



Chamber of Commerce  
and Industry WA

Chamber of Commerce and Industry of Western Australia

# Submission in Response to the Interim Report of the Ministerial Review of the State Industrial Relations System

30 April 2018

## Helping business work

180 Hay Street,  
East Perth WA 6004  
PO Box 6209,  
East Perth WA 6892  
Phone: 1300 4 CCIWA (1300 422 492)  
Fax: (08) 9365 7550  
Email: [workplacerelations@cciwa.com](mailto:workplacerelations@cciwa.com)

ABN 96 929 977 985  
© 2018 Chamber of Commerce and Industry of Western Australia

This work is copyright. No part of this publication may be reproduced or used in any way without acknowledgement to the Chamber of Commerce and Industry of Western Australia.

### **Disclaimers & Acknowledgements**

The Chamber of Commerce and Industry of Western Australia (CCIWA) has taken reasonable care in publishing the information contained in this publication but does not guarantee that the information is complete, accurate or current. In particular, CCIWA is not responsible for the accuracy of information that has been provided by other parties. The information in this publication is not intended to be used as the basis for making any investment decision and must not be relied upon as investment advice. To the maximum extent permitted by law, the CCIWA disclaims all liability (including liability in negligence) to any person arising out of use or reliance on the information contained in this publication including for loss or damage which you or anyone else might suffer as a result of that use or reliance.

## Contents

1.	The Ministerial Review of the State Industrial Relations System.....	5
2.	About this Submission.....	6
3.	The State Industrial Relations System.....	8
4.	Term of Reference 1 – Structure of the WAIRC.....	9
5.	Term of Reference 2 – Access to the WAIRC by Public Sector Employees.....	17
6.	Term of Reference 3 – Equal Remuneration.....	19
7.	Term of Reference 4 – Definition of Employee.....	23
8.	Term of Reference 5 – Minimum Conditions of Employment.....	34
9.	Term of Reference 6 – State Awards.....	43
10.	Term of Reference 7 – Compliance and Enforcement.....	49
11.	Term of Reference 8 – Local Government.....	55
12.	Other Matters.....	57

## Acronyms and Abbreviations

<b>AIRC</b> .....	Australian Industrial Relations Commission
<b>CCIWA</b> .....	Chamber of Commerce and Industry of Western Australia
<b>Cth</b> .....	Commonwealth of Australia
<b>DMIRS</b> .....	Department of Mines, Industry Regulation and Safety
<b>FW Act</b> .....	Fair Work Act 2009 (Cth)
<b>FWC</b> .....	Fair Work Commission
<b>FWCFB</b> .....	Fair Work Commission Full Bench
<b>ILO</b> .....	International Labour Organisation
<b>IMC</b> .....	Industrial Magistrates Court
<b>IR Act</b> .....	Industrial Relations Act 1979 (WA)
<b>LSL Act</b> .....	Long Service Leave Act 1958
<b>MCE Act</b> .....	Minimum Conditions of Employment Act 1993
<b>MCE Regulations</b> .....	Minimum Conditions of Employment Regulations 1993
<b>NES</b> .....	National Employment Standards
<b>SES</b> .....	State Employment Standards
<b>SME</b> .....	Small and Medium Enterprises
<b>SMW</b> .....	State Minimum Wage
<b>SWC</b> .....	State Wage Case
<b>SWO</b> .....	State Wage Order
<b>WA</b> .....	Western Australia
<b>WAIRC</b> .....	Western Australian Industrial Relations Commission
<b>WALGA</b> .....	Western Australian Local Government Association
<b>WGEA</b> .....	Workplace Gender Equality Agency
<b>WGEA Act</b> .....	Workplace Gender Equality Act 2012 (Cth)

# 1. The Ministerial Review of the State Industrial Relations System

1. The Ministerial Review of the State Industrial Relations System (the Review) was announced by the Hon. Bill Johnston MLA, Minister for Mines and Petroleum; Commerce and Industrial Relations; Electoral Affairs; Asian Engagement (the Minister) on 22 September 2017.
2. The Review is governed by the eight Terms of Reference that, when announced by the Minister, were accompanied by a Ministerial statement clarifying that the “*Western Australian Government does not intend to refer any industrial relations powers to the Commonwealth*” and “*the Ministerial review will be predicated on there being no referral of powers*”.
3. CCIWA acknowledges that the Review is governed by the Terms of Reference and that the Review’s purpose was not to consider the State system generally or to reconsider previous work undertaken in previous reviews
4. The Terms of Reference therefore determined the scope of the Review.
5. While the matter of referral of the State’s industrial relations powers was not to be contemplated by the Review, it clearly remains a valid and significant matter that cannot continue to be left aside.
6. The role of the State industrial relations system has diminished significantly as a result of the Fair Work Act 2009 (FW Act), now being limited in the main to the remaining private sector business participants of sole traders, partnerships and trusts such that the largest segment covered by the State system is public sector employees.
7. There remains no compelling evidence to support a retention of a separate state industrial relations regulatory framework in Western Australia (WA), especially with respect to the private sector.
8. If the underlying justification for retention of the system is principally to ensure State Government management of public sector employees, by far the largest cohort covered by the State system, then the most effective approach remains to refer the powers for the private sector to the Commonwealth and retain the WAIRC as a public sector only authority for the regulation of the employment for WA’s public sector. The WAIRC should, as a consequence, be restructured to meet this designated purpose.
9. CCIWA does not propose to further any argument on this matter that resides outside the Terms of Reference other than to reiterate the principal position that the operation of two disparate workplace relations frameworks governing the private sector is not for the competitive advantage and future of WA. Absent the referral of WA’s industrial relations powers, CCIWA recommends harmonisation with the FW Act to the extent possible / appropriate with an emphasis on recognising the needs of small business.
10. The Review released its Interim Report on 20 March 2018. The purpose of the Interim Report was stated at paragraph [3] “*to inform the Government, stakeholders and the public of the progress that has been made by the Review and to seek further consultation and submissions upon the issues that emerge from a consideration of the Terms of Reference, the submissions received by the Review to date, and proposed or possible recommendations to be made by the Review*”.
11. The Interim Report provides 73 recommendations, of which the Review requested further detailed submissions on 23 recommendations.

## 2. About this Submission

12. CCIWA provided an initial submission to the Review on 12 December 2017 and welcomes the opportunity to provide further submissions in response to the Interim Report.
13. This submission addresses the detailed recommendations contained in the Interim Report. This submission provides both general observations and comments on all recommendations, where necessary, for each Term of Reference as well as addressing the request by the Review for additional submissions on specific recommendations.
14. In the compilation of its Final Report, CCIWA would urge the Review to consider the impact of its recommendations on creating a workplace relations environment that is focused on the future of WA, the future of business and the future of employment opportunities for the long-term benefit of the state.
15. The required changes for the future must be supported by enabling workplace regulations.
16. The challenge is to view workplace relations through the front window rather than the rear-view mirror. This will not be possible with the retention of legacy attitudes, philosophies or principles. While it may be comfortable and reassuring to retain what is known, this will not benefit WA into the future.
17. CCIWA would urge the Review, and subsequently the WA Government, to recommend and enact for the future. While the level of change needed for the future security of the WA economy, individuals and communities may not be achievable in the immediate short-term, the base can certainly be established.
18. The initiation of the Review, although limited by the Terms of Reference, does provide an opportunity to make the critical first steps in creating a more contemporary workplace regulatory framework.
19. As CCIWA noted in its initial submission at 2.12, *“the regulation of how we work is of vital national importance and is an area where good policy must prevail over political pragmatism”*.
20. The world of work is changing and how WA workplaces are regulated will either contribute to success in a highly globalised and competitive marketplace, or it can continue to constrain economic development and growth with its resultant impacts on business, individuals and communities. It is uncontentionous that the globally competitive environment is placing unprecedented challenges on business.
21. The submission of the Australian Chamber of Commerce and Industry to the Senate Committee on the Future of Work and Workers<sup>1</sup> on 30 January 2018, supported by CCIWA, extensively outlines the array of matters that must be considered for the future of work.
22. The current workplace relations system in WA is outdated and fails to address the needs of the modern workplace.
23. CCIWA’s initial submission to the Review advocated at 2.4 that the Review should seek to:

---

<sup>1</sup> The Australian Chamber Submission to the Senate Committee on the Future of Work and Workers can be downloaded at <https://www.australianchamber.com.au/publications/submission-senate-select-committee-future-work-workers-30-january-2018/>

- (a) *“ensure there is a fair, efficient, universally acceptable, easily understood, and consistently applied regulatory framework; and*
  - (b) *create a level playing field across WA to promote business efficiency and competition; and*
  - (c) *remove unnecessary costs to government, business and taxpayers, noting that additional transactional and compliance employment costs harm the unemployed and employees as well as those who employ them; and*
  - (d) *promote higher levels of understanding, awareness and compliance through the simplification of IR and related legislation; and,*
  - (e) *consider the implications of the Future of Work on workplace needs and regulation; and*
  - (f) *anticipate and consider the future needs of contemporary small business in WA.”*
24. The world of work is changing rapidly, and the demands and expectations of the workforce have also changed and are continuing to change.
25. This includes, for example, the fact that individuals are increasingly adopting a portfolio approach to work, careers and income generation; the longevity of the working population coupled with the need to work longer is contributing to the desire for a scaled working transition to retirement; the high level of entrepreneurship and pursuit of self-employment; the heightened needs for balance of work and life; and the increased demands for flexibility at work, when and how work is done are all reflective of the changing expectations of individuals.
26. There is a greater mobility of talent and that mobility is increasingly global. Individuals are able to engage in work anywhere in the world and any business is able to access talent anywhere in the world. This is the developing extension to flexibility at the workplace - the desire to work anywhere, anytime and for anyone.
27. Employees are demanding and expect to work differently than traditional thinking considers.
28. Businesses must be able to respond to these demands and expectations. Work and skills must be able to be structured and managed to create jobs that will attract staff. Businesses must be agile and flexible for both the customer and staff.
29. Maintaining traditional approaches to workplace relations regulations that have their origins at another time in history are increasingly inconsistent with contemporary workforce and business expectations. As the Review noted at paragraph [4] of the Interim Report, *“the IR Act was enacted for a different time and jurisdictional coverage of the State industrial relations system”*.
30. Further, at paragraph [7] the Review noted the Terms of Reference *“required the Review to look at contemporary issues for the State system and try to make recommendations to take things into the immediate future”*. CCIWA concurs that the primary focus should be on the full range of contemporary issues, not selected ones. While no one can predict the future, what can be achieved is a removal of traditional impediments, historical views and outdated approaches. There is a need for a comprehensive understanding of the needs of the contemporary workforce and the needs for business.
31. Change must be enabling for businesses and individuals in a competitive market for goods, services and labour. There are massive challenges upon all economic participants in WA.

### 3. The State Industrial Relations System

32. CCIWA maintains that, in the absence of any accurate data or evidence, estimates of the coverage of the State industrial relations system are unreliable.
33. It is CCIWA's view that the absence of reliable and measurable data is reflective of the tenuous scope of coverage of the IR Act. CCIWA maintains the view that the purported numbers of the private sector covered by the State industrial relations system are an overrepresentation of the actual number of employing entities covered by the State system.
34. Most private sector employers regulated by the State industrial relations system are small unincorporated businesses, typically employing 0-6 staff.
35. The WAIRC Annual Report 2016-17 confirms that the private sector jurisdiction is limited to *“sole traders, partnerships, some trusts and not-for-profit organisations including independent schools”*.
36. The WAIRC also maintains responsibility for claims for denial of contractual benefits.
37. The Annual Report states that the reduced coverage of the Act has resulted in unions covering the private sector in Western Australia having very little involvement in the State system. In 2016-17 *“unions in the private sector in the State system have had negligible involvement with matters before the Commission”*<sup>2</sup>.
38. The Annual Report further notes that in 2016-17 no Employer-Employee Agreements, made available under Part VID of the IR Act in 2002, were lodged and in fact only 13 in total were lodged in the preceding three years.
39. The work of the WAIRC is declining. The number of matters concluded by the WAIRC in 2016-17 totalled 463, down from 803 in 2013-14<sup>3</sup>. This represents a decline of 42.4 per cent.
40. It is important to note that 38 matters concluded in 2016-17 involved the Public Service Arbitrator (PSA) and 21 matters involved the Public Service Appeal Board (PSAB). In 2013-14, these matters were 70 and 28 respectively. This represented 12.2 per cent in 2013-14 and 12.7 per cent in 2016-17 of all matters concluded.
41. Awards and agreements in force in 2017 totalled 1,395 compared to 2,577 in 2013<sup>4</sup>.
42. It is essential that the WA Government develops an effective mechanism that accurately identifies the coverage of the State industrial relations system. At present, the answer to the question of 'who is covered' is a compilation of estimations and assumptions that differ significantly and are unreliable.
43. Any informed decision on the role of the State system and the structure and operations of the WAIRC is dependent upon reliable and measurable data.

<sup>2</sup> Report of the Chief Commissioner of the Western Australian Industrial Relations Commission 2016-2017, page 17

<sup>3</sup> Report of the Chief Commissioner of the Western Australian Industrial Relations Commission 2016-2017, page 5

<sup>4</sup> Report of the Chief Commissioner of the Western Australian Industrial Relations Commission 2016-2017, page 6



## 4. Term of Reference 1 – Structure of the WAIRC

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

### General Submission on Recommendations for Term of Reference 1

44. CCIWA submits that the structure and role of the WAIRC must be a function of what it will be required to do following the adoption of the Review's recommendations and the resulting enactment of the 2018 IR Act. The WAIRC should be structured therefore as 'fit for purpose'.
45. The 'fit for purpose' must not only be with respect to the legislative outcomes and the WAIRC operating to those prescriptions. Fit for purpose must be, more importantly, to those who are covered by the system itself – small business operators. The WAIRC must match its operational methodology to those for whom the system applies.
46. As provided in paragraph [8] of this submission, CCIWA maintains the view that the State IR system should be for the purpose only of managing the public sector and thus should be structured accordingly.
47. If coverage remains to include the current private sector coverage of small and micro businesses, then the WAIRC must be structured to separate the public sector and the private sector. To be effective for the private sector, the WAIRC must be more attuned to the needs of its constituents, i.e. small business. This would necessitate changes also to its operational mechanics such as the adoption of electronic filing, telephone conferences as recommended, and other methods to alleviate the bureaucratic imposts and other consequential demands that impact small business.

### Additional Submission on Recommendation 4

48. CCIWA does not support recommendation 4 that proposes to abolish the Full Bench of the WAIRC with it to be replaced by a new body to be known as the 'Industrial Commission Judicial Bench' (Judicial Bench).
49. CCIWA submits that the WAIRC is intended to be a tribunal accessible to lay people, and the IR Act is broadly intended to be concerned with the 'minimum of legal form and technicality' (s. 7(c) of the IR Act).
50. CCIWA would be concerned that replacing the Full Bench and replacing it with the 'Judicial Bench' may result in a lay person perceiving the Judicial Bench to be 'legalistic' in nature. The unintended consequences of the renaming may be that parties will feel less confident about representing themselves, will seek costly legal representation or simply abandon the process.
51. CCIWA recommends that the 'Full Bench' continues to be named as such.
52. CCIWA broadly supports recommendations 4(a) to (e). However, with respect to recommendation 4(a), CCIWA refers to s 49(3) of the IR Act and recommends that the power to extend time to institute a Full Bench appeal ought to be expressed in the legislation to avoid uncertainty<sup>5</sup>.

---

<sup>5</sup> See *United Voice WA v The Director General, Department of Education* (2014) 94 WAIG 1486.

53. CCIWA would submit that the starting position must be that the Full Bench should not extend time to institute an appeal, otherwise the prescribed time limit is rendered meaningless. In the interests of finality of proceedings, certainty and the importance of settling industrial disputes with the maximum of expedition, an out of time appeal should only be accepted in rare and exceptional circumstances.
54. CCIWA therefore recommends that the grounds for accepting an out of time appeal be expressed in the legislation, which could include an 'exceptional circumstances' consideration.

### Additional Submission on Recommendation 5

55. CCIWA would support recommendation 5(a) that the position of the President of the WAIRC be abolished and be replaced by a Supreme Court justice presiding over Full Bench matters, as allocated by the Chief Justice of the Supreme Court, on a case by case basis.
56. As outlined at paragraph [303] of the Interim Report, CCIWA takes comfort in the knowledge that any questions about the prompt hearing of matters will likely be overcome when the Chief Justice allocates a judge to an individual Full Bench matter in cooperation with the Chief Commissioner.
57. Further, any concerns about workload will be partially alleviated by recommendation 6(b).
58. CCIWA supports recommendations 5(b) to (d).

### Additional Submission on Recommendation 6

59. CCIWA would support recommendation 6, including that the 'Commission in Court Session' be renamed the 'Industrial Commission Arbitral Bench' (Arbitral Bench). CCIWA agrees with the Review at paragraph [24] of the Interim Report that Arbitral Bench fits better with the functions the Full Bench performs in practice, and therefore is clearer for lay people.
60. CCIWA also supports the proposed constitution of the Arbitral Bench.
61. With respect to recommendation 6(a), CCIWA agrees that the Arbitral Bench ought to continue to exercise the jurisdiction currently exercised by the Commission in Court Session. CCIWA is in support of recommendation 6(b) that proposes that some of the powers exercised by the Full Bench should be distributed to the Arbitral Bench.

### Additional Submission on Recommendation 7

62. CCIWA would support recommendation 7 that the Industrial Appeal Court be abolished and instead, appeals from the Full Bench ought to be heard by the Court of Appeal of Western Australia on a question of law, upon leave being granted.
63. The Interim Report at paragraph [323(a)] invites submissions regarding costs in respect to Court of Appeal matters. CCIWA recommends that the costs of lodging an appeal should not be brought into line with the Supreme Court's general filing fee, otherwise parties, some of whom may be self-represented, could be deterred from instituting an appeal. In saying that, CCIWA would support a slight increase to the general filing fee, which currently sits at the nominal amount of \$5.

64. CCIWA submits that s 86(2) of the IR Act ought to be revoked and the usual rules as to costs should apply at the Court of Appeal level. This will address the problem of the WA industrial relations jurisdiction becoming overly litigious, largely risk-free and therefore resource-intensive in some circumstances.
65. CCIWA is concerned that, currently, a party may be encouraged to keep appealing to 'have a go' despite having an unmeritorious case. CCIWA would assert that applying the usual rules as to costs is a reasonable proposition considering that, at the Court of Appeal stage, the parties would have already appeared before the Full Bench, presided over by a Supreme Court justice.
66. It is further submitted that the current s 86(2) costs provision is too narrow, as costs will only be awarded for the services of a legal practitioner if, in the Court's opinion, the proceedings have been 'frivolously or vexatiously instituted'.
67. In practice, s 86(2) is applied narrowly and requires something 'substantially more' than a lack of success before costs will be awarded.<sup>6</sup> It is difficult for a party to establish that an appeal was instituted with the intention of annoying or embarrassing the other party or for an impermissible collateral purpose.<sup>7</sup>
68. The narrow application of s 86(2) means appellants can bring highly unmeritorious appeals and make poor arguments, with limited prospects of success, and yet a costs order will be unlikely to be made against them.
69. This means respondents to the appeal who, should they elect to be represented, are required to bear their own legal costs and invest significant resources in defending a poor claim. These current problems can be addressed by applying the usual rules as to costs.
70. CCIWA supports the position that employer organisations, unions and industrial agents are capable of representing parties before the Court of Appeal.

### Additional Submission on Recommendation 8

71. In the interests of efficiency, CCIWA would support recommendation 8 to avoid parties having to conduct or defend claims in multiple jurisdictions.
72. In particular, CCIWA supports the Industrial Magistrates Court's ability to hear all counterclaims and any set-off claims. For example, there is currently a structural problem whereby an employer may have a worthy counterclaim or set-off argument but must pursue that claim in a separate jurisdiction.
73. Bringing associated claims 'under one roof' will decrease multiplicity of litigation, complexity, and the efficient use of the parties' and judiciary's resources. Parties ought to be able to resolve disputes as expeditiously as possible.
74. For the same reasons, CCIWA submits that the WAIRC's denial of contractual benefits jurisdiction should be expanded, so that if an employer has a set off claim or counterclaim, those arguments should be determined by the WAIRC as part of the same set of proceedings.

<sup>6</sup> The Commissioner of Police of Western Australia v AM [2010] WASCA 163 (S) [36].

<sup>7</sup> The Commissioner of Police of Western Australia v AM [2010] WASCA 163 (S) [37].

## Additional Submission on Recommendation 12

75. CCIWA supports part of recommendation 12 in that s 26(1)(a) of the IR Act is not to apply if the WAIRC is deciding a question of law.
76. It is questionable what role s 26(1)(a), which requires the WAIRC to act in accordance with 'equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms', should reasonably have in determining a question of law and legal rights.
77. For example, s 26(1)(a) does not fit well with denied contractual benefits claims which is, in essence, a claim based on contract law principles which can be technical in nature. In particular, 'good conscience' is an uncertain and unpredictable concept.
78. CCIWA submits that the WAIRC should be required to determine a question of law in accordance with legal principles, as this provides parties with greater certainty. This issue could perhaps be addressed by way of a carve out in the legislation.
79. However, in saying that, the WAIRC still ought to be able to make discretionary procedural decisions, including dismissing the matter pursuant to s 27(1), with reference to s 26(1)(a).
80. Broadly speaking, for example, if a party does not come to the WAIRC with 'clean hands' or seeks to litigate to achieve an ulterior purpose, the WAIRC ought to be able to invoke s 26(1)(a). Sections 26(1)(a) and 27(1) of the IR Act may be harnessed to address some of the offensive conduct specified in paragraph [354] of the Interim Report.

## Additional Submission on Recommendation 14

81. CCIWA supports recommendation 14(a) that a 'slip rule' ought to be introduced into the IR Act to allow for clerical mistakes or accidental errors in orders to be corrected by the WAIRC on its own motion or upon application by a party or parties.
82. With respect to recommendations 14(b) and 14(c), CCIWA submits that 'speaking to the minutes' is an unnecessary procedural hurdle, which ought to be removed from the legislation.
83. It is not unusual, however, for courts to request that parties provide brief submissions as to what order should be made in more complex matters, on a case by case basis. The WAIRC could adopt the same approach.
84. With respect to recommendation 14(c), CCIWA supports the WAIRC's ability to conduct conciliation conferences by telephone if the WAIRC prefers it, or a party or parties request it, in a particular case.
85. Attending a conference by telephone is less time-consuming than attending the WAIRC in person.
86. Attendance in person can be particularly onerous for small businesses where time attending a conference can be time away from running their business. Additionally, this would be particularly beneficial for parties in rural or remote locations, those that may have mobility issues or those that have travel limitations.
87. Recommendation 14(c), therefore, is supported on efficiency grounds.

## Additional Submission on Recommendation 15

88. CCIWA submits that the privative clause provisions in sections 34(3) and 34(4) of the IR Act ought to be revoked. It is likely that the privative clause is unconstitutional.<sup>8</sup> This appears to be well-known by practitioners experienced in the WA industrial relations jurisdiction. From the perspective of the inexperienced, and in particular lay-litigants, it is likely a person would assume the legislation 'says what it means', so sections 34(3) and 34(4) could have access to justice implications.
89. CCIWA, therefore, recommends that the privative clauses should be removed from the IR Act, as the clauses likely have no work to do in practice.

## Additional Submission on Recommendation 16

90. CCIWA has no submissions to make with respect to the revocation of Boards of Reference under s 48 of the IR Act. Any measures that can be taken to reduce inefficiencies and duplication are welcomed.

## Additional Submission on Recommendation 17

### **Recommendation 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.***
91. CCIWA would support recommendation 17(c) that would provide for the denial of contractual benefits jurisdiction and / or the interpretation of awards, orders and industrial agreements jurisdiction to be exercised by the IMC rather than by the WAIRC as currently provided.
92. In the alternative, CCIWA would support the adoption of recommendation of 17(b) that would continue the powers to be exercised by the WAIRC but only by Commissioners who had practised law for not less five years as an Australian lawyer.
93. In CCIWA's view there is no significant concern with the current exercise of these powers by the WAIRC, though the proposed adjustment would enhance the operations and authority of the State Industrial Relations System.

<sup>8</sup> For example, *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531; *Sealanes (1985) Pty Ltd v The Western Australian Industrial Relations Commission Constituted By Commissioner J L Harrison & Ors* [2005] WASC 158 [28]-[30].

## Additional Submission on Recommendation 18

### **Recommendation 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.***

94. CCIWA submits with respect to recommendation 18 that legal practitioners should be able to appear before the WAIRC as of right. Further, CCIWA does not recommend that this be subject to the WAIRC's discretion in a particular matter.
95. Parties should be entitled to be represented by a lawyer, if they so choose, as this is linked to the right to a fair hearing. While the WAIRC was intended to be a lay tribunal, in practice, the tribunal can be far from lay-friendly. The way in which the law is applied to a particular set of facts is often complex, uncertain and technical, and conducting research to determine the state of the law can be equally complex.
96. CCIWA submits that it can be difficult for a self-represented party to represent themselves before the WAIRC, and a party ought to engage the services of a legal practitioner, if they so wish.
97. The argument in favour of the right for legal practitioners to appear as of right, is strengthened by the fact that industrial agents currently have an unfettered right of representation before the WAIRC. There is, therefore, a distinction without a difference.
98. Legal practitioners can assist the WAIRC by reducing the matters in issue. Further, coordinating and running litigation is time consuming for self-represented parties, particularly small business employers. In many instances, employers may wish to engage a lawyer so the employer can focus its energies on running its business.
99. If representation continued to be discretionary, CCIWA would submit that this will continue to create uncertainty. For example, there could be duplication of resources where the instructing officer prepares for a hearing, in addition to the legal practitioner, as the party does not know whether the WAIRC will exercise its discretion or not. Allowing legal practitioners to appear as of right furthers the interests of efficiency.

## Additional Submission on Recommendation 19

### **Recommendation 19.**

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

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

100. CCIWA supports recommendation 19(a) but urges the Review to expand the proposed costs provisions to include the equivalent of sections 400A and 404 of the FW Act.
101. It is CCIWA's position that the WAIRC should be empowered to make costs orders in the same circumstances as the FWC as outlined in s 401 which deals with costs orders against representatives, and s 611 which deals with vexatious claims or claims with no reasonable prospect of success.
102. Additionally, CCIWA recommends the WAIRC ought to have the power to award costs in the same circumstances as s 400A of the FW Act. Section 400A allows the FWC to award costs if a party has committed an 'unreasonable act or omission' in connection with the conduct or continuance of a matter which has caused the other party to incur costs.
103. CCIWA also recommends that the WAIRC be given the power to require a party to provide security for costs, in terms similar to s 404 of the FW Act (also r.44 of the *Fair Work Commission Rules 2013* (Cth)).
104. The current no-costs jurisdiction is disproportionately unfair to employers, and particularly small business employers. It is a common experience for CCIWA's members to be required to respond to employees' unmeritorious claims which have no reasonable prospect of success.
105. It is also a disturbingly common trend for an employer to pay an applicant 'go away' money, unrelated to the employer's risks, simply due to the resources involved in defending the claim and the associated disruption to an employer's business. It is a necessary that risk-free litigation should be addressed in a balanced way, particularly in light of the drain unreasonable litigation can have on employers' resources and the resources of the State.
106. To address the current problem, CCIWA would submit that the WAIRC ought to have the power to award costs, including on an indemnity basis, against a party to a proceeding in s 400A circumstances.
107. Such costs ought to be able to be awarded at any stage of the proceedings. For example, if an employer calculates its risk and considers its commercial interests and makes a reasonable 'without prejudice save as to costs' offer to an applicant, which is then unreasonably rejected, an applicant ought to be at risk of an adverse costs order. This risk would be due to the applicant's 'unreasonable act' in rejecting the reasonable offer which consequentially caused the respondent to incur costs in continuing to defend itself before the WAIRC.
108. CCIWA submits that s 400A-type orders should be intended to capture a range of conduct, such as an unreasonable rejection of reasonable 'Calderbank' offer, the unreasonable continuation with a matter, unreasonably requiring a party to respond to baseless assertions, commencing proceedings despite previously settling the matter, circumstances where an in-principle settlement is reached at conciliation which is later retracted without any reasonable justification or where an applicant unreasonably discontinues proceedings the day before the hearing.
109. The introduction of s 400A costs provision to the IR Act should not be designed to prevent litigants from pursuing their claims, but rather, should aim to address circumstances where litigants conduct themselves unreasonably during proceedings before the WAIRC.
110. For example, such unreasonable conduct can impose a significant cost on employers in drafting responses, collecting evidence, interviewing witnesses, drafting witness statements, preparing for conferences and interlocutory proceedings, and then being involved in the hearing.

111. This is particularly prejudicial for under-resourced small business employers. Section 400A will assist in getting the balance right.
112. In relation to security for costs, CCIWA recommends the introduction of provision equivalent to s 404 of the FW Act to address exceptional circumstances where, for example, an application is 'hopeless or bound to fail'.<sup>9</sup> CCIWA further submits that a security for costs provision ought to expressly include the ability for the WAIRC to order that an agent or lawyer pay security for costs.

## Additional Submission on Recommendation 20

### **Recommendation 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.***

113. CCIWA generally welcomes change which will increase efficiency and consistency.
114. If the s 32 and s 44 processes are harmonised, CCIWA would recommend that the parties be required to file an application and answering statement in line with the s 32 process and dispense with the 'Memorandum following compulsory conference' which forms part of the s 44 process.<sup>10</sup>
115. The 'pleadings' in the form of the application and answering statement, assists parties and the WAIRC in framing the issues to be determined (thus creating more certainty and efficiency), and the subsequent conference(s) can assist in narrowing those issues. Further, in the interests of efficiency, CCIWA observes that time limits ought to be implemented in respect of the ss 32 and 44 processes.
116. For completeness, CCIWA confirms that the current position, where individual employees cannot access the WAIRC by way of the s 32 or s 44 processes (save for an unfair dismissal or a denied contractual benefits claim), ought to be maintained.
117. CCIWA notes that if individual employees were able to apply to the WAIRC in respect of a broad 'industrial matter', there is a risk that litigation 'floodgates' could be opened. This would be an unreasonable cost to business and the resources of the State.

## Additional Submission on Recommendation 21

### **Recommendation 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.***

<sup>9</sup> For example, *Harris v Home Theatre Group Pty Ltd t/as Home Theatre Group* [2011] FWA 2910 [29].

<sup>10</sup> Reg 31, Industrial Relations Commission Regulations 2005 (WA).



**(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.**

118. With respect to recommendation 21(a), CCIWA would submit that no change be made to current provisions of s 84(A)(b).
119. CCIWA would support recommendation 21(b).

## Additional Submission on Recommendation 22

### **Recommendation 22.**

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

120. CCIWA would submit that the current provisions and process for obtaining discovery and inspection of relevant documents should remain unchanged. This principally ensures the procedural integrity and lessens the potential misuse of process.

## 5. Term of Reference 2 – Access to the WAIRC by Public Sector Employees

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

### General Submission on Recommendations for Term of Reference 2

121. As stated at paragraph [8] of this submission, the most effective approach with respect to the State's industrial relations system is for the referral of the State's powers with respect to the private sector to the Commonwealth and retain the WAIRC to regulate the employment for WA's public sector.
122. Consistent with CCIWA's approach at paragraph [8] of this submission, the WAIRC should therefore provide access for public sector employees on matters from which they are currently excluded. As the largest cohort covered by the State system, this would be appropriate.
123. The Review was tasked through Term of Reference 1 to consider the structure of the WAIRC with the "objective of achieving a more streamlined and efficient structure". As indicated at paragraph [44] of this submission, the WAIRC should be structured fit for purpose.
124. As a foundation principle, the workplace relations regulatory framework should be consistent for all employers and employees in WA.

125. Consistency can only be achieved by the operation of a single workplace relations system that places all employers and employees on equal footing, removes inequities and ensures a competitive environment for the business and labour markets.
126. Absent the consistency achieved from a single system framework, the alternative is to ensure consistency is at least achieved for the employers and employees that remain under the coverage of the State system.
127. This would achieve the objective of creating a streamlined and efficient structure for the regulation of employment in WA as a result of the reduction of regulatory burden and bureaucracy.
128. Term of Reference 2 requires the Review to examine access for public sector employees to the WAIRC for matters from which they are currently excluded.
129. At paragraph [17] of the Interim Report, the Review expresses the view that the present regime is *“overly technical and complex, without concomitant good reason”*. The Review goes on to say that the system *“separates different parts of the public sector into different pathways of rights, jurisdictions and remedies”*.
130. The Review concludes that the current arrangements are in need of change.
131. At paragraph [18] of the Interim Report, the proposition forwarded by the Review is that, by way of general preliminary opinion, *“public sector employees, public sector industrial organisations and employers should be covered by the ordinary jurisdiction of the WAIRC and as a consequence able to refer industrial matters to the WAIRC in the same way as their private sector counterparts”*.
132. CCIWA would support this proposition as it would begin to deliver a consistent framework within WA.
133. Further at paragraph [18] the Review highlights the different considerations that might apply to the public sector that do not apply to the private sector, including the *“nature of the public sector involving as it does the expenditure of public money, the types of employers and employees included in the public sector and the desire of the State Government to be able to reform it”*.
134. A separate division or part(s) of the 2018 IR Act could address these identified considerations with respect to the management of the public sector by the WAIRC.
135. Similarly, should the recommendations arising from Term of Reference 8 be adopted resulting in local government being within the coverage of the State system, then a separate division or part(s) of the 2018 IR Act could be established specifically to address local government if necessary.
136. Separate divisions or parts of the 2018 IR Act would ensure clear delineation so as to operate separately to the regulation of employment in the public and private sectors.

## Additional Submission on Recommendation 30

### **Recommendation 30.**

***Whether the 2018 IR Act should include, for the benefit of both public and private sector employees, an entitlement to being an application to the WAIRC to seek orders to stop bullying at work based on the model contained in the FW Act Part 6-4B “Workers bullied at work” and, if so, whether there ought to be any variations from that model”.***

137. Recommendation 30 proposes that the 2018 IR Act include, applicable to both private and public sector employees, provisions aligned to those in the Part 6-4B of the FW Act with respect to workplace bullying.

138. The FW Act anti-bullying provisions were introduced in January 2014. The Productivity Commission in 2015 acknowledged that the provisions were still relatively recent and that it was “*too early to conclude on the effectiveness – or indeed the need for – national laws and their impact*”<sup>11</sup>.
139. At that time the view expressed by CCIWA was that workplace bullying should continue to be addressed as a work health and safety matter and not through the workplace relations framework.
140. The new anti-bullying provisions at that time showed that they were lengthy, complex, resource intensive and adversarial. The provisions challenged and overextended the capabilities of the FWC.
141. The Productivity Commission said that despite the adverse commentary concerning the new provisions, “*it appears that the FWC has made considerable efforts to implement effective and evidence-based systems and processes for dealing with cases*”<sup>12</sup>.
142. Since the Productivity Commission report in 2015, the application of the provisions and the processes for managing matters brought to FWC have matured. The skills, expertise and experiences developed over time have shown the value that can be achieved by the provisions.
143. The Review’s recommendation 10 provides for the dual appointment of FWC Commissioners to the WAIRC. CCIWA would see this as an opportunity to utilise the FWC specifically for the application of any anti-bullying provisions and to capitalise on the experiences gained by the FWC.
144. The jurisdiction has become quite sophisticated and the FWC has produced a significant resource, the Anti-bullying Benchbook<sup>13</sup>, that reflects the experiences gained by the FWC in managing such claims before it with respect to anti-bullying.
145. If recommendation 30 is progressed, CCIWA would recommend that the 2018 IR Act replicate that of the FW Act to deliver consistency for both workplace relations frameworks in WA and would therefore send employees and employers exactly the same messages on acceptable conduct.
146. There is a need for an effective and broad-based mechanism for prevention, detection, cessation and redress in relation to workplace bullying.
147. CCIWA would therefore support recommendation 30 for the inclusion of anti-bullying provisions consistent with those provided in Part 6-4B of the FW Act. This would achieve the important alignment with national system employers and employees to establish a common standard within WA.

## 6. Term of Reference 3 – Equal Remuneration

*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.*

<sup>11</sup> Productivity Commission Inquiry Report No. 76, Workplace Relations Framework, 30 November 2015, page 627

<sup>12</sup> Productivity Commission Inquiry Report No. 76, Workplace Relations Framework, 30 November 2015, page 641

<sup>13</sup> <https://www.fwc.gov.au/resources/benchbooks/anti-bullying-benchbook>

## General Submissions on Recommendations for Term of Reference 3

148. CCIWA, consistent with the desire and commitment of the WA Government, maintains its support for gender equity and improving pay equity in WA. While recognising that the gender pay gap is improving, CCIWA acknowledges that much remains to be done.
149. CCIWA supports the principle of equal remuneration for work of equal or comparable value.
150. CCIWA's initial submission at 8.7(c) stated that *"there should be no move towards including equal remuneration provisions into the Industrial Relations Act 1979, or for the facilitation of equal remuneration cases at the State level"*. CCIWA maintains that view.
151. One particular difficulty with respect to the principle of equal remuneration is the differentials and variances that arise by the very nature of the operation of two different workplace relations systems in WA, delivering different minimum award rates of pay and other terms and conditions within the same industry in the State.
152. The differences between state and national rates and conditions within an industry creates confusion for employers and employees, and makes it difficult to attract and retain staff. For example, WA operates with two different statutory minimum wages created by the application of both a National Minimum Wage and a State Minimum Wage.
153. CCIWA's initial submission at 8.5 stated, *"CCIWA does not believe that equal remuneration will be effectively realised through the facilitation of equal remuneration cases and other activities of the WAIRC"* and that such cases *"would be unlikely to achieve pay equality"*.
154. The best run and determined equal remuneration or pay equity case conducted in the State system which, in the estimation of CCIWA represents only 8 – 11 per cent of the WA private sector, cannot make a difference in a small jurisdiction that lacks leverage or bite on the overall labour market.
155. Again, to facilitate improved outcomes in this area, a referral of the remaining WA system as it applies to the private sector should be referred to the Commonwealth, allowing more WA businesses access to national pay equity mechanisms.
156. CCIWA submits that pay equity/equal remuneration is most effectively addressed through other initiatives.
157. As the dominant cohort covered by the State system is the public sector, the most significant impact on pay equity / equal remuneration rests with the WA Government.
158. The Workplace Gender Equality Act 2012 (Cth) (WGEA Act) strengthened the legislative processes to improve and promote equality for both men and women in the workplace. The stated principles of the legislation are<sup>14</sup>:
- (a) *Promote and improve gender equality (including equal remuneration between women and men) in employment and in the workplace*
  - (b) *Support employers to remove barriers to the full and equal participation of women in the workforce, in recognition of the disadvantaged position of women in relation to employment matters*
  - (c) *Promote, amongst employers, the elimination of discrimination on the basis of gender in relation to employment matters (including in relation to family and caring responsibilities)*

<sup>14</sup> <https://www.wgea.gov.au/about-legislation/workplace-gender-equality-act-2012>

- (d) *Foster workplace consultation between employers and employees on issues concerning gender equality in employment and in the workplace*
- (e) *Improve the productivity and competitiveness of Australian business through the advancement of gender equality in employment and in the workplace*
159. The WGEA Act requires non-public sector employers with 100 or more staff to report annually against standardised indicators that are critical to gender equality, including gender composition of the workforce; equal remuneration between women and men; and the availability and utility of employment terms, conditions and practices relating to flexible working arrangements for employees and to working arrangements supporting employees with family or caring responsibilities.
160. The Workplace Gender Equality Agency (WGEA) provides useful internal and external resources to assist employers to develop policies and strategies related to the standardised gender equality indicators.
161. The 2015 Review of the Industrial Relations Framework in Queensland acknowledged that the reports required from employers under the WGEA Act have been “*instrumental in providing the impetus for change in some workplaces*”<sup>15</sup>. It further went on to say that “*there has as yet been no coordinated approach to addressing pay equity in the federal or state public services*”<sup>16</sup>.
162. CCIWA believes that continued progress is more effectively achieved through co-operative initiatives and programs with business and the WA Government that would deliver business-driven change rather than imposed outcomes.
163. As mentioned previously, given the limited extent of coverage of the State system the ability to address pay equity / equal remuneration through industrial legislation would be of limited effect. Where sectors are particularly vulnerable, the State Government should act to fund the ability to remedy.
164. The State Government should work with the Federal Government to establish an office for the WGEA in WA. The Agency would bring to the State the tools and resources necessary to assist and educate WA business to actively address the gender equity position.
165. CCIWA would welcome the opportunity to partner with the Government on the development of an innovative strategy to deliver promotion and other initiatives to the WA business community.
166. Should a recommendation continue forward for the inclusion of equal remuneration provisions within the 2018 IR Act, CCIWA would submit that this should reflect the provisions provided by Part 2-7 of the FW Act. This would continue the legislative alignment of minimum standards between the national and State jurisdictions and maintain consistency within WA for all employers and employees.
167. CCIWA would submit that, in the absence of any existing provisions, this alignment with the provisions of the FW Act would provide an important initial introduction into the 2018 IR Act.
168. Recommendation 35 proposes that the 2018 IR Act include an equal remuneration provision based upon the model in the *Industrial Relations Act 2016 (Qld)*.
169. CCIWA would note that the Queensland Industrial Relations Act applies only to State and local government employees representing approximately 14 per cent of the Queensland workforce. There is no

<sup>15</sup> A Review of the Industrial Relations Framework in Queensland, December 2015, pages 91-92

<sup>16</sup> A Review of the Industrial Relations Framework in Queensland, December 2015, page 92

- application to private sector employers because of that state's referral of its industrial relations powers to the Commonwealth. The WA public sector is comparable at approximately 12 per cent of WA's workforce.
170. The adoption of an equal remuneration provision in the 2018 IR Act must be constructive, effective and practical with respect to WA.
171. With respect to Recommendation 36, CCIWA would submit that, in line with our previous submissions, that equal remuneration and the narrowing of the gender pay gap is best achieved by means involves education and consultation. To that end CCIWA submits that the establishment of an equal remuneration principle as provided for by recommendation 36 is best achieved as a consent principle.
172. The Review states at paragraph [11] of the Interim Report that there *"is an alarming gender pay gap in Western Australia and the Review considers the WAIRC ought to be armed with the tools necessary to do what it can to enhance equal remuneration"*.
173. The gender pay gap data incorporates all remuneration data and does not differentiate between award-covered and award-free employees nor between industrial relations jurisdictional coverage and thus would include state and national system employer data. This is not to diminish the work that needs to be done nor to suggest that there is any question as to the validity of the status of current gender pay equity.
174. However, it serves to highlight the complexity of the data and analysis and the subsequent limited impact that can be achieved by the WAIRC outside the limited scope of coverage of the State system and the role of State awards in establishing equity and fairness.
175. The operation of the gender-neutral award system and award classifications support and enforce the principle of equal pay for work of equal value.
176. The Productivity Commission considered the issue of equal pay for work of equal value in its 2015 report examining Australia's workplace relations framework and noted that *"awards appear to have reduced gender wage inequality"*<sup>17</sup>.
177. Equal pay cases are complex and difficult. As the Productivity Commission report outlined, it *"is not possible to determine meaningfully that different occupations deserve equal pay simply because they share some common features"*<sup>18</sup>.
178. There are innumerable dimensions of jobs that do not necessarily equate. The Commission determined that *"making judgments that identify 'equal work' in a way that could genuinely inform precise wage differentials looks to be profoundly difficult"*<sup>19</sup>.
179. It must be acknowledged that the private sector cohort covered by the State system are dominantly award reliant and are comprised of small and micro businesses, sole traders, partnerships and trusts. The award system enforces equal pay for work of equal value.
180. The recommendations of the Review in the Interim Report for the consolidation and modernisation of the State's award system on the basis of industry and occupation will allow the awards to support gender pay equity to an even greater extent.

<sup>17</sup> Productivity Commission Inquiry Report No. 76, Workplace Relations Framework, 30 November 2015, page 355

<sup>18</sup> *ibid*

<sup>19</sup> *ibid*

## 7. Term of Reference 4 – Definition of Employee

*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.*

### General Submissions on Recommendations for Term of Reference 4

181. The Review notes in section 5.4(a) that Western Australia does not comply with the Forced Labour Convention, 1930 (ILO Convention 29). Australia ratified this convention in 1932. Convention 29 seeks to suppress and eliminate all forms of forced or compulsory labour.
182. Article 2 of Convention 29 defines the term forced or compulsory labour as meaning “*all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily*”.
183. Article 2 further clarifies that the term forced or compulsory labour does not include “*any work which forms part of the normal civic obligations of the citizens of a fully self-governing country*”<sup>20</sup> and “*minor communal services of a kind, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services*”<sup>21</sup>.
184. Protocol 029 of 2014 to the Forced Labour Convention, 1930 (ILO Protocol P029), adopted by the ILO on 11 June 2014, requires each member to “*develop a national policy and plan of action for the effective and sustained suppression of forced or compulsory labour*”<sup>22</sup>. Article 2 of the P029 outlines the measures to be taken for the prevention of forced or compulsory labour.
185. P029 was entered into force on 9 November 2016 and is only in force for 13 nations with a further nine to be in force during 2018. Only three G20 nations (Argentina, France and the United Kingdom) have ratified P029.
186. The Commonwealth is progressing towards the enactment of a Modern Slavery Act in Australia. The Joint Standing Committee on Foreign Affairs, Defence and Trade has consulted widely to progress the introduction of the proposed legislation.
187. The proposed Modern Slavery Act reflects the required national policy and plan of action under P029 to eliminate forced or compulsory labour.

<sup>20</sup> C029 – Forced Labour Convention, 1930, Article 2, section 2, paragraph (b)

<sup>21</sup> C029 – Forced Labour Convention, 1930, Article 2, section 2, paragraph (e)

<sup>22</sup> P029 – Protocol 29 of the Forced Labour Convention, 1930, Article 1, section 2

## Additional Submission on Recommendation 37

188. CCIWA would oppose the removal of the current exclusion under section 7(1) of the IR Act for “any person engaged in domestic service in a private home”.
189. CCIWA believes that adequate protections are provided within the definition of **employee** at paragraph (e) and (f) of section 7(1) to capture those persons who are engaged in domestic services in a boarding or lodging environment and for those persons providing domestic services to an employer who is engaged to provide the services to an owner or occupier of a private home.
190. The removal of the exclusion as proposed, it is submitted, would in the first instance create a simply untenable and unworkable proposition.
191. The proposition suggests that a home owner who engages (in the broadest sense of the word engage) a friend to undertake general domestic services once a week would become an employer and would be required to provide a suite of relevant insurance coverage, pay employer superannuation contributions, deduct and pay taxation contributions, and the like. In addition, the home owner would be obliged to provide all minimum terms and conditions by virtue of that friend being deemed an employee.
192. The removal of this exclusion would have the effect of making the home owner an employer of a person who vacuums and cleans once per week, of a person who spends two hours within a home doing the ironing for the home owner, a teenager earning some extra money providing baby-sitting services, au pairs who live with the family and provide a broad range of assistance to the host family, a pensioner who provides ad hoc handyman services or gardening services, and a vast range of other ‘domestic’ services.
193. For a large number of individuals performing minor home domestic services it is a critical source of additional income.
194. Any change that creates a home owner as an employer would simply end domestic services. There would be significant impacts on individuals.
195. CCIWA would submit that people providing domestic services are doing so in a freely entered into arrangement, often between friends, neighbours and acquaintances and cannot be considered employees with the IR Act. Fundamentally, people do this voluntarily and mutually agree the price. This is not labour that is forced or captive domestic service in any way, there is no compulsion or threat / duress to individuals who perform the work.
196. Individuals may also elect to engage in the provision of domestic services through a registered domestic agency that provides status and coverage as an employee.
197. Thus, CCIWA recommends that the State does not seek to include domestic workers as employees, as the consequence of making all households employers, by default, would create unacceptable, impractical and additional regulations that are unnecessary and intrusive into the private home. The extension of workplace regulations to home owners would raise fundamental concerns.
198. A household cannot sensibly be seen as an employer.
199. CCIWA recommends that there should be no change to the definition of “employee” in the IR Act and the MCE Act. The 2018 IR Act should continue to exclude individuals providing domestic services as currently provided by section 7(1) of the IR Act.
200. Doubtless the broader WA community would find this recommendation and its implications unpalatable.



## Additional Submission on Recommendation 38

201. CCIWA would submit that, in principle, it does not oppose the proposition forwarded by recommendation 38. However, wider industry consultation would be required where commission-only or piece-rates are an essential component of operating business models.
202. For example, CCIWA would draw the Review's attention in particular to the real estate industry.
203. Employees within the real estate industry are engaged either on a retainer plus commission basis or as commission-only employees, whereby the employee is remunerated solely when commission is earned by the real estate agent from the sale of a property.
204. Businesses within the real estate industry in WA currently fall within either the national or State regulatory systems dependent upon, of course, the particular statutory nature of the real estate business itself. Consequently, there are businesses within the real estate industry that operate in either system.
205. A modern award, the Real Estate Industry Award 2010, currently operates under the FW Act to cover national system employers / employees.
206. There is currently no award under the State industrial relations system that covers the real estate industry.
207. The Real Estate Industry Award 2010 provides for the engagement of employees on commission-only engagement under the terms of clause 16 of the Award. The provisions of clause 16 operate to ensure that the option for commission-only employment is limited to an agreement between an employer and employee where the employee satisfies certain mandatory conditions.
208. Commission-only engagement is an attractive option for employees given the potentially sizeable nature of the commission to be earned compared to customary wages or salaries, and thus the potential to generate income related to and driven by performance.
209. Should the definition of employee be amended in accordance with recommendation 38 so as to no longer exclude persons who are remunerated by commission-only or percentage reward or wholly at piece rates as currently provided under the MCE Act and the MRC Regulations, to result in coverage by the 2018 IR Act, then current practices would need to be accommodated.
210. In December 2005, the *Workplace Relations Amendment (Work Choices) Bill 2005* amending the *Workplace Relations Act 1996* came into operation in March 2006. This change brought the vast majority of real estate employers into the coverage of the national jurisdiction for the first time. The amendment required a minimum wage to be paid to all employees as at that time there was no award covering the real estate industry and no provision for commission-only employment. This caused significant difficulties within the real estate industry and, following an application to the then Australian Fair Pay Commission, commission-only employment was revalidated and reinstated.
211. It is proposed to review and replace existing private sector awards with New Awards as outlined in paragraphs (a) to (g) of recommendation 55. The New Awards would be established similar to that adopted in the national jurisdiction where modern awards were established on the basis of industry or occupational scope.
212. In Schedule A to the Interim Report, the Review proposed 28 private sector New Awards with industry or occupational scope (inclusive of a Miscellaneous award).

213. CCIWA would recommend that the list of New Awards be expanded to include a Real Estate Industry Award that would contain provisions, similar to those expressed by clause 16 of the Real Estate Industry Award 2010, to allow for the engagement of commission-only employees. Such terms as those contained in clause 16 would provide adequate protections for employees as well as reducing the impact on operating businesses.
214. 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. CCIWA would submit that this should be a primary consideration of the Review's recommendations.

### Additional Submission on Recommendation 39

215. Recommendation 39 calls for the 2018 IR Act 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.*
216. All participants in the WA community must do as much as possible to support and encourage people with disabilities having access to and actively participating in the workforce.
217. In principle, CCIWA would support the inclusion of people with disabilities engaged in employment being included in the definition of employee where they are so engaged.
218. Within the workplace relations environment, one critical issue would be with respect to wages payable for the work undertaken. This is a complex matter where the rate of wage is proportional to, and therefore determined by, the assessed skill, capacity and capability of the individual.
219. It is imperative to ensure that people with disabilities are not excluded from employment opportunities because of any rigidity or lack of pragmatism within the workplace relations system because of any change.
220. Therefore, the supported wage framework is essential to achieve the outcomes desired.
221. 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.
222. This would essentially include interactions with the social security system and wage supplements provided together with other forms of support.
223. It is also important to examine the interrelationships with other State employment legislation.
224. While this recommendation deals with the definitional question, there are however a significant range of complex issues that arise from any outcome in this area.
225. CCIWA would submit that this recommendation should be examined in consultation with the expertise of the disability support sector and employment services providers.

## Additional Submission on Recommendation 40

226. Recommendation 40 calls for the establishment of a taskforce *“to assist employers and employees in the change to the regulation of employment in Western Australia contained in proposed recommendations in [37], [38] and [39] above, and any proposed recommendations that might arise after the receipt by the Review of submissions in response to the request in [42] – [45] below”*.
227. CCIWA would welcome participation on the proposed taskforce should the proposed changes in the regulation of employment proposed by recommendations 37, 38 and 39, together with any changes arising as a consequence of submissions with respect to recommendations 42 to 45 be actioned.

## Additional Submission on Recommendation 41

228. CCIWA acknowledges the views of the Review in recommendation 41, in particular 41(d).
229. However, CCIWA would submit that it is necessary for the so-called ‘gig’ economy to be addressed with respect to the recommendations responding to Term of Reference 4, particularly recommendations 41(a) to 41(f).
230. Recommendation 41(g) calls for the establishment of a taskforce to *“monitor the engagement, working conditions and termination of engagement of people in the gig economy and to consider and report to and make recommendations to the Minister as to whether and to what extent the regulation of the industry can or ought to be pursued by the State Government, by way of representations to the Commonwealth Government, separate legislative action or otherwise”*.
231. CCIWA would welcome participation on the proposed taskforce.
232. The fundamental nature of the ‘gig’ economy is not new. It simply derives its name from an individual undertaking a piece of work being analogous to an individual ‘gig’. The Oxford dictionary defines a ‘gig’ as *“a job, especially one that is temporary or that has an uncertain future”*.
233. The gig economy is not an industry. Rather it is more appropriately and accurately the description of a mode of engaging in work.
234. The gig economy is part of a shifting cultural and business environment.
235. Individuals are becoming disillusioned with a traditional work routine that is inflexible for both present and future workers who have an increasing need for flexible, independent, autonomous and diversified work. The gig economy refers to the growing number of individuals abandoning traditional 9 to 5 employment in favour of working independently on a task-by-task basis for various employers.
236. Individuals are increasingly shaping their careers by working on a task-by-task basis for different employers concurrently. This is the generational shift for greater freedom and entrepreneurship.
237. This trend forms the “gig economy.”
238. For small and medium sized business who have traditionally lacked the resources (affordability) to recruit and retain the best talent, this increased access to on-demand or ‘gig’ workers is particularly beneficial.

239. It is the emergence of digital platforms that link individuals to work that is the driving force behind the increasing prominence of gig work. The advent of technology has enabled the connection between individuals and business to be facilitated more quickly, easily and globally.
240. However, the use of digital platforms is only one contributor.
241. Individuals seek and secure gig work through an array of other means. By direct introduction using a known network of contacts, by direct marketing to business, by online marketing through web sites and social media (Linkedin, Twitter, Facebook, etc.), blogs, through specialised agencies, as well as through available online platforms that serve as connectors.
242. Digital platforms facilitate the connection of economic and social activity. Such platforms connect buyers and sellers (eBay, Amazon, Alibaba, etc.) and more recently connecting gig workers to those providing the available opportunities. Recruitment agencies have been providing this 'introduction' service for decades.
243. The platform economy is narrower in scope than the "digital economy", but wider in scope than the "gig economy".
244. The drive for flexible work is not solely the manifestation of new generations of employees as older workers also want to set their own schedules, choose their tasks and work in an environment and in a manner that suits them. This is particularly more important as people seek a transition to retirement.
245. Importantly, not all gig economy roles are based on or require technology. Gig workers are also engaged within and for traditional companies.
246. The gig economy is developing at an increasing rate because the workforce is increasingly mobile, and work can be done from anywhere, so that job and location are becoming decoupled more frequently and to a greater extent.
247. Individuals can select when, how and for whom they work, potentially from anywhere around the world, while employers can select the best individuals for specific projects from a larger pool than that available in any given location. In a gig economy, individuals can select the type of work that interests them and that provides expanded experiences, skills and career growth.
248. For individuals participating in the gig economy, the ability to choose when and where they work can offer a work-life balance not possible in most traditional jobs. It also provides a means of generating additional income outside of regular employment.
249. The emerging workforce now have a different mindset from the past. There is an increasing number of people moving away from traditional employment models in favour of undertaking what was traditionally referred to as 'freelance' work. This needs to be recognised and accommodated.
250. Technology simply enables freelancers to locate and connect quickly and easily with employers and engage in interesting work. The range of tasks available is significant, making freelancing accessible to anyone.
251. Such freelance work arrangements have long been commonplace in writing, consulting, design, IT and skilled trades but, with the assistance of technology, have now moved into a broader range of occupations and industries.

252. With the arrival of digital freelance marketplaces and high-speed connectivity, the complete autonomy that accompanies freelance work is more attainable than ever. As the benefits of working independently become more apparent, the freelance economy will continue to influence the workforce and the economy.
253. Therefore, CCIWA would submit that the 'gig' economy is a description of a manner of work activity that is not new, is broadly encompassing and is not an industry per se.
254. The scope of 'gig' work is wide-reaching across all industry sectors and occupations.
255. Prior to the last election, WA Labor issued its *Plan for Jobs* to "broaden our economy and become more diverse and dynamic".
256. The *Plan for Jobs* expressed the commitment to "ensuring that there is a focus on innovation as a future driver of our economy"<sup>23</sup>. It also acknowledged that technology will reshape current industries, work practices and professions.
257. Importantly, it further stated that a "Labor Government is committed to having a skill ready workforce. This is critical to capitalise on the emerging innovation economy to create local jobs"<sup>24</sup>.
258. This acknowledgement of innovation as a future driver of the economy, and that technology is indeed reshaping industries, work practices and professions is to acknowledge that the much-needed future diverse and dynamic economy must encourage and support a change of traditional views, which includes the operation of the 'gig' economy and the outcomes it delivers for individuals and business.
259. The workplace regulatory environment must, as a matter of first principle, facilitate the future of work. This means flexibility not only for employers but also employees who are demanding new ways of work.
260. The contemporary workforce is demonstrating its growing rejection of the traditional business and work models. As a consequence, it is imperative that WA does not confine businesses and employees to traditional systems that cannot deliver on current expectations.
261. Similarly, care is necessary not to impede the freedom of the individual to choose when, where, how and for whom they work.
262. Individuals undertake gig work in a number of ways and for a multitude of individual reasons or personal choices, for example:
- (a) An individual working in full time employment for an employer under an appropriate award (either national or state), or contract of employment and performs additional work for another employer either as a part time or casual employee under an appropriate award (either national or state), contract of employment or as a sub-contractor in order to supplement income for a specific reason such as to purchase a new car, an overseas holiday, or add to their savings to purchase a home;
  - (b) An individual may be employed by an employer under an appropriate award (either national or state), or contract of employment as a part time or casual employee, and employed by another employer under an appropriate award (either national or state), or contract of employment as a part time or casual employee because they simply prefer the work-life balance that these two gigs provide;

<sup>23</sup> WA Labor Plan for Jobs, page 26

<sup>24</sup> WA Labor Plan for Jobs, page 49

- (c) An individual undertakes a range of project tasks or consulting assignments for one or many employers as a sub-contractor as this provides the flexibility to choose how and when they work and what type of work they wish to do;
  - (d) A stay-at-home parent may wish to earn additional income by performing a range of 'gigs' either as an employee or sub-contractor during school hours that suits their parenting desires and preferences;
  - (e) A person may choose to work one, two or more 'gigs' to maintain income while in the process of securing full time or other employment;
  - (f) A person on a Newstart allowance may wish to supplement the fortnightly allowance by performing 'gigs' to generate additional income while searching for permanent work and because a person on a Newstart Allowance can earn up to \$104 per fortnight without reducing the allowance payment, the individual is only needing short periods of income generation;
  - (g) A shift worker who may work on a roster with lengthy periods rostered 'on' and 'off' work may choose to engage in short term 'gigs' during the rostered 'off' period either as an employee or a sub-contractor;
  - (h) A tradesperson working full time may perform contract 'gigs' outside of traditional employment in order to develop additional skills and experience that cannot be offered by the full-time employment and while proactively developing themselves to improve their employment and career prospects they earn additional income;
  - (i) A teacher may undertake a range of short-term work or sub-contract work to supplement full time employment such as tutoring in the evenings / weekends or undertaking short-term supplementary work over the school holiday periods;
  - (j) A university student who constructs a mix of 'gig' work to match study commitments and university breaks to generate additional income, a method by which have in fact many university students have managed their needs for decades;
  - (k) A retiree may wish to supplement the government pension or their superannuation income by working part time or casually for an employer who uses the retiree's experience or expertise a few hours a week to assist the business, or the retiree may simply wish to continue to contribute, be active and enjoy the socialisation that work offers; or
  - (l) An individual may simply identify a short term or non-traditional employment arrangement that will satisfy their career objectives, advance their skills and experience or provide flexibility for a better life balance.
263. There are endless reasons why gig work is being undertaken by individuals in lieu of the traditionally prescribed forms of employment.
264. These reasons are all individualistic and gig work is fundamentally driven by individual choice.

## Additional Submission on Recommendation 42

### **Recommendation 42.**

***Whether, and if so what, limitations or safeguards ought to be imposed upon industrial inspectors or people holding right of entry permits with respect to the carrying out of their duties, rights and privileges at places of work that are also private residences.***

265. CCIWA's submission with respect to recommendation 42 is definitive. It simply cannot be contemplated that private residences can be entered as proposed. The notion that industrial inspectors or those persons holding a right of entry permit (i.e. union officials) can, with or without notice, enter a private residence would be unacceptable to the WA community.
266. Such an unequivocal right to enter a private residence without consent is not even available to members of the WA Police Force.
267. Division 2 of Part 3-4 of the FW Act specifically prevents a permit holder from entering any part of the premises that "is mainly used for residential purposes" (section 493).
268. Entering a private home should not be contemplated. Consider the ability for the individual entering a private residence to proceed to a child's bedroom (even more concerning if children are present in the home), view personal possessions, 'inspect' the home and assess activities within the residence. Further consider what if there is loss or damage that occurs during the entry? Who would be responsible for loss or damage and the impacts on the householder's insurance?
269. Additionally, recommendation 65 would that mean that entry suggested can occur at any time not just while work is being carried out.
270. CCIWA would submit that the public concern on this would be significant.

## Additional Submission on Recommendation 43

### **Recommendation 43.**

***Whether the MCE Act or, if included in the 2018 IR Act, the State Employment Standards, should contain the following exclusion, either at all or in some amended form:***

***Volunteers etc.***

***Persons who are not entitled to be paid for work done by them but who receive some benefit or entitlement in relation to the work.***

***being persons who are currently excluded from the definition of an employee under s 3 of the MCE Act and regulation 3 of the MCE Regulations.***

271. Volunteering plays an integral role in the WA community.
272. Volunteers demonstrate the community spirit necessary to support community events, sporting clubs, arts and crafts centres, local festivals and other special events, social clubs, museums and historical societies, and school events.

273. The role of volunteers was a significant contribution to the success of the Sydney Olympics and most recently at the Commonwealth Games in Brisbane. Equally, local, State and Federal elections are dependent on volunteers, especially on polling-day.
274. Communities rely on the selfless donation of time by volunteers.
275. The Department of Local Government and Communities (DLGC) estimates that each year, around 80 per cent of Western Australians aged 15 years and over willingly give their time for the good of the community.
276. DLGC developed the WA Volunteering Strategy as a call to action for the whole community to work together to encourage and support volunteering in WA.
277. The strategy built on national and international research, as well as extensive consultation with and guidance from a wide range of stakeholders including State Government agencies, Volunteering WA, local governments, resource centres, volunteer-involving organisations and, most importantly, volunteers.
278. According to the Department of Communities WA Volunteering Strategy:
- “Volunteers play a vital role in Western Australian communities, making a social, economic and cultural contribution to the State conservatively valued at \$39 billion annually.*
- Volunteers create, support and sustain organisations delivering services and activities that are essential to our communities. Among other activities, volunteers’ work ensures that Western Australia’s community sport, recreation, arts and culture thrives.”*
279. State and local governments are some of WA’s largest volunteer-involving organisations. They engage volunteers to support the delivery of essential community services as well as sporting, cultural, and recreation programs and activities that enhance local life. The Department of Fire and Emergency Services engages 26,000 emergency service volunteers to support its operational, administrative and functional activities. More than 1,200 volunteers enable Department of Local Government, Sport and Cultural Industries funded organisations to deliver activities and events to Western Australian audiences.
280. For the benefits gained by the community from volunteering, any proposed disruption would affect the community as a whole. The consequences of the removal of the exclusion for volunteers such that the proposed IR Act 2018 would apply to the organisations relying on the selfless work of volunteers is untenable. Volunteers willingly donate of their time for the service of their local community. They are not and cannot be considered employees in any reasonable context.
281. Volunteers should remain excluded from the definition of employee under the 2018 IR Act.

## Additional Submission on Recommendation 44

### **Recommendation 44.**

***Whether the MCE Act or, if included in the 2018 IR Act, the State Employment Standards, should exclude from its coverage persons appointed under s 22(1) of the National Trust of Australia Act 1964 (WA) to carry out the duties of wardens, being persons who are currently excluded from the definition of an employee under s 3 of the MCE Act and regulation 3 of the MCE Regulations.***

282. CCIWA provides no further submissions on recommendation 44.



## Additional Submission on Recommendation 45

### **Recommendation 45.**

#### **Whether:**

- (a) ***The 2018 IR Act could contain a legally operative provision, broadly similar to s 192 of the Workers' Compensation and Injury Management Act 1981 (WA), that would have the effect of allowing the 2018 IR Act to cover people who are, under the Migration Act 1958 (Cth) either unlawful non-citizens in Australia who have engaged in work for an employer, or who are lawful non-citizens in Australia who have engaged in work for an employer that is contrary to the conditions of their visa, having regard to s 109 of the Commonwealth Constitution, the contents of s 235 of the Migration Act and the Migration Act as a whole.***
- (b) ***If the answer to (a) is yes, whether, as a matter of policy, the 2018 IR Act ought to contain such a provision.***

283. CCIWA does not support the proposed change outlined in recommendation 45 that illegal contracts of employment may be treated as valid for the purposes of the IR Act. Individuals working without a visa or contrary to their visa terms should not be deemed 'employees' for the purposes of the IR Act.
284. The starting position is that working without a visa, or contrary to a visa, would breach the *Migration Act 1958 (Cth)* (Migration Act) and any such contract of employment could be rendered unenforceable.
285. It is CCIWA's view that recommendation 45, which would provide such workers access to the WAIRC (and potentially the Court of Appeal) for the purposes of seeking a remedy, would undermine the legislative scheme provided for in the Migration Act, and may be considered unconstitutional.
286. In any event, even if the Migration Act has not covered the field rendering the proposal unconstitutional, recommendation 45 should not be introduced on public policy grounds. For example, the WAIRC cannot be seen to come to the assistance of a party acting illegally. The introduction of the proposed provisions would place the WAIRC at risk of being perceived by the community as furthering an illegal purpose<sup>25</sup>.
287. As a general statement of principle, it is well-established that a contract "*whose making or performance is illegal will not be enforced*"<sup>26</sup>. Potential claims by individuals working without a visa, or contrary to a visa's conditions, would be so closely linked with the illegal performance of the work as provided for by the Migration Act, that the WAIRC cannot appear to condone or aid in such conduct by granting a remedy.
288. In some circumstances, a worker may work contrary to the terms of their visa in respect to some *portion* of the employment, such as working beyond their visa's expiry. CCIWA submits that these types of cases could be decided on a case by case basis by applying the doctrine of illegality, without the need for any amendment to the IR Act.
289. For example, the validity of the employment contract will likely depend on the nature of the breach taking into account the particular circumstances, such as whether the illegal work can be separated from the legal work, whether the employment contract was tainted with illegality in toto, and / or whether the worker actively participated in the illegality or had knowledge of it.

<sup>25</sup> See *Miller v Miller* (2011) 242 CLR 446 [27] citing *Holman v Johnson* (1775) 1 Cowp 341 at 343

<sup>26</sup> See *Miller v Miller* (2011) 242 CLR 446 [24].

290. CCIWA does recognise the complex policy questions arising in circumstances where a vulnerable unlawful non-citizen has been exploited by their employer, who is then unable to bring a claim on the basis of the employment contract being rendered unenforceable due to statutory illegality.
291. However, CCIWA doubts whether the proposed amendment to the IR Act is the correct mechanism by which to address this complex legal and policy question.<sup>27</sup> Indeed, the Migration Act, the criminal law and/or potentially the common law courts may be better equipped to deal with questions associated with such illegality.

## Additional Submission on Recommendation 46

### **Recommendation 46.**

#### ***Whether the IR Act, MCE Act or, if included in the 2018 IR Act, the State Employment Standards, ought to apply to:***

- (a) ***People who are employed in Western Australia by a foreign state or consulate.***
- (b) ***People who are employed as sex workers.***
292. CCIWA provides no further submissions on recommendation 46.

## 8. Term of Reference 5 – Minimum Conditions of Employment

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

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

### General Submissions on Recommendations for Term of Reference 5

293. The Interim Report proposes that the 2018 IR Act be the single piece of workplace legislation that would incorporate relevant matters currently provided by other legislation (the MCE Act and the LSL Act) and a General Order of the WAIRC (Termination, Change and Redundancy General Order).
294. The Review recommends that a set of State Employment Standards (SES) be established within the 2018 IR Act that reflects those minimum conditions contained in the National Employment Standards (NES) of the FW Act.

<sup>27</sup> For an example of the complexity, where even pre-eminent legal minds differ, see the UK Supreme Court case *Hounga v Allen* [2014] UKSC 47.

295. CCIWA's initial submission at 2.11 (c) recommended the *“creation of a State-based set of legislative minima that reflects the core entitlements of the National Employment Standards (NES), drafted in a simpler fashion with a less prescriptive approach to the application of the entitlements. In addition, these provisions should be specifically tailored to smaller business”*. In making this recommendation, CCIWA also stipulated that the creation of the SES should not result in a *“scaling up or duplication of entitlements but will instead require rationalisation of award content that is consistent with those standards”*.
296. The establishment of the SES will provide a single point of reference to the minimum employment standards and entitlements, without needing reference an assortment of legislation. To that end it makes progress to reducing regulatory confusion, will assist employer and employee understanding, and establish a consistent base within WA despite conflicting national and State jurisdictions.
297. CCIWA supports recommendation 47 to provide for the 2018 IR Act to include the minimum conditions of employment to be covered by the State system to be known as the State Employment Standards (SES).
298. With respect to recommendation 48 (a), CCIWA would submit that, as with the NES, that the minimum wage should not be included within the SES and the 2018 IR Act. As the State minimum wage is determined each year through the State Wage Case, the inclusion within the SES is unnecessary and would require legislative amendment each year.
299. The State minimum wage is currently adequately addressed by section 50A and the processes outlined. This is similar to the provisions for the National Minimum Wage under Division 3 of Part 2-6 of the FW Act. The NMW is not provided nor is there reference to the NMW within the NES.
300. Consistent with CCIWA's initial submission as restated in paragraph [295] of this submission, the establishment of the SES should not result in a scaling up or duplication of entitlements. This is an important consideration with respect to recommendation 48(d).
301. It remains an essential component that consistency is established for employers and employees under conflicting workplace relations jurisdictions within the State.
302. Under the FW Act, a safety net of ten legislated National Employment Standards (NES) are provided for all employees under Part 2-2. The NES, together with the modern award system (Part 2-3) and the national minimum wage order (Part 2-6) provide a safety net of terms and conditions for national system employees. The NES is designed to 'lock in' to modern awards and enterprise agreements. An award or agreement cannot be detrimental to an employee in any respect when compared to the NES.
303. The NES provides for:
- (a) Maximum hours of work – Division 3
  - (b) Request for flexible working hours – Division 4
  - (c) Parental leave and related entitlements – Division 5
  - (d) Annual leave – Division 6
  - (e) Personal and carer's leave and compassionate leave – Division 7
  - (f) Community service leave – Division 8
  - (g) Long service leave – Division 9
  - (h) Public holidays – Division 10
  - (i) Notice of termination and redundancy pay – Division 11

304. The equivalent existing coverage under the MCE Act are:
- (a) Maximum Hours of work – Part 2A
  - (b) Parental leave and related entitlements – Part 4, Division 6
  - (c) Annual Leave – Part 4, Division 3
  - (d) Personal and Carer’s Leave and compassionate leave – Part 4, Divisions 2 and 4
  - (e) Public holidays – Schedule 1
  - (f) Notice of termination and redundancy pay – Part 5
305. The MCE Act also includes Minimum Rates of Pay at Part 3. However, these provisions are more appropriate for award prescription rather than a legislated minimum in the SES.
306. The establishment of the SES by alignment with the NES would provide the additional entitlement to ‘Request for flexible working hours’ that is not currently provided by the MCE Act.
307. Modernisation and inclusion of the LSL Act into the SES would be considered appropriate. However, CCIWA would raise concerns regarding the specific propositions contained in recommendation 49.
308. The long-established principle of long service leave is the granting of leave for an employee after a long period of working for the same employer. This does not reconcile with the categories of employees identified in recommendations 49(a) and 49(b) both of which could not reach the qualification for long service leave by the nature of their work performed. Their inclusion is purposeless. Additionally, this should not be used as a mechanism for any later pursuit for portability of entitlements.
309. Further, such provisions would be a significant administrative impost on small business.
310. With respect to the taking of long service leave in alternative ways, CCIWA would submit that the minimum period should be one week.
311. The Termination, Change and Redundancy General Order of the WAIRC came into effect on 1 August 2005 on Application 784 of 2004. This General Order remains in effect in WA. The General Order applies to any employee as defined by section 7(1) of the IR Act.
312. The incorporation of the terms of the current General Order and alignment with the provisions of the FW Act would be supported by CCIWA provided consistency is achieved with the provisions with the FW Act.
313. The SES would be a key provision in the 2018 IR Act to establish the legislative minimum conditions of employment in WA.
314. Recommendation 51(a) provides that within 12 months of the passing of the 2018 IR Act that the WAIRC review and decide if the SES ought to be enhanced or clarified by General Order.
315. Equally, recommendation 52(a) proposes that the SES is reviewed every two years by the WAIRC and decide by General Order whether, and to what extent, the SES ought to be added to and / or enhanced.
316. Further, recommendation 52(c) provides that the WAIRC may, in exceptional circumstances, of its own motion or on application, review any or all of the SES at any time and decide by General Order whether the SES should be added to and / or enhanced.
317. CCIWA does not support recommendations 51(a), 52(a) and 52(c).

318. Once established, the SES would be enacted in the 2018 IR Act and thus should only be varied by legislative amendment by State Parliament as is the case with the National Employment Standards (NES) under the FW Act.
319. The SES establishes consistent alignment with the FW Act and thus equalises the minimum standards for employees in WA regardless of jurisdictional coverage. Maintaining consistency is essential and a contrary approach would be to the detriment of the State.

### Additional Submission on Recommendation 53

#### **Recommendation 53.**

***Should the “casual loading” currently set at 20 per cent under the MCE Act be increased or should the issue be deferred to consideration by the WAIRC, either on an award by award basis, or as a possible updated or enhanced SES, to be determined by the Arbitral Bench.***

320. CCIWA believes that the matter of casual loading is best dealt with on an award-by-award basis.
321. Recommendation 48 of the Interim Report provides for the inclusion of the minimum conditions of employment into the proposed SES which will reflect terms consistent with the NES.
322. The NES does not contain matters related to ‘casual loading’. CCIWA does not believe that ‘casual loading’ is a matter for the SES in the same way that it is not included in the NES.
323. Modern awards under the FW Act address the matter of ‘casual loading’ and these ultimately vary dependent upon the individual modern award.
324. The SES establishes the safety net minimum conditions of employment. Casual loading is a rate of pay issue the same as base minimum rates of pay and allowances that are appropriately an award matter.
325. As provided by the recommendations relating to Term of Reference 6, it is proposed that the WAIRC conduct an award modernisation and consolidation process within three years, to review and replace all private sector awards with New Awards.
326. CCIWA would submit that the matter of ‘casual loading’ is most appropriately managed through that modernisation process, on an award-by-award basis, allowing the relevant parties the opportunity to present and prosecute on all matters related to relevant award.
327. This appropriately considers the terms and conditions that best apply to the particular industry or occupation to which the award applies.

### Additional Submission on Recommendation 54

#### **Recommendation 54.**

***The nature and extent of the FDV leave to be included in the SES, including the length of the leave and the extent to which the leave should be paid or unpaid.***

328. It is clear that family and domestic violence (FDV) is a significant social issue in Australia. Like any social issue, family and domestic violence is complex and gives rise to a raft of social, cultural, legal and human challenges.

329. Considering FDV within the industrial setting gives rise to a series of questions and issues that may well be answered and addressed differently than if considered within the social or political debate.
330. The complexity of this issue was considered by the Fair Work Commission (FWC) in matter AM2015/1 as part of the four-yearly review of modern awards under the FW Act.
331. The proceedings before the FWC considered the claim of the ACTU for the insertion of a Family and Domestic Violence Leave clause in all modern awards. The matter was dealt with by a FWC Full Bench, of which Deputy President Gooley and Commissioner Spencer issued a majority decision on 3 July 2017.
332. The majority view<sup>28</sup> of the Full Bench accepted that *“employees, other than casual employees, who experience family and domestic violence, may be able to use personal/carer’s leave, annual leave and long service leave to enable them to deal with the consequences of the violence. An employee who is unfit for work because of either a physical or psychological injury can take personal leave. However, an employee cannot take such leave to attend court or to find alternative accommodation. Employees can use their annual leave for any purpose. However, an employee can only take annual leave at a time agreed by the employer and, while an employer may not unreasonably refuse to agree to such a request, we do not consider that there is sufficient flexibility around the taking of annual leave for it to be of sufficient assistance for employees facing the need for urgent leave. For the same reason we do not consider that being able to take long service leave will necessarily meet the employee’s needs”*.
333. As a result, the majority were *“not satisfied that the existing entitlements meet the needs of employees who experience family and domestic violence”*<sup>29</sup>.
334. In its evaluation of the ACTU’s claim, the Full Bench stated that *“we are not satisfied that the ACTU has made out a case for ten days paid leave to all employees. We have also formed a view that the ACTU’s proposed definition is too broad in scope and would be difficult to apply. Those conclusions however do not negate the need for a protective **unpaid provision**”*<sup>30</sup>. **[emphasis added]**
335. The Full Bench majority formed the preliminary view that *“it is necessary to meet the modern award objectives for provisions to be inserted in modern awards which would allow for a period of unpaid family and domestic violence leave and which would allow employees who experience family and domestic violence access to personal/carer’s leave for the purpose of taking family and domestic violence leave”*<sup>31</sup>.
336. On 15 September 2017, the FWC issued a Background Paper to assist the parties address a range of issues relating to the form and content of a model term that would give effect to the preliminary view as outlined in paragraph [335]. The Background Paper identified five key elements that required the consideration of the parties for the drafting of a model term:
- (i) the definition of ‘family and domestic violence’ for the purpose of the clause;
  - (ii) the purpose of the leave (i.e. in what circumstances an employee can access the leave and which employees may take the leave);
  - (iii) unpaid leave;
  - (iv) the evidence requirements; and
  - (v) privacy considerations.

<sup>28</sup> [2017] FWCFB 3494 at [44]

<sup>29</sup> [2017] FWCFB 3494 at [46]

<sup>30</sup> [2017] FWCFB 3494 at [59]

<sup>31</sup> [2017] FWCFB 3494 at [119]

337. The FWC President, Justice Ross subsequently held conferences with the parties on the terms of the model clause on 19 and 20 October 2017.

338. On 20 October 2017 Justice Ross issued a Statement on the progress of the proposed model term of which there was agreement on five of the six clauses of the model term. The agreed terms of the model term contained (also provided in the subsequent decision of the Full Bench on 26 March 2018) are as follows:

(a) *Definitions (Clause 1)*

1.1 *In this [model term]:*

**family and domestic violence** means violent, threatening or other abusive behaviour by a family member of an employee that seeks to coerce or control the employee and that causes them harm or to be fearful.

**family member** means:

- (a) a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the employee; or
- (b) a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the employee; or
- (c) a person related to the employee according to Aboriginal or Torres Strait Islander kinship rules.

1.2 A reference to a spouse or de facto partner in the definition of **family member** in clause 1.1 includes a former spouse or de facto partner.

(b) *Taking Unpaid Leave (Clause 3)*

*An employee experiencing family or domestic violence may take unpaid family and domestic violence leave if the employee needs to do something to deal with the impact of the family and domestic violence and it is impractical for the employee to do that thing outside their ordinary hours of work.*

*Note: The reasons for which an employee may take leave include making arrangements for their safety or the safety of a family member (including relocation), attending urgent court hearings, or accessing police services.*

(c) *Notice and Evidence Requirements (Clause 4)*

*Notice*

4.1 *An employee must give their employer notice of the taking of leave by the employee under this [model term].*

4.2 *The notice:*

- (a) *must be given to the employer as soon as practicable (which may be a time after the leave has started); and*
- (b) *must advise the employer of the period, or expected period, of the leave.*

*Evidence*

4.3 *An employee who has given their employer notice of the taking of leave under this [model term] must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken for a purpose specified in clause 3.*

*Note: Depending on the circumstances such evidence may include a document issued by the police service, a court or a family violence support service, or a statutory declaration.*

(d) Confidentiality (Clause 5)

5.1 *Employers must take steps to ensure information concerning any notice given or evidence provided under clause 4 is treated confidentially, as far as it is reasonably practicable to do so.*

5.2 *Nothing in this clause prevents an employer from disclosing information provided by an employee if the disclosure is required by an Australian law or is necessary to protect the life, health or safety of the employee or another person.*

*Note: Information concerning an employee's experience of family and domestic violence is sensitive and if mishandled can have adverse consequences for the employee. Employers should consult with such employees regarding the handling of this information.*

(e) Compliance (Clause 6)

*An employee is not entitled to take leave under this [model term] unless the employee complies with this [model term].*

339. From the conferences on 19 and 20 October 2017, the provisions of Clause 2 of the proposed model term relating to 'Entitlement to unpaid family and domestic violence leave' remained to be agreed by the parties. The unresolved clause 2 encompassed, among others, the quantum of leave per annum, the accrual or non-accrual of leave, and whether employees are required to exhaust other forms of leave prior to becoming entitled to unpaid family and domestic violence leave.

340. At the conferences held by Justice Ross on 19 and 20 October 2017, two specific matters were agreed:

- (a) that it was appropriate to express the unpaid leave entitlement in terms of a specified number of days per annum (and it was generally agreed that an employer and employee may agree to an additional period of unpaid leave); and
- (b) that the period of unpaid leave would not count as service for the purpose of any other leave entitlements but such unpaid leave would not break an employee's continuity of service.

341. The Full Bench handed down its decision on AM2015/1 on 26 March 2018<sup>32</sup> which concluded that "we are of the view that five days' unpaid leave per annum represents a fair and relevant minimum safety net entitlement"<sup>33</sup>.

342. Having determined the issue of quantum, the Full Bench turned to four related issues as they related to the unresolved clause 2 of the model term:

<sup>32</sup> [2018] FWCFB 1691

<sup>33</sup> [2018] FWCFB 1691 at [235]



- (a) *does the entitlement accrue progressively during a year of service or is it simply an entitlement in each 12-month period?*

The Full Bench decided that the unpaid leave entitlement will be available in full at the commencement of each 12-month period rather than accruing progressively during a year of service.

- (b) *Does the entitlement accumulate from year to year?*

The Full Bench decided that the unpaid leave entitlement will not accumulate from year to year.

- (c) *How does the entitlement apply to part-time employees?*

The Full Bench decided that the unpaid leave entitlement will be available in full to part-time and casual employees and not pro-rated.

- (d) *Does the entitlement apply to casual employees?*

The Full Bench decided that the model term entitlement of five days' unpaid domestic and family violence leave will apply to all employees.

343. The Full Bench has indicated that the model term to give effect to the decision would be concluded shortly. Initial hearings are scheduled for May 2018.
344. Further, in its decision on 26 March 2018 of the FWC Full Bench decided to “*defer our consideration of whether employees should be able to access paid personal/carer’s leave for the purpose of taking family and domestic violence leave*”<sup>34</sup>.
345. The Full Bench proposes to revisit the issue of FDV leave in June 2021 after the model term has been in operation for three years.
346. Considerable research, evidence and exhaustive examination had been undertaken on the matter before the FWC Full Bench over an extended period and an appropriate decision has been delivered.
347. The FWC decision on AM2015/1 on 26 March 2018<sup>35</sup> is instructive for the Review with respect to the provision of FDV leave as a minimum condition of employment within the proposed SES.
348. CCIWA recommends that, should the Review recommendation for the provision of FDV leave be adopted, the decision of the FWC Full Bench as provided in [2018] FWCFB 1691 be adopted as the minimum condition of employment in WA within the proposed SES. The terms of the model term would provide the construction of any proposed provision in the SES. This would include the agreed terms outlined in paragraph [339] and the subsequent decision of the Full Bench with respect to the proposed clause 2 as outlined in paragraph [343].
349. The decision of the FWC Full Bench relates to the provision of a model term within modern awards rather than a matter for inclusion within the NES which would be a matter for legislative change.
350. The adoption of the terms of the decision of the FWC Full Bench on 26 March 2018 would be consistent with the overall objective to align and establish consistent minimum terms and conditions of employment between the state and national jurisdictions expressed by the recommendation 48(b) of the Interim Report.

<sup>34</sup> [2018] FWCFB 1691 at [307]

<sup>35</sup> [2018] FWCFB 1691

351. CCIWA would submit that the entitlement to FDV leave should be available where the scope of the events is contained. While the FWC is yet to resolve this as a content matter within the model clause, CCIWA would reserve its position until the model clause is concluded. However, CCIWA submits that the following provides those urgent circumstances arising from an employee experiencing an incident of family or domestic violence for which an entitlement to FDV leave would be available:
- (i) attendance with police to report on an incident of domestic violence (including any required ongoing attendance with police);
  - (ii) attendance at Court;
  - (iii) attendance with a lawyer;
  - (iv) attendance with a Government service providing support to persons experiencing domestic violence; and
  - (v) attendance to locate refuge or shelter or temporary accommodation.
352. CCIWA believes that the circumstances triggering the necessity for FDV leave could reasonably be contained to the situations outlined in paragraph [351] of this submission.
353. The fundamental question arises as to whether or not the employee can practically deal with these matters outside work time and it is CCIWA's view that when this is available it should be undertaken. However, when it is impracticable or necessary to use work time then the leave would be available. Therefore, the above should therefore include *"provided it is impracticable to attend outside work time"*.
354. However, CCIWA acknowledges that the view of the FWC Full Bench in handing down its decision on FDV leave was not to mandate for such an approach as it would *"introduce an unwarranted degree of complexity into the award term"*<sup>36</sup>.
355. On 26 March 2018, the Hon Craig Laundy MP, Minister for Small and Family Business, the Workplace and Deregulation and the Hon Kelly O'Dwyer MP, Minister for Women jointly announced that the Federal Government would introduce legislation to extend the FDV leave entitlement as provided by the FWC Full Bench decision to all employees covered by the FW Act.
356. The Ministers said that they *"want to ensure a consistent safety net for employees covered by the national workplace system, so we will amend the Act in line with the final model clause to give other federal system employees access to unpaid leave on the same terms"*.
357. As submitted in paragraph [319] of this submission, while Recommendation 52(a) of the Interim Report provides that the SES is reviewed every two years by the WAIRC and decide by General Order whether, and to what extent, the SES ought to be added to and/or enhanced, it is CCIWA's view that the SES should only be varied by legislative amendment by State Parliament as is the case with the National Employment Standards (NES) under the FW Act.

---

<sup>36</sup> [2018] FWCFB 1691 at [267]

## 9. Term of Reference 6 – State Awards

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

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

### General Submission on Recommendations for Term of Reference 6

358. As the Review concisely states at paragraph [10] of the Interim Report, *“the State award system is in need of rejuvenation”*.
359. The current awards are outdated and do not reflect the needs of contemporary work or workplaces in WA.
360. The WAIRC 2016-17 Annual Report stated that *“private sector employees’ rates of pay and conditions of employment, apart from those covered by the Minimum Conditions of Employment Act 1993, are set out in the safety net provided by awards which have not been reviewed for many years and do not reflect current circumstances. Otherwise it is those matters brought on at the Commission’s own initiative which provide for private sector employees to have their minimum rates of pay and location allowances kept up to date”*<sup>37</sup>. The WAIRC Commission has no power generally to review awards of its own initiative.
361. The award system is of fundamental importance to the particular cohort of private sector employers and employees in WA that are not covered by the national system. As predominantly small and micro enterprises they are directly reliant on the award safety net.
362. As the Productivity Commission reported in 2015 that *“many small business operators find the system to be complex and a major impediment to employing more staff.”*<sup>38</sup>. It went on to further report that many Modern Awards *“present a set of complicated and complex provisions that are not reflective of flexible and modern work practices”*<sup>39</sup>.
363. While specifically referring to the national workplace relations framework, the views are equally relevant and applicable to WA.
364. CCIWA supports a modernisation of WA State awards to ensure they are comprehensive, contemporary and user-friendly. Therefore, CCIWA supports recommendation 55.

<sup>37</sup> Report of the Chief Commissioner of The Western Australian Industrial Relations Commission 2016-17, page 18-19

<sup>38</sup> Productivity Commission Inquiry Report No. 76, Workplace Relations Framework, 30 November 2015, Volume 1, page 351

<sup>39</sup> *ibid*

365. However, with respect to the timetable indicated for the completion of the review and replacement of private sector awards within three years, caution should be exercised given the potential complexity of the process and the required resources necessary of all parties to achieve this objective. Thus, this timetable should be regarded as indicative only.
366. With respect to paragraph (a) of recommendation 55, CCIWA would express its concern that this direction places a significant limitation on the consolidation and modernisation process at the outset. It also would encourage the view that the process will be one of ‘winners and losers’. It will not facilitate effective consolidation and modernisation. For example, in the process of consolidating awards A and B, it could lead to an improvement in terms and conditions for employees in under award A and no gain for employees under award B. For the employers of employees under award A there would be an increase in operating costs to the detriment of the business and, ultimately, the employees of that business.
367. CCIWA does not advocate that employees should be impacted through the consolidation and modernisation process. However, the condition precedent offered by paragraph (a) of recommendation 55 needs to be reconsidered. It is of singular dimension to only consider that the terms and conditions of employees are not reduced and does not adequately consider or recognise the impacts on employers.
368. As the Productivity Commission reported in 2015, at the time of the award modernisation process at the national level, the then Minister for Employment and Workplace Relations placed several restrictions of how the awards were to be modernised, including that, “*as far as possible, the modernisation process should not either disadvantage employees or **increase costs for employers***”<sup>40</sup>. [emphasis added]
369. The undertaking of such a process should not lose the opportunity to make awards contemporary for current and future business, work and workplaces.
370. To address potential concerns, the proposition would potentially require a basic, broadly applicable award structure of standard terms and, where necessary, contain separate schedules that may be used that address specific inconsistencies that are incapable of consolidation. This should however not lead to a complex award that does not meet the fundamental requirements of simplicity, ease-of-use, plain language drafting and so on.
371. With respect to recommendation 55(g), while the proposition affords the opportunity for submissions from relevant parties about the terms of New Awards, it leaves the actual making of the New Award solely with the WAIRC.
372. CCIWA would submit that this process should be made more consultative with a view to the parties working together with the WAIRC on the determination of content and structure of a New Award or that the New Award drafted by the WAIRC would then be the subject of further submissions and hearing before the New Award is ultimately determined.
373. As the Productivity Commission noted, “*the process of award modernisation was complex and detailed, and involved extensive consultation with stakeholders and interested parties*”<sup>41</sup>.
374. Additionally, CCIWA would submit that comprehensive consideration be given to the transition and implementation mechanisms necessary to achieve the New Awards outcome prior to the commencement of the consolidation and modernisation process to limit the negative impacts on all parties.

<sup>40</sup> Productivity Commission Inquiry Report No. 76, Workplace Relations Framework, 30 November 2015, Volume 1, page 325

<sup>41</sup> Productivity Commission Inquiry Report No. 76, Workplace Relations Framework, 30 November 2015, Volume 1, page 325

375. The Review states at paragraph [10] of the Interim Report that the preliminary opinion of the Review is that in the “*priority ought to be given to employers and employees not presently covered by a State award and where the employers and employees are currently working within the State system*”.
376. CCIWA is uncertain how this preliminary opinion reconciles with Term of Reference 6 which only requires the Review to devise a process for the updating of State awards. It is acknowledged that paragraph (a) of Term of Reference 6 refers to ensuring the scope of awards provide comprehensive coverage to employees. However, there appears to be no direction given to expand the coverage outside existing awards such that would suggest the creation of additional new awards.
377. Therefore, CCIWA would make the following general submissions in paragraphs [378] to [389] with respect to Term of Reference 6.
378. With respect to the scope of the New Awards, CCIWA would submit that, as the process of consolidation and modernisation of current State awards is to create New Awards on an industry or occupation basis, the scope of any New Award should not be expanded to include employees that not are currently covered by an award. To that end, the 2018 IR Act should contain explicit provisions, as provided in section 143(7) of the FW Act that:
- “(7) *A modern award must not be expressed to cover classes of employees:*
- (a) *who, because of the nature or seniority of their role, have traditionally not been covered by awards (whether made under laws of the Commonwealth or the States); or*
- (b) *who perform work that is not of a similar nature to work that has traditionally been regulated by such awards.*
- Note: For example, in some industries, managerial employees have traditionally not been covered by awards”.*
- While relevant to all awards, this is particularly important with respect to the development of the proposed Miscellaneous Award. The Miscellaneous Award should not be scoped and used as a ‘catch-all’ to capture employees not covered or traditionally covered by an award.
379. Further, CCIWA would recommend that provisions be included in the 2018 IR Act that New Awards should not apply to employees earning above a high-income level that should be established on a similar basis as that provided within Part 2-9 of the FW Act at section 333.
380. The exclusion from award coverage as a result of being a high-income employee under the FW Act is provided by section 47(2) of the FW Act. For the purposes of consistency for all employers and employees in WA, it is recommended that this high-income level be linked to that level which applies under the FW Act, indexed on 1 July of each year (currently \$142,000 at 1 July 2017). This would allow employees earning over the high-income level to be award-free and at liberty to agree their own terms and conditions without reference to an award. This will provide flexibility for employers and employees. The minimum SES would continue to apply regardless of the high-income level.
381. CCIWA would recommend that well-defined terms of reference be established by which the WAIRC undertakes the award consolidation and modernisation process. This approach was adopted by the Federal Government in 2008 when providing guidance to the then Australian Industrial Relations Commission (AIRC) when conducting the award modernisation process that lead to the Modern Awards.

382. The determination of the applicable terms of reference for the award consolidation and modernisation process must be appropriate for the State award review process and should be determined through an engaged consultative process with all relevant parties. It would be suggested that this be the section 50 parties under the IR Act in the first instance.
383. CCIWA would also submit that, consistent with the approach of the FW Act and provided in section 134 of the FW Act, that the 2018 IR Act should set out the statutory purpose and intention of awards and their relationship with the proposed SES. To that end a (New) Awards Objective should be framed for inclusion on the 2018 IR Act to guide the WAIRC for both the establishment and ongoing future 'management' of the New Awards.
384. In the process of consolidating and modernising State awards, nothing should be put in place that is designed to or have the effect of constraining true award reform but rather to facilitate reform.
385. Importantly, the New Awards must not place high compliance costs on businesses.
386. Under the FW Act, modern awards, along with the National Employment Standards (NES) form a safety net for employees in the national workplace relations system. Modern awards provide a fair and relevant safety net for employees.
387. In much the same way, the proposed New Awards and the SES would provide the minimum safety net of terms and conditions for employees in WA.
388. The Fair Work Bill 2008 Explanatory Memorandum explains the aim of the award modernisation process was to "*create a comprehensive set of awards that, together with any legislated employment standards, must provide a fair minimum safety net of enforceable terms and conditions of employment for employees*"<sup>42</sup>. It further outlined that the "*process must be economically sustainable, promote flexible modern work practices and the efficient and productive performance of work, must be simple to understand and easy to apply, must reduce the regulatory burden on business and must result in a certain, stable and sustainable award system for WA*"<sup>43</sup>.
389. CCIWA would submit that the modernisation process for State awards be premised on a similar basis.

## Additional Submission on Recommendation 57

### **Recommendation 57.**

***The Review requests additional submissions upon the method to be included in the 2018 IR Act for the WAIRC to review and update New Awards, after they have been made by the WAIRC, under the methodology set out above.***

390. Recommendation 55 provides that, within three years, that the WAIRC reviews and replaces existing private sector awards with New Awards.
391. The Review seeks additional submissions on the methodology to be included for the review and updating of the New Awards after they have been made by the WAIRC.

<sup>42</sup> Fair Work Bill 2008 Explanatory Memorandum, paragraph r.95, page xxvii

<sup>43</sup> *ibid*

392. CCIWA submits that there should be no requirement within the 2018 IR Act for periodic reviews of the New Awards. The experiences of the Modern Award review process under the FW Act are instructive.
393. The FW Act requires the FWC to conduct four-yearly reviews of modern awards<sup>44</sup> and that such reviews must be conducted by a Full Bench of the FWC. Section 156(2) requires that all modern awards must be reviewed and section 156(5) further stipulates that each modern award must be reviewed in its own right. Outside of these reviews there are still limited opportunities for change upon application by a party or at the initiative of the FWC.
394. The Productivity Commission reported the view of the ACTU: *“that the periodic reviews prompted unions and employer groups to contest award matters..... simply because the review process provides a trigger for doing so. Employer organisations and unions are effectively bound by their charters to use the review mechanism as an opportunity to improve their position. As a result, elements of the safety net that were well entrenched and relatively uncontroversial prior to the creation of modern awards ..... have become a battleground for industrial parties”*<sup>45</sup>.
395. So cumbersome and unwieldy is the process that the 2014 Modern Award review process has yet to conclude. The subsequent Modern Award review was due to commence in January 2018 but had to be deferred until after the 2014 review process has been completed, estimated late in 2018.
396. Not only has the four-yearly review been protracted, it has been a hugely resource intensive and expensive exercise. All parties have expressed their rejection of the scheduled review process.
397. The Productivity Commission recommended in its 2015 report that the *“Australian Government should amend the Fair Work Act 2009 (Cth) to remove the requirement for continued four yearly reviews of modern awards”*<sup>46</sup>.
398. The Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017 is currently before the House of Representatives that responds to the Productivity Commission’s recommendation to remove the requirement for the FWC to conduct four yearly reviews.
399. The matter of regular award reviews was also considered by the 2015 Review of the Queensland Industrial Relations Framework which recommended:
- “That the current requirements for four yearly cyclical reviews be abolished. The legislation should reinforce the principle that awards need to be maintained as contemporary documents, with appropriate application, consultation, dispute resolution and flexibility provisions. Once updated, awards should remain in place for a minimum period of 12 months before they can be amended. Variations inside that period should only occur if the Queensland Industrial Relations Commission determines that extraordinary circumstances exist”*<sup>47</sup>.
400. Prior to the implementation of the modern award-making process, the Queensland Industrial Relations Commission was required to review awards three years after the making of the award, and then again after a further three years later.

<sup>44</sup> Fair Work Act 2009, Part 2-3, Division 4, s.156

<sup>45</sup> Productivity Commission Inquiry Report No. 76, Workplace Relations Framework, 30 November 2015, Volume 1, page 345

<sup>46</sup> Productivity Commission Inquiry Report No. 76, Workplace Relations Framework, 30 November 2015, Volume 1, Recommendation 8.1, page 347

<sup>47</sup> A Review of the Industrial Relations Framework in Queensland in December 2015, Recommendation 20, Page 63

401. Clearly, on the experiences under the FW Act and the QLD IR Act, the requirement to undertake mandatory periodic reviews of awards is flawed. A timed review results in a 'collision' of reviews taking place at the same time incurring significant time and resources cost. For the private sector cohort covered by the State system, small and micro-businesses, time and resources are simply not in supply.
402. Once the consolidation and modernisation process has been completed and the New Awards established, it is necessary to ensure that the New Awards remain contemporary. This is particularly relevant given the rapidly changing nature of work and workplaces. The New Awards cannot be allowed to fall into disrepair or irrelevance due to any failure to attend to them over time.
403. CCIWA would recommend the following as a process for attending to the New Awards:
- (a) It is assumed that New Awards would be made in accordance their priority order that has been established through recommendation 56 and therefore brought into force in a sequential manner and thus have variable initial operative dates;
  - (b) New Awards should remain unchanged for a period of three years from the time of the making of the New Award;
  - (c) However, the exception to (b) is that within 12 months after a New Award is made, the award may be examined and varied (if needed) by the WAIRC to remedy obvious small anomalies, inconsistencies or errors of drafting on the consent application of all parties to the Award or by the WAIRC of its own initiation with consent of the parties;
  - (d) Otherwise, after a period of three years from the awards inception, any party to the award may make an application to the WAIRC for a specific significant matter within an award to be addressed;
  - (e) It should be emphasised that this does not provide or suggest a scheduled award review but an avenue to address specific priority issues only;
  - (f) Applications may only be made for specific matters within the award and shall not be a review of the award per se or an opportunity for a party to make ambit claims over the award;
  - (g) Upon receiving an application under (d), the WAIRC should convene a conference of the parties for preliminary discussions on the specific matter to determine the substantive nature and merits of the issue and for the WAIRC to determine the progression or otherwise of the matter;
  - (h) Progression of the matter would be to a hearing for determination though it should be open for the WAIRC to progress initial stages via consultation and conference to determine if matters in part or whole can be determined by consent prior to proceeding to hearing;
  - (i) The process must ensure that matters that are raised and applications made relate to the specific award (industry or occupation) and cannot be applications generalised to all awards (any pattern activity);
  - (j) Applications on specific matters are only at the initiation of the parties;
  - (k) The opportunity to make application is only afforded every three years and parties must make application within six months after the period is reached after which time the application must wait until the next three-year application window is available;



- (l) However, the WAIRC may allow at any other time and only in exceptional circumstances, an application to be made to address issues that make the award complex, difficult to understand or that limit operational flexibility;
  - (m) Adjustments to award wages will continue to be derived only from the State Wage Case (SWC) with adjustments made to award rates of pay made to reflect the outcome of the SWC as is the case under the FW Act and the National Wage Decision.
404. CCIWA provides in paragraph [403] of this submission a proposed broad conceptual outline for the upkeep of the New Awards. The general principle put forward is that only every three years and within six months of that date are the parties able to make application to the WAIRC to deal with specific significant matters within an award. Awards are not to be the subject of a broader review.
405. Where significant issues are raised, and where the WAIRC deems necessary, the WAIRC should be able to commission independent research as well as seeking detailed evidence and submissions from the parties to demonstrate a substantive case on which the WAIRC may decide if a matter should proceed. It is for the benefit of the ongoing independence of the WAIRC that such resources are available for use by the WAIRC and relevant parties.
406. Importantly, it should be a requirement for the WAIRC to evaluate the impact of any proposed change to an award on the parties and provide that evaluation within any determination handed down.

## 10. Term of Reference 7 – Compliance and Enforcement

*Review statutory compliance and enforcement mechanisms with the objectives of:*

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

### General Submission on Recommendations for Term of Reference 7

407. The Review has formed the opinion that the tools of enforcement are inadequate and out of date. The Review particularly noted at paragraph [12] of the Interim Report that the *“maximum penalties that may be imposed on infringing employers are too low, as compared to the FW Act and in contemporary times. The methods that may be used to enforce conditions, short of commencing court proceedings, are inadequate and should be broadened. There is, remarkably, no penalty for an employer that breaches the LSL Act. All of that needs to be attended to, in the preliminary opinion of the Review”*.
408. Further, the Review also considered the right of entry as another aspect of enforcement that required attention. In particular, the Review noted its preliminary opinion that it is appropriate that there is the need for a “fit and proper person” test to be applied for a person to obtain and hold a right of entry certificate.

### Additional Submission on Recommendation 58

409. Recommendation 58 proposes industrial inspectors be empowered to issue compliance notices for breach of record-keeping and pay slip obligations; issue compliance notices based on the model contained in section 716 of the FW Act if it is in the public interest to do so; and to issue enforceable undertakings based on the model contained in section 715 of the FW Act, if it is in the public interest to do so.
410. CCIWA does not oppose recommendation 58, particularly as it provides alignment with the provisions of the FW Act and therefore consistency within WA.

### Additional Submission on Recommendation 59

411. Recommendation 59 address the penalties in enforcement proceedings brought in the Industrial Magistrates Court (IMC) to be the equivalent to those provide in section 539 of the FW Act.
412. CCIWA would provide in principle support to the alignment with the FW Act.
413. However, CCIWA cannot support the general recommendation with respect to indexation of penalties as the proposition has not been articulated fully. The proposition is only that the indexation would “*take into account inflationary change*”. CCIWA would recommend alignment with section 539 of the FW Act and that penalties applicable in WA should remain consistent with those of the FW Act.

### Additional Submission on Recommendation 60

414. Recommendation 60 proposes the 2018 IR Act be aligned with the provisions of section 550 of the FW Act. Section 550 deals with accessorial liability.
415. CCIWA opposes the introduction of accessorial liability provisions comparable to section 550 of the FW Act. CCIWA refers to paragraph [1314] of the Interim Report and cannot support the adoption of terms similar sections 550(1) and 550(2) without the Review articulating to what types of contraventions accessorial is intended to attach.

### Additional Submission on Recommendation 61

416. Recommendation 61 proposes that the 2018 IR Act include provisions to enable the IMC to impose penalties for a breach of the SES, or any applicable award, agreement or other instrument including long service leave.
417. CCIWA would urge the Review to consider the particular characteristics of the private sector cohort covered by the State system, small and micro businesses comprising sole traders, partnerships and trusts, when addressing the matter of any breaches. By their very nature they are not resourced or skilled in the complexity of employment regulation. As a result, it cannot be taken that any and all breaches are intentional.
418. CCIWA would submit that the first priority must always be a process that focuses on the education and guidance to remedy any breach be adopted. This should be done in a cooperative manner with the rectification of any breach the primary objective. The required actions may be achieved through a range of options including enforceable undertakings without immediate resort to penalty.

419. The most important element should always be to educate, inform and correct. CCIWA also considers that government strategies to provide improved access to information and knowledge is more effective in bringing about change than prosecution.

### Additional Submission on Recommendation 62

420. Recommendation 62 proposes that the 2018 IR Act include provisions aligned with section 557C of the FW Act. The circumstances expressed in recommendation 62 are those contained only in section 557C(1) of the FW Act and the recommendation is not framed with respect to section 557C(2) and 557C(3). CCIWA recommends the provisions of section 557C(2) of the FW Act to be included as a matter of reasonableness.

### Additional Submission on Recommendation 63

421. CCIWA supports recommendation 63 that proposes the 2018 IR Act include provisions aligned with sections 535(4) and 536(3) of the FW Act.

### Additional Submission on Recommendation 64

422. With respect to recommendation 64, CCIWA would express its concern over the proposition as put forward regarding the sharing of information obtained by industrial inspectors. CCIWA can identify no comparable application of equivalent sections 112 and 113 of the Fair Trading Act 2010 (WA) that deals principally with consumer protection and the regulation of business conduct with respect to consumers.
423. Further specific details on the recommendation would be required as to the inclusion of appropriate safeguards for the information that could be obtained and where and for what purpose that information would be shared and subsequently used. In this respect, and as expressed within this submission relating to recommendation 68, information and data security is of particular and significant concern.

### Additional Submission on Recommendation 65

424. Recommendation 65 proposes an amendment to section 98 of the IR Act so that there is no restriction on the powers of inspectors only being exercised at an “industrial location”. The Review recommends that an industrial inspector may exercise their powers at (i) the premises where work is or was being performed; or (ii) business premises where the inspector reasonably believes there are relevant documents or records.
425. As expressed, this extension to the powers of industrial inspectors is too broad and in particular, with respect to the implications of recommendation 42 for private residences and the application to the proposed definition provided at paragraph (i) of recommendation 63.
426. CCIWA would not support any change to the current provisions of section 98 of the IR Act. The limits of the powers of an industrial inspector must remain limited to an ‘industrial location’.
427. Any proposed variation to the current provisions must specifically provide for the exclusion on the exercise of powers ‘at any location, premises or part of premises that are used mainly for residential purposes’.

428. CCIWA would submit that to provide such a proposed open-ended ability to exercise of powers to any location 'where work is or was being performed' is too broad in scope.

### Additional Submission on Recommendation 66

429. Recommendation 66 proposes amending section 84A(5) of the IR Act to empower the Judicial Bench (proposed under Term of Reference 1) to impose a maximum penalty of \$12,000 or imprisonment for not more than 12 months or both.
430. CCIWA finds the recommendation as to imprisonment unacceptable and uncertain in scope, and unreservedly opposes the recommendation. While, upon the Review providing further details, a case may be presented that there be a review with respect to the quantum of monetary penalty under section 84A(5) of the IR Act, the proposed introduction of a penalty of imprisonment for a contravention of the Act is harsh and cannot be accepted.
431. The cohort covered by the State system is small business, comprising sole traders, unincorporated partnerships and unincorporated trusts. It would be disproportionately unjust for an individual sole trader, for example, to face the risk of imprisonment for a breach, whereas a corporation or other entity could be at risk of pecuniary penalties.
432. Considered together with recommendation 37 with respect to domestic workers and the potential for home owners to be regarded as employers by the removal of the current exemption, recommendation 66 would therefore provide that a home owner could be subject to a penalty of imprisonment for a breach of the Act. Such provisions cannot be contemplated.
433. CCIWA firmly rejects the proposal of imprisonment.

### Additional Submission on Recommendation 67

434. Recommendation 67 addresses the right of entry and proposes that 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.*
435. CCIWA supports recommendation 67.
436. CCIWA would make the following additional submissions with respect to right of entry.
437. The FW Act provides for a right of entry to hold discussions with employees (section 484) and a right of entry for the purposes of investigating a suspected contravention of the Act or a term of a fair work instrument (section 481). Section 487(3) requires that in both instances that 24 hours' notice is required.

438. The IR Act provides for entry to hold discussions with employees under section 49H(3). Entry for this purpose requires 24 hours' notice. However, right of entry for the purpose of investigating suspected breaches of the Act, award or agreement is 'entangled' with the exercise of rights for purposes under the Occupational Safety and Health Act 1984, the Mines Safety and Inspection Act 1994, the Long Service Leave Act 1958, and the MCE Act 1993. For right of entry in these circumstances no notice is required.
439. CCIWA would submit that, as with Division 3 of Part 3-4 of the FW Act, that occupational health and safety be separated from those employment matters under the IR Act, MCE Act and LSL Act.
440. This done, CCIWA would submit that the right of entry exercised for investigation of a suspected breach be aligned with the FW Act requiring 24 hours' notice to be provided.
441. As the Review is recommending consolidation of the IR Act, MCE Act and the LSL Act, this would provide simplicity and consistency between the competing jurisdictions.
442. The principal reason forwarded for no notice for entry in the case of contravention under the IR Act was considered essential for the immediacy for attendance for occupational health and safety reasons. With that separated as proposed in paragraph [439] there is nothing that would prevent alignment to the 24 hours' notice requirement for entry as provided in section 487(3) of the FW Act for entry for either reason.
443. Occupational health and safety is not an industrial relations matter. The recommended separation within the 2018 IR Act will remove the confusion that currently arises on right of entry between industrial and health and safety matters and, therefore, achieve clarity at the workplace and consistency across WA on right of entry between state and federal jurisdictional coverage.

### Additional Submission on Recommendation 68

444. Recommendation 68 proposes to amend section 49I(2)(b) and 49I(2)(c) of the IR Act to allow for the recording of evidence by electronic means to support a possible breach of industrial laws. This would include, as provided by 49I(2)(b) to "*make copies of the entries in the employment records or documents related to the suspected breach*" and as provided by 49I(2)(c) "*during working hours, inspect or view any work, material, machinery, or appliance, that is relevant to the suspected breach*".
445. The Review recommends at paragraph (a) and (b) of recommendation 68 that there should be an entitlement to photograph, or record by video, tape or other electronic means.
446. CCIWA would submit that there are significant issues and concerns that would arise from the adoption of these recommendations.
447. Firstly, there is the issue concerning intellectual property rights and market / commercial confidentiality. The right to photograph and video would expose a business to an invasion of, or at the least a compromise to, their protected commercial rights. This would include, for example, issues concerning copyright, patents and trademarks, inventions and product developments, prototypes, commercial practices, operational efficiency measures, technology applications, commercial secrets and so on. The existence of an unfettered right to photograph and record is an unacceptable threat to business.
448. Secondly, there is the significant issue regarding data security. As electronic files they are subject to use and distribution without appropriate protocols and safeguards. Additionally, well reported recent events have shown that even large global corporations that have invested significantly in data security, there is

no guarantee that can be provided for the protection of the business and the individuals if records are electronically made and stored. Further, there are no controls and protections as to where a video recording may be displayed or broadcast.

449. Thirdly, the provision of an entitlement to record by video or tape would appear to contradict the protections afforded by the Surveillance Devices Act 1998 (WA).
450. Fourthly, as section 49I(2)(a) and 49I(2)(b) concern, among others, the electronic recording of employee records would compromise the obligations that an employer has in protecting the privacy of the employee. This is also of additional concern regarding data security once the employee records become electronic. Identity theft<sup>48</sup>, according to the Australian Federal Police (AFP) website, costs upwards of \$1.6 billion each year with \$900 million lost by individuals.
451. Among the precautions recommended by the AFP to individuals are to “*be cautious of who you provide your personal and financial information to*” and “*be wary of transmitting personal information and copies of documents via email or electronically*”. The employer is entrusted with the individual’s personal information, an electronic record taken by a third party cannot be guaranteed by the employer to be securely stored and protected. It then questions how the employee can actually “be cautious” of their private information in these situations.
452. Finally, there is no ability to verify or certify the authenticity of an electronic file.
453. CCIWA does not support the recommendations 68(a) and (68(b) of the Interim Report. The provisions present unacceptable risk and do not provide adequate controls and safeguards to both business and individuals.
454. CCIWA would support the inclusion within the 2018 IR Act of provisions aligned with section 504 of the FW Act as provided by recommendation 68(c). This is an essential protection against the misuse of any record, particularly employee records. However, the provisions of section 504 do not adequately address the concerns expressed in paragraphs [447] to [452].
455. Section 504 deals specifically with information or a document and does not contemplate electronic records. There is significant additional complexity with respect to electronic files of any form – photograph, video or recording, the most critical of which is security.

### Additional submissions with respect to implementation and compliance

456. Through its recommendations, the Review has proposed significant change.
457. Implementation of the proposed changes will place a significant impost on business with respect to compliance.
458. A significant consideration must be given to a moratorium period for employers to allow adequate time for implementation and education and that business be provided with the necessary assistance in order to make the required transitions to comply with the changed environment.

<sup>48</sup> The Australian Federal Police website: <https://www.afp.gov.au/what-we-do/crime-types/fraud/identity-crime>

459. As mentioned at paragraphs [418] and [419] of this submission, CCIWA believes that a significant contributor to the solution with respect to compliance and enforcement is that employers and employees need improved access to resources, information and knowledge.
460. This is particularly the case of the private sector cohort covered by the State system that are small and micro businesses comprised predominantly of sole traders, partnerships and trusts. They are not able to engage in-house specialists or employees with the requisite expertise and rely on a range of ad hoc sources of information, sometimes unreliable, inaccurate or outdated. These employers must be supported through any change.
461. To that end CCIWA recommends, as a sub-set of the current review, that the WA Government investigates ways the improved access and support is able to be provided for small business employers. This will be most important where significant change results, particularly those that will arise from consolidation and modernisation of State awards. From these significant changes alone, the need for better information and resource support for the private sector employers will be critical. CCIWA would be available to work with the WA Government on this matter.

## 11. Term of Reference 8 – Local Government

*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.*

### General Submission on Recommendations for Term of Reference 8

462. Chapter 9 of the Interim Report confirms that the jurisdictional ambiguity for local government over industrial relations system coverage between the State and national systems continues to create confusion and uncertainty that needs to be resolved.
463. CCIWA agrees with the opinion of the Review that “*uncertainty is not productive of a good system*”<sup>49</sup>.
464. There appears to be agreement as expressed in all submissions to the Review that this uncertainty must be addressed and that the local government sector be covered by a single system.
465. The continued operation of two different workplace relations regulatory systems will continue to create confusion and uncertainty within WA, not just for local government.
466. If the State Government remains of a mind to retain the state industrial relations system, CCIWA again submits that this should be for the coverage of the public sector and that the private sector should be referred.
467. With respect to the position of local government, CCIWA acknowledges the submission to the Review by the Western Australian Local Government Association (WALGA), the main peak body for local governments.

---

<sup>49</sup> Interim Report of the Ministerial Review into the State Industrial Relations System, page 43 at [14]

468. As noted on page 7 of the WALGA submission, there are 148 Local Government employers in Western Australia of which 131 currently operate under the national workplace relations system including two Federal territories (Shire of Christmas Island and Shire of Cocos (Keeling) Islands), with the remaining 17 currently being governed by the State system.
469. Thus only 11.5 per cent of local government is currently covered by the State industrial relations system.
470. These 148 local governments employ over 22,000 people throughout the State. The WALGA submission states that 96 per cent of the terms and conditions of employment for local government employees were derived under the national workplace relations system.
471. At paragraph [1533] of the Interim Report the Review outlines how other States have provided certainty as that being sought in WA:
- “All other States in Australia have provided certainty for the industrial regulation of local government authorities by one of two methods:*
- (a) *Referring powers to the Commonwealth so as to place all local government employers and employees into the Federal system. This has occurred in Victoria and Tasmania.*
- (b) *Enacting State-based legislation to declare a local government body not to be a national system employer, which has been endorsed by the Federal Minister. This has occurred in New South Wales, Queensland and South Australia, where local governments operate in their respective State jurisdictions.”<sup>50</sup>*
472. Method (a) supports CCIWA’s principal view for the referral of industrial relations powers to the Commonwealth. Implementation of this solution in WA would only impact 11.5 per cent of local government employers. This achieves consistency via the least complex and disruptive path.
473. Adoption of method (b) is to contemplate disruption to 88.5 per cent of local government employers (and employees) and the substantial complexity necessitated by a ‘drag-back’ to the state system that, as submitted, does not make practical sense. There is no compelling reason to do so.
474. Further, and importantly, the Review notes the significant challenges arising from the adoption of method (b) in paragraphs [1539] to [1553] of the Interim Report, particularly paragraph [1552] that raises doubt as to the capability of the State to unilaterally implement method (b).
475. WALGA’s submission highlights the significant issues that would arise should it be adopted that local government employers be regulated by the State industrial relations system. CCIWA respects the view of WALGA as the main peak representative body for local government and supports the substance of the submissions made by WALGA.
476. The purpose of any proposed change should be to remove uncertainty and ambiguity for local governments and provide clarity and stability for both local government employers and employees.
477. Jurisdictional uncertainty can be brought to an end by either of the two methods cited by the Review: (i) referral of the powers to the Commonwealth or (ii) amending the status of local governments so as to fall within the coverage of the State system.

---

<sup>50</sup> Interim Report of the Ministerial Review into the State Industrial Relations System, page 548 at [1533]



478. It would appear logical that, if any change is to be contemplated, it is the less disruptive approach that must be considered in the first instance. That is, coverage of 17 local governments currently under the State industrial relations system be resolved such that local governments are covered by the FW Act. Change must, as first principle, be practical and purposeful.
479. Further, the submission of WALGA particularly highlights and emphasises the complexity of the considerations that would arise from any change in legislative coverage. It is CCIWA's view that considerable weight must be given to these considerations.
480. Therefore, as WALGA emphasises in its submission, substantial consultation must be undertaken with the sector to resolve the matter in the interests of the sector. CCIWA would support the position of WALGA that this consultation occurs as a priority before any recommendation is adopted.
481. However, should recommendation 69 be adopted and that "local government employees be regulated by the State industrial relations system" CCIWA would submit that, as stated in paragraph [8] of this submission, this could form part of the reforming of the WAIRC (and the IR Act) to cover public sector employees with the referral of private sector employees to the Commonwealth.

## 12. Other Matters

482. In addition to the submissions provided in response to the Interim Report, CCIWA would make the following additional submissions for consideration by the Review.

### Support Resources for Business

483. The FWC produces a comprehensive range of resources (benchbooks, guides, fact sheets and videos) to assist business and employees. The benchbooks explore extensively the more complex areas such as agreement making, anti-bullying, general protections, industrial action and unfair dismissal.
484. CCIWA would recommend that a similar range of resource materials be provided for WA business and employees to ensure the most efficient operation of workplace relations in WA.
485. In addition, as mentioned earlier in this submission at paragraphs [418] and [419], it will be essential that a broader range of education and support resources be provided and readily available to business with any change to the IR Act, especially given the extent of the proposed changes in the Interim Report.
486. Any transition from the current legislative framework and resulting changes in compliance obligations for employers, will need to be supported by substantial state-wide education and support.

### Unfair Dismissal and Small Business

487. As the principal private sector coverage is small business, it is important for the state system to provide a clear set of guidelines for small business as to what constitutes a fair termination of employment.
488. Part 3-2 Division 3 of the FW Act provides in section 388 for the establishment of the Small Business Fair Dismissal Code (Code).

489. The Small Business Fair Dismissal Code applies to small business employers with fewer than 15 employees. This is calculated on a simple headcount of all employees including casual employees who are employed on a regular and systematic basis.
490. Small business employees cannot make a claim for unfair dismissal in the first 12 months following their engagement. If an employee is dismissed after this period and the employer has followed the Code then the dismissal will be deemed to be fair.
491. These provisions were established in recognition of the issues faced by small business in this arena.
492. CCIWA would recommend that these aspects of the national system be reflected in the State system. It would represent an incremental improvement given that no such Code applies in Western Australia, Further, its adoption will ensure harmony with the national system and would provide a clear set of guidelines for small business as to what constitutes a fair termination of employment.
493. It is CCIWA's view that the definition of small business, as provided by section 23 of the FW Act, should be based on Full Time Equivalents (FTE) rather than simplistic headcount. Many of the businesses which predominantly fall under the State system employ a significant proportion of employees on other than a full-time basis. If a business size is calculated on headcount, a number of genuinely small businesses would not fall into the small business definition due to a large number of staff being other than full-time employees. They would be accurately categorised as small business if staffing was reflected on an FTE basis.