but only in the same circumstances as the FWC may make an order for costs under s 401 and s 611 of the FW Act; or
b) Alternatively to (a), only in a matter that proceeds to arbitration by the WAIRC, but only in the same circumstances as the FWC may make an order for costs under s 401 and s 611 of the FW Act; or
c) In no cases, so the WAIRC remains a no costs jurisdiction in all matters.

The AMWU strongly opposes (a) and (b) of this recommendation and supports sub-(c). The Interim Report identifies that the FWC has the power to award costs in certain circumstances, and that the Law Society of Western Australia and employer groups in their submissions supported a similar provision being imported into the WAIRC. Some of the submissions from the employer groups argued that costs are necessary to deal with vexatious or frivolous claims.

Section 27(1)(a) already allows the Commission to dismiss matters before it on the following bases:

> ***27. Powers of Commission***
> *(1) Except as otherwise provided in this Act, the Commission may, in relation to any mater before it –*
> *(a) at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if is it satisfied –*
> *(i) that the matter or part thereof is trivial; or*
> *(ii) that further proceedings are not necessary or desirable in the public interest; or*
> *(iii) that the person who referred the matter to the Commission does not have a sufficient interest in the matter; or*
> *(iv) that for any other reason the matter or part should be dismissed or the hearing thereof discontinued, as the case may be;*

The WAIRC has used this section in a number of cases,[6] including the earlier mentioned *Sandra Tye* matter. The Interim Report also does not identify any deficiencies in s 27(1)(a). Making the WAIRC a costs jurisdiction would unfairly affect layperson claimants, who are generally unsophisticated litigants. It is telling that that the power to award costs has only been sought by employer groups and the Law Society, but not by any of the organisations that represent workers. We submit that that it is appropriate for the WAIRC to remain a no cost jurisdiction and to deal with vexatious or frivolous claims through s 27(1)(a).

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

The AMWU does not have any substantive submissions to make on this item, though we agree with the Interim Report's observation at paragraph 352 that ss 32 and 44 are designed for different purposes and used in different circumstances, and as such, it may be difficult or unnecessary to 'harmonise' the two sections.

21. Whether:
    a) The 2018 IR Act should include an amendment to s 84A(1)(b) of the IR Act to permit orders to be enforced by the party for whose benefit the order was made, in addition to the Registrar or a Deputy Registrar.
    b) The 2018 IR Act should contain a division equivalent to Part 5-1, Division 9 of the FW Act, about offences committed in and before the WAIRC.

The AMWU agrees with sub-(a).

The AMWU agrees with introducing offences that are aimed at preserving the integrity of the WAIRC and its processes, as well as introducing prohibitions against intimidating witnesses.[7] However before considering the introduction of offences that carry a potential penalty of imprisonment, it would be appropriate to know whether there is currently a problem with behaviour in and before the WAIRC, and if so, the scope of it and how such issues are currently dealt with.

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

[6] *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia* [2014] WAIRComm 562; *Dale Lewis v Radium St Lunch Bar Michael Vogel* [2016] WAIRComm 147.

[7] FW Act, s 676.

The AMWU does not agree with this proposition. There is already a mechanism to obtain discovery under s 27(1)(o) of the Act. Under the current system parties can request discovery, and common law principles relating to discovery apply.

Changing this so that discovery is a matter of right in industrial matters is too onerous, and opens up the potential for ‘fishing’ and potential abuse of the right.

The AMWU notes that even in the Federal Court, discovery is not a right.

TERM OF REFERENCE 2

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

The AMWU does have members in the public service, but generally does not need to appear for them in the WAIRC. The AMWU endorses the submissions made by UnionsWA and the CSA – to the extent that they are consistent – on this term of reference and the relevant recommendations.

TERM OF REFERENCE 3

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

The AMWU supports and adopts the submission made by UnionsWA with regards to this term of reference and relevant recommendations.

TERM OF REFERENCE 4

Review the definition of "employee" in the IR Act and the Minimum Conditions of Employment Act with the objective of ensuring comprehensive coverage for all employees.

The AMWU supports and adopts the submissions made by UnionsWA and United Voice on Recommendations 37-40 in this Term of Reference.

41. Given:
    a) The operators of digital platforms in the gig economy are mostly if not entirely constitutional corporations; and
    b) If these constitutional corporations employ people they will be national employers under the FW Act, whose industrial relations and employees' conditions of employment are governed by the FW Act; and
    c) If these constitutional corporations engage someone as an independent contractor under a "services contract", as defined in s 5 of the *Independent Contractors Act 2006 (Cth)* (IC Act), so that s 7 of the IC Act applies to exclude State laws from operation in the circumstances there set out, in relation to any workplace relations matter, as defined in s 8 of the IC Act; so that
    d) The State Parliament may have very limited, if any legal authority to effectively legislate about the engagement, working conditions and termination of engagement of people working in the gig economy; and
    e) The gig economy is a new and fast developing industry in Western Australia; but
    f) As the State Government has a legitimate interest in the engagement, working conditions and termination of engagement of people working in the gig economy in Western Australia; therefore
    g) A taskforce be assembled and chaired by a representative of DMIRS and include a member from the CCI, UnionsWA, the WAIRC, the State Solicitor's Office and a nominee of the President of the Law Society of Western Australia

It is unfortunately outside the time constraints of this submission to fully explore the facets of the gig economy and the complex position it occupies in Australian industrial relations law.

It is worth noting however that whilst the gig economy's utilisation of digital platforms may be new, it is not a novel problem. Governments everywhere have always grappled with questions of what work looks like, and how to classify the myriad of ways the relationship between worker and capital can manifest. In Australia the employment relationship can be wrought in a number of different ways, and the AMWU submits that the gig economy is just the latest phase in the ongoing discussion of how individuals can be engaged in work.

Despite the difficulty of the question of how the gig economy should be tackled, it is absolutely imperative that Government addresses it. The AMWU notes and recommends the substantial work conducted by the Australia Institute's Centre for Future Work on the gig economy and the

inequality suffered by those who engage in it.[8] It should be anathema to any Australian government that it is possible for companies to engage workers in such a way that they do not receive the entitlements and protections that other workers do.

The Interim Review identifies a number of different strategies that could and should be explored:

- Develop legislation similar to the *Construction Contracts Act 2004 (WA)* and the OD Act to extend employment protections to independent contractors in the gig economy;[9]
- Create a new category between employee and independent contractor, such as "dependent contractor";[10] and
- Extend statutory entitlements to independent contractors by way of "deeming" provisions.[11]

The AMWU notes the different outcomes between the UK case of *Aslam v Uber BV*[12] *(Aslam)* and the Australian case of *Kaseris v Rasier Pracific V.O.F*[13] *(Kaseris).* As explored by the Interim Report, in *Kaseris* Gostencnik DP dismissed an unfair dismissal application from an Uber driver on the basis that he was an independent contractor, not an employee. In *Aslam*, a group of Uber drivers brought an action against Uber for failing to pay them the minimum wage and paid leave in accordance with the *Employment Rights Act 1996* (UK), *National Minimum Wage Act 1998* (UK) and *Working Time Regulations 1998* (UK).

Unlike the FWC in *Kaseris*, the Tribunal in *Aslam* found that the Uber drivers were workers. A fundamental difference between UK and Australian law in this regard is the UK's definition of "worker", which is:

> *… an individual who has entered into or works under (or, where the employment has ceased, worked under)—*
>
> *(a) a contract of employment, or*
>
> *(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;*
>
> *and any reference to a worker's contract shall be construed accordingly.*[14]

[8] Jim Stanford Ph.D., *Subsiding Billionaires: Simulating the Net Incomes of UberX Drivers in Australia*, March 2018 https://d3n8a8pro7vhmx.cloudfront.net/theausinstitute/pages/2692/attachments/original/1519989285/Subsidizing_Billionaires_Final.pdf?1519989285; Jim Stanford Ph.D., *The Future of Work Is What We Make It*, submission to the Senate Select Committee on the Future of Work and Workers, January 2018 https://d3n8a8pro7vhmx.cloudfront.net/theausinstitute/pages/2668/attachments/original/1517531725/Senate_Inquiry_Future_of_Work.pdf?1517531725 .

[9] Interim Report, paragraph 939.

[10] Interim Report, paragraph 958.

[11] Interim Report, paragraph 963.

[12] [2016] UKET 2202551/2015.

[13] [2017] FWC 6610.

[14] *Employment Rights Act 1996* (UK) at s 230(3)(b); *National Minimum Wage Act 1998* (UK) at s 54(3).

The AMWU submits that the UK experience provides an example for us to consider in terms of creating new definitions and categories of employee.

The AMWU agrees with the Interim Report's suggestions to explore ways of extending statutory entitlements. There is currently an active review of workers' compensation legislation in Western Australia, with the scope of the legislation a consideration. There is a similar review of Western Australian occupational health and safety legislation underway. The AMWU submits that these reviews present opportunities to extend protections that employees currently have to workers in the gig economy in a way that avoids a potential constitutional challenge.

Issues arising from Term of Reference 4 – Additional Submissions Sought

The AMWU supports and adopts the submissions made by UnionsWA and United Voice on items 42-46.

TERM OF REFERENCE 5

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

a) **The minimum conditions should be updated; and**
b) **Whether there should be a process for statutory minimum conditions to be periodically updated by the WAIRC without the need for legislative change.**

47. The 2018 IR Act include a Part that provides for minimum conditions of employment for employees covered by the State System to be called the State Employment Standards (SES).

The AMWU agrees with this recommendation.

48. The SES include:
    a) The minimum wage (including for employees who have a disability that has been assessed to affect their productive capacity to perform their particular job).
    b) Subject to (d), the National Employment Standards (NES), as contained in the FW Act, other than the long service leave NES.
    c) Conditions comparable to those contained in Part 3-6, Division 3 (Employer obligations in relation to employee records and pay slips) and Part 2-9, Division 2 (Payment of wages and deductions) of the FW Act.
    d) Any minimum condition of employment, as contained in the MCE Act, if the condition is, on the issue to which it relates, more beneficial to an employee or in addition to any NES condition of employment.
    e) The conditions set out in the *Termination, Change and Redundancy General Order* of the WAIRC (TRC General Order) in lieu of Part 5 of the MCE Act, but incorporating the provisions contained in the FW Act that are more beneficial to employees than the TCR General Order.
    f) Subject to [49] below, provision for long service leave.
    g) Provision for Family Domestic Violence (FDV) leave as a minimum condition of employment, in accordance with recommendations to be made after receiving additional submissions as requested in [54] below.

The AMWU agrees with this recommendation, with comments around (f), which is discussed below in relation to Recommendation 49.

49. The SES condition with respect to long service leave include the following:
    a) Express provision for casual employees to be entitled to receive long service leave and guidance on how to calculate their continuous employment.
    b) Express provision for seasonal workers to be entitled to receive long service leave and guidance on how to calculate their continuous employment.
    c) A provision that no long service leave may be "cashed out" until it is an entitlement that has accrued or crystallised as a legal entitlement.
    d) Provision for all forms of paid leave to count towards an employee's continuous employment.
    e) Provision for continuous employment to apply in circumstances equivalent to when there has been a transfer of business under Part 2-8 of the FW Act.
    f) A provision that an employer be obliged to provide a copy of an employee's employment records, relevant to an assessment of it, and when, they will be entitled to long service leave, to any subsequent employer to whom the first employer's business has been transferred, at the time of or within one month of the transfer of the business.
    g) Provision for the taking of long service leave in alternative ways.
    h) Express provision that service as an apprentice counts towards an employee's continuous employment.
    i) Expressing that the term "one and the same employer" in s 8(1) of the *Long Service Leave 1958* (LSL Act), includes related bodies corporate within the meaning of s 50 of the *Corporations Act 2001* (Cth).

The AMWU agrees with the suggested changes to long service leave in WA. However we note that the Interim Report disappointingly stops short of agreeing with the number of submissions from a variety of organisations that a portable long service leave scheme be introduced.[15] We are unsure how recommendations like 49(b) can be effectively confer a benefit onto workers without a portable scheme.

The portable long service leave scheme in the *Construction Industry Portable Paid Long Service Leave Act 1985 (WA)* (CIPPLSL Act) was introduced in recognition of the fact that workers in the construction industry generally work for a variety of employers for short periods of time. Without a portable long service leave scheme construction industry workers would not be able to accrue and take long service leave.

Every other industry now appears to be in the same boat as construction industry workers. It is now the norm for employers to engage employees for short periods of time, with full-time secure work steadily replaced by precarious work arrangements. As a matter of policy, a portable long service leave scheme must be introduced if ordinary working Western Australians are to enjoy the benefit of long service leave.

We also refer to our earlier submissions on the gig economy and how extending statutory entitlements should be explored. We have unique long service leave legislation in that it goes beyond the reach of the IR Act and can cover federal system employees. A portable long service

[15] Interim Report, paragraphs 1132-1135.

leave scheme that covers gig economy workers would be a step in addressing the inequality of entitlements that gig economy workers suffer.

50. The law in Western Australia be amended so that, under the 2018 IR Act, a failure to comply with the long service leave SES will, like the other SES, be able to be enforced by the imposition of a pecuniary penalty, compensation and/or associated orders made by the IMC, on application by an industrial inspector, the person who was the subject of the alleged failure to comply or an industrial organisation of which the person is a member.

The AMWU agrees with this recommendation.

The AMWU adopts the submissions made by UnionsWA on Recommendations 51-52 and Items 53-54.

TERM OF REFERENCE 6

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

a) **Ensuring the scope of awards provide comprehensive coverage to employees;**
b) **Ensuring awards reflect contemporary workplaces and industry, without reducing existing employee entitlements;**
c) **Ensuring awards are written in plain English and are user friendly for both employers and employees; and**
d) **Ensuring that any award updating process is driven by the WAIRC, with appropriate input from the award parties and other relevant stakeholders.**

Recommendations 55 and 56 effectively propose an 'award modernising' process, very similar to the Federal award modernisation process that commenced in 2008.

Recommendation 55 sets out the following proposed requirements of the 'New Awards':

a) Subject to (b) the current conditions of employment of employees under existing awards are not to be reduced under the New Awards.
b) Despite (a), the New Awards should not include any work practice or condition of employment that is obsolete and/or would breach any Australian or Western Australian equal opportunity legislation.
c) Similar to the FW Act, the New Awards have either industry based or occupational scope clause, in accordance with (d).
d) The industries and occupational groups covered by the New Awards are, subject to the WAIRC deciding otherwise, to be those set out in Schedule A.
e) Subject to (a), although a New Award should specify that conditions of employment are included in the SES they should not otherwise provide for any condition of employment contained in the SES, unless the WAIRC is of the opinion that the condition is required to be included in a New Award because of the particular circumstance or requirements of the industry or occupational group to be covered by the New Award.
f) The New Awards are to be drafted in a plain English style, with the aim of being user friendly for employers and employees.
g) In the process of making the New Wards, the WAIRC will give registered organisations and employer groups whose membership includes employees and employers to be covered by the New Wards, and peak body organisations, the Minister and any other interested person or stakeholder the opportunity to make submissions about the terms of the New Award,

The AMWU recognises that there is a need to have a robust and comprehensive State award system that covers all State system employees. However, the proposed New Awards fall short of the Term of Reference and in our view has serious deficiencies.

Problems with the Proposed New Awards Process

Cost

Regardless of the merits of the proposal, amalgamating 181 awards into 28 New Awards is a long, complex, and incredibly resource intensive task for employer groups, employee groups and the WAIRC. Such a process would require the WAIRC and unions to hire additional people to properly conduct the process. The AMWU was heavily involved in the federal Award Modernisation process, which even with the involvement and resources of our national office and multiple State branches took several years and consumed a significant amount of human resources.

We cannot speak to whether Government has the resources to invest in such a process, but the AMWU and all of the unions we have consulted with would not be in a position to fund the extra positions this type of process requires.

Outcomes

The recommendation calls for plain English drafting, amalgamated awards and the requirement that current employee conditions are not to reduced. We respectfully submit that the first two concepts are not compatible with maintaining current conditions.

Awards contain provisions and words that are industry and litigation tested. Though there may be terms and phrases that would be confusing to an outsider to the particular award, it does not mean that they are not understood by the relevant employers and employees. Removing them in a push for plain English drafting would actually cause more confusion for the people covered by the award, which cannot be the outcome this Review is seeking. It would also open up a new wave of litigation as parties try to deal with new and untested terms.

The federal Award Modernisation process showed that consolidating multiple awards into one sets off a race to the bottom. Trying to find common ground between multiple awards inevitably means settling for the lowest common denominator.

The requirement that current employee conditions cannot be reduced has a number of issues that are perhaps not appreciated by the Interim Report. Such a safeguard only works for very straightforward monetary conditions. Even with monetary conditions it can become complicated very quickly.

Non-monetary conditions are incredibly difficult to reconcile. Take the example of hours of work clauses: if there is a choice of 10 different clauses on rosters, ordinary hours and lunch breaks, which one is picked? A possible solution to this would be to have a schedule detailing different provisions for different industry sub-sets/types of employees. However this approach begs the question of what the point of consolidating the awards in the first place is.

An unintended and possible (though in our view, unlikely) consequence of this requirement could be that when combining clauses across awards the highest common denominator is picked, resulting in higher or more onerous conditions for industries. Whilst that could be attractive for employees, it could create conditions that small businesses in particular cannot comply with.

What is the problem that needs to be addressed?

Paragraphs 1184 to 1205 of the Interim Report identify the following issues with the current State awards:

- Awards are not being maintained;
- Gaps in award coverage;
- Respondency issues/scope clauses in awards;
- Outdated or non-existent provisions; and
- Awards do not reflect contemporary workplace arrangements.

The AMWU agrees that these issues need to be addressed. However the proposed New Awards in trying to address these issues create new problems that are incompatible with the Term of Reference and unresolvable in light of current Government and union resources.

An Alternative Solution

The Interim Report and a number of the submissions recognise that s 40B of the IR Act already provides a mechanism for awards to be varied. Section 40B was expressly inserted as an award modernisation provision.[16] The Interim Report also recognises that there were problems with the s 40B process that was attempted in 2002.

It is our observation that 2002 process was hampered by two issues:

- The process did not have a clear focus or set of priorities. It was aimed at wholescale rewriting of State awards which was a cumbersome and unattractive process for employer and employee organisations; and
- Lack of resourcing for the WAIRC, employer and employee organisations.

The AMWU proposes an alternative updating process, whereby the involved parties utilise s 40B to review awards with the following questions to be actioned (in order of priority):

1. Who does the award cover? How can it be amended to cover an industry?
2. Are there any obsolete clauses?
3. Are there any clauses that are less than the proposed SES?

We submit that it would be sensible to apply this defined process to State awards through from highest coverage to lowest coverage, and in phases. This would allow the parties to assess the process and also monitor the list of award-free classifications.[17]

All of classifications that are currently award-free are not isolated, in that they do not exist in an industry vacuum where they are not connected to classifications that are already award-covered. An example is shop assistants working for mobile phone shops, party hire businesses and video/DVD stores. We submit that opening up the coverage clause of one of the existing retail awards would likely result in these shop assistants being covered.

[16] Interim Report, paragraphs 1165-1169.
[17] Interim Report, Attachment 7D.

Having a clearly defined process would allow the relevant parties to engage fully and efficiently. We note that our suggested process would still require resourcing, but not on the same level as the New Awards.

The AMWU urges the Review to consider a process that utilises the existing mechanism in s 40B, rather than an onerous award modernisation that requires legislative change.

TERM OF REFERENCE 7

Review statutory compliance and enforcement mechanisms with the objectives of:

a) ensuring employees are paid their correct entitlements;
b) providing effective deterrents to non-compliance with all State industrial laws and instruments; and
c) updating industrial inspectors' powers and tools of enforcement to ensure they are able to effectively perform their statutory functions.

The AMWU agrees with recommendations [58]-[65] and [68].

66. The present s 84A(5) of the IR Act be amended to empower the Judicial Bench to impose a maximum penalty for a breach of $12,000 or imprisonment for not more than 12 months or both.

The AMWU does not disagree with increasing penalties under s 84A(5), but similar to our comments on Item 21 under Term of Reference 1, any introduction of imprisonment as a penalty should be carefully considered.

67. The right of entry provisions in the 2018 IR Act be amended to:
    a) Include a requirement that a person must be a fit and proper person to obtain, hold or maintain a right of entry permit.
    b) Provide that an application may be made to the WAIRC by the Registrar or an industrial inspector for the suspension or revocation of a right of entry permit on the basis that the holder is no longer a fit and proper person to hold the permit; and
    c) In any application made under (b), or in considering an application for a right of entry permit, the WAIRC must take into account, as a relevant consideration, any suspensions, revocations or other sanctions imposed on the holder by or under the FW Act with respect to any corresponding rights of entry.

The AMWU disagrees with this recommendation. We do not see how this recommendation fits into the framework of the term of reference: it will not ensure that employees are paid their correct entitlements; it will not enhance deterrence to non-compliance with State industrial laws and instruments; and it does not relate to updating industrial inspectors' powers and tools of enforcement.

The Interim Report canvases what appears to be the one case of a right of entry revocation in the State system, and two cases of a right of entry being suspended[18] under s 49J(5) of the IR Act.

Despite the recognition that there is already a provision in the Act that addresses undesirable behaviour from authorised representatives, and identifying evidence that the provision works, the Interim Report curiously reaches the following conclusion at paragraph 1412:

[18] Interim Report, paragraphs 1408-1411.

The Review, at this preliminary stage, believes that these cases demonstrate the limited circumstances in which rights of entry can be revoked or suspended, supporting the preliminary view that there ought to be a "fit and proper person test" as previously mentioned

The AMWU submits that s 49J(5) already covers the behaviour of right of entry permit holders, and that there are no identified deficiencies in its scope that would be rectified by the introduction of a fit and proper person test.

There would be some who would ask why the Union opposes the introduction of such a test, if it is to the same effect as s 49J(5). The difference between s 49J(5) and a fit and a proper person test is the point in the process where the onus is loaded. Under s 49J the WAIRC must issue a right of entry authority on request of a union secretary. This is balanced by s 49J(5), which permits any person to make an application that the right of entry authority should be revoked or suspended, and s 49J(2), which prohibits the issuing of an authority if the individual has previously fallen foul of s 49J(5).

This is different to a fit and proper person test to obtain the authority, which has to be discharged at the time of the authority application. Unions that operate in the Fair Work system can attest to the significant administrative burden that this has created for unions. Given that there is no identified problem with how right of entry operates in the State system, there is no appropriate reason to shift this onus and make it administratively harder for unions to access workplaces and hear the concerns of their members.

TERM OF REFERENCE 8

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

The AMWU endorses and adopts the submissions made by the Australian Services Union on this term of reference.