ECCWA Submission in relation to the
Review of the State Industrial Relations Review Report

ECCWA is the peak umbrella body in WA that represents the interests of culturally and linguistically diverse communities. It is pleased to provide this submission as many of the recommendations are particularly relevant to components of its constituency who are not proficient in English and or have difficulties in understanding and navigating the industrial relations system.

Term of Reference 1
Structure of the Western Australian Industrial Relations Commission

ECCWA agrees with the proposed recommendations of the Review to achieve a more streamlined and efficient structure, namely the:

- Renaming of the Industrial Relations Act 1979 to the Industrial Relations Act 2018 (WA) (2018 IR Act).
- Review of this Act after three years of its operation.
- Act is to be in a plain English drafting style and gender neutral.
- Full Bench of the Western Australian Industrial Relations Commission (WAIRC) be abolished and replaced by a body to be known as the Industrial Commission Judicial Bench (Judicial Bench) to hear and determine:
  (a) Appeals from decisions of single Commissioners of the WAIRC on the basis and grounds set out in s 49 of the IR Act.
  (b) Appeals from decisions of the Industrial Magistrates Court (IMC) on the basis and grounds set out in s 84 of the IR Act.
  (c) Appeals under s 69(12) of the IR Act.
  (d) Applications currently heard by the Full Bench under s 84A of the IR Act.
  (e) Referrals on questions of law, from the Chief Commissioner or any Commissioner of the WAIRC with the concurrence of the Chief Commissioner, or the Industrial Commission Arbitral Bench, as provided for in proposed recommendation
- Position of the President of the WAIRC be abolished and instead:
  (a) The Presiding Member of the Judicial Bench be a Supreme Court Justice, allocated on a case by case basis, by the Chief Justice of Western Australia (the Presiding Member).
  (b) The jurisdiction currently exercised by the President of the WAIRC under s49 (12) of the IR Act be exercised by the Presiding Member.
  (c) The jurisdiction currently exercised by the President of the AIRC under s72A(6) of the IR Act be exercised by the Chief Commissioner.
  (d) Any other powers or duties of an administrative nature currently exercised by the President under the IR Act be exercised by the Chief Commissioner.
- The Commission in Court Session (CCS) of the WAIRC be abolished and replaced by a body to be known as the Industrial Commission Arbitral Bench of the WAIRC (Arbitral Bench) constituted by three Commissioners, with either the Chief Commissioner or Senior Commissioner presiding:
  (a) To hear and determine the State Wage Case, applications for a General Order, and other matters presently heard by the CCS.
  (b) To exercise the jurisdiction currently exercised by the Full Bench under sections 53, 54, 55, 58, 59, 60, 62, 68, 71, 72, 72A and 73 of the IR Act.
- The Industrial Appeal Court (IAC) be abolished.
- The 2018 IR Act be amended to include a right of appeal to the Court of Appeal of Western Australia, upon a grant of leave by a Justice of the Court, from a decision of the Presiding Member, the Judicial Bench, or the Arbitral Bench on the ground that the decision involved an error of law.
- The jurisdiction of the IMC is to be amended so that if a claim for enforcement of a State Employment Standard (SES), State award, or other State industrial instrument is made

to the IMC, the IMC has jurisdiction to deal with all enforcement proceedings, claims and counterclaims arising between the employer and the employee, or former employer and employee, including any claims by the employee or former employee for a denial of a contractual benefit and any claims of set-off from, or counterclaim to, the denial of contractual benefit alleged by the employee.

- The 2018 IR Act provide for the dual appointment of WAIRC Commissioners to the Fair Work Commission (FWC), as contemplated by s631(2) of the Fair Work Act (FW Act).
- The 2018 IR Act provide for the dual appointment of FWC members to the WAIRC, as contemplated by s 631(1) of the FW Act.
- The 2018 IR Act include an amendment so that the compulsory retirement age of the members of the WAIRC be increased from 65 to 70 years of age.
- The 2018 IR Act specify that any section equivalent to the current s 26(1)(a) of the IR Act is not to apply if the WAIRC is deciding a question of law in any matter and upon any issue it is required to decide.
- The 2018 IR Act empower the WAIRC to regulate the conduct of registered industrial agents appearing before the WAIRC, by way of a Code of Conduct to be published by the WAIRC, that includes the entitlement of the WAIRC to, on notice to the agent and with the agent having the opportunity to make submissions on the issue, suspend or revoke an agent's registration or withdraw the right of the agent to appear before the WAIRC, either generally or for a particular matter, occasion or hearing.
- The 2018 IR Act contain:
  (a) A "slip rule" for orders made by the WAIRC.
  (b) An amendment to the current requirement for a "speaking to the minutes" of orders, to give discretion to the WAIRC to dispense with a speaking to the minutes in a particular case if it is warranted in the opinion of the WAIRC.
  (c) An amendment to the requirement for a "speaking to the minutes" of orders that would permit the WAIRC to specify that unless parties indicate by a specified time that a speaking to the minutes is requested, that the WAIRC may issue the order in the terms of the minutes.
  (d) Power for the WAIRC to conduct conciliations by telephone.
- The 2018 IR Act is not to include any equivalent of the privative clause provisions contained in s 34(3) and s 34(4) of the IR Act, which purport to provide that any decision of the WAIRC will not, subject to the IR Act, be impeached" or subject to a writ of certiorari, or award, order, declaration, finding or proceeding liable to be "challenged, appealed against, reviewed, quashed or called into question by any court".
- The 2018 IR Act should not include any equivalent of s 48 of the IR Act that provides for the establishment of Boards of Reference under awards made by the WAIRC.

Views on additional submissions sought by the Review on issues arising from Term of Reference 1.

ECCWA would prefer that the denial of contractual benefits jurisdiction and/or the interpretation of awards, orders and industrial agreements jurisdiction, currently exercised by the WAIRC, ought to: "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.

ECCWA believes that parties should be entitled in all matters before the WAIRC, however constituted, to be represented by an Australian legal practitioner, as defined in s5 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.

ECCWA also believes that the WAIRC ought not to be empowered to make orders for costs, including legal costs so that the WAIRC remains a no costs jurisdiction in all matters.

It further believes that the 2018 IR Act should:

- Include an amendment to s84A (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.
- Contain a division equivalent to Part 5-1, Division 9 of the FW Act, about offences committed in and before the WAIRC.
- Include, in any industrial matter before the WAIRC, and subject to the overall discretion of the WAIRC, a right for any party to obtain discovery and inspection of relevant documents held in the possession, power or custody of any other party.

Term of Reference 2
Jurisdiction and powers of the Western Australian Industrial Relations Commission regarding access for public sector employees to the Western Australian Industrial Relations Commission on a range of matters for which they are currently excluded.

ECCWA agrees with the following proposed recommendations of the Review:

- The Public Service Appeal Board (PSAB), the Public Service Arbitrator (PSA) and the Railways Classification Board be abolished.
- Subject to (b), the 2018 IR Act include a single system for public sector employers and employees to refer industrial matters to the WAIRC so that all employees who are currently subject to the jurisdiction of the PSA and the PSAB will now be subject to the ordinary jurisdiction of the WAIRC.

Additional submissions on these issues arising from Term of Reference 2.

ECCWA would prefer that there should be a division between the industrial matters that a public sector employee may refer to the WAIRC, as opposed to those a registered organisation may refer to the WAIRC on the employee's behalf, which affect the employment of an individual public sector employee.

ECCWA believes that all breaches of a public sector standard by an agency under the PSM Act may be referred, challenged or appealed by a public sector employee or an organisation on their behalf, to the WAIRC, and the remedies that may be awarded by the WAIRC.
It also believes that, a police officer, police auxiliary officer, Aboriginal police liaison officer or a special constable and/or the WA Police Union on their behalf ought to be entitled to refer to the WAIRC an industrial matter of the type described in Schedule 3 clause 2(3) of the IR Act.

It further believes that the 2018 IR Act should include, for the benefit of both public and private sector employees, an entitlement to bring an application to the WAIRC to seek orders to stop bullying at work based on the model contained in the FW Act Part 6-4B "Workers bullied at work",

ECCWA agrees with the proposal that the sections of the Offenders Act 1994 (WA), the Police Act 1892 (WA) and the Prisons Act 1981 (WA), which contain rights of appeal to the WAIRC against removal decisions, should be abolished and replaced by an entitlement for an employee to make an application to the WAIRC for a remedy in respect of an alleged unfair dismissal, with the WAIRC having the same jurisdiction and powers to determine the application and award remedies as in the jurisdiction that applies to private sector employees.

ECCWA is also agreeable to the jurisdiction of the WAIRC being expanded to allow the WAIRC to make General Orders for public sector discipline matters, with the consequent repeal of s 78 of the PSM Act.

Term of Reference 3
Consider the inclusion of an equal remuneration provision in the Industrial Relations Act 1979 with the objective of facilitating the conduct of equal remuneration cases and other initiatives in the Western Australian Industrial Relations Commission.

ECCWA strongly supports the proposal to include in the 2018 IR Act an equal remuneration provision based upon the model in the Industrial Relations Act 2016 (Qld).

It supports the inclusion of a requirement in the 2018 IR Act that the WAIRC develop an equal remuneration principle to assist parties in bringing or responding to applications brought pursuant to the equal remuneration provision.

Term of Reference 4
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.

ECCWA strongly supports the view that the 2018 IR Act should not exclude from its coverage:

- Any employee whose place of work is the private home of another person, presently referred to as "any person engaged in domestic service in a private home" in s 7(1) of the IR Act.
- Persons whose services are remunerated wholly by commission or percentage reward, or wholly at piece rates, being persons who are currently excluded from the definition of an employee under s 3 of the Minimum Conditions of Employment Act 1993 (WA) (MCE Act) and regulation 3 of the Minimum Conditions of Employment Regulations 1993 (the MCE regulations) 39.
- Persons:

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

(b) Those 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.

ECCWA supports the proposal to establish a Taskforce to be chaired by a representative of the Department of Mines, Industry Regulation and Safety (DMIRS), with representatives from the Chamber of Commerce and Industry WA (CCI), Unions WA and the WAIRC, to assist employers and employees in the change to the regulation of employment in Western Australia contained in proposed recommendations in [37], [38] and [39] and any proposed recommendations that might arise after the receipt by the Review of submissions in response to the requests in [42] –[45] given that:

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

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

(c) If these constitutional corporations engage someone as an independent contractor under a "services contract", as defined in s 5 of the Independent Contractors Act 2006 (Cth) (IC Act), so that s 7 of the IC Act applies to exclude State laws from operating in the circumstances there set out, in relation to any workplace relations matter, as defined in s 8 of the IC Act; so that

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

ECCWA agrees that the gig economy is a new and fast developing industry in Western Australia; and as the State Government has a legitimate interest in the engagement, working conditions and termination of engagement of people working in the gig economy in Western Australia; a taskforce be assembled and chaired by a representative of DMIRS and include a member from the CCI, UnionsWA, the WAIRC, the State Solicitor's Office and a nominee of the President of the Law Society of Western Australia, to monitor the engagement, working

conditions and termination of engagement of people in the gig economy and to consider and report to and make recommendations to the Minister as to whether and to what extent the regulation of the industry can or ought to be pursued by the State Government, by way of representations to the Commonwealth Government, separate legislative action or otherwise.

Additional submissions on issues arising from Term of Reference 4.

ECCWA believes that industrial inspectors or people holding right of entry permits with respect to the carrying out of their duties, rights and privileges at places of work that are also private residences should have reasonable access to them.

ECCWA agrees that 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.

ECCWA strongly believes that the 2018 IR Act should 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.

ECCWA also agrees that whether the IR Act, MCE Act or, if included in the 2018 IR Act, the State Employment Standards, ought to apply to:
(a) People who are employed in Western Australia by a foreign state or consulate.
(b) People who are employed as sex workers

Term of Reference 5
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

ECCWA strongly believes that the minimum conditions should be updated; and that 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. ECCWA accordingly supports the proposal that the 2018 IR Act include a Part that provides for minimum conditions of employment for employees covered by the State system to be called the State Employment Standards (SES); and that the SES include:
(a) The minimum wage (including for employees who have a disability that has been assessed to affect their productive capacity to perform their particular job).
(b) The National Employment Standards (NES), as contained in the FW Act, other than the long service leave NES.
(c) Conditions comparable to those contained in Part 3-6, Division 3 (Employer obligations in relation to employee records and pay slips) and Part 2-9, Division 2 (Payment of wages and deductions) of the FW Act.
(d) Any minimum condition of employment, as contained in the MCE Act, if the condition is, on the issue to which it relates, more beneficial to an employee or in addition to any NES condition of employment.
(e) The conditions set out in the Termination, Change and Redundancy General Order of the WAIRC (TCR General Order) in lieu of Part 5 of the MCE Act, but incorporating the provisions contained in the FW Act that are more beneficial to employees than the TCR General Order.

(f) Subject to Section [49] of the Review Report, provision for long service leave and Provision for Family Domestic Violence (FDV) leave be a minimum condition of employment, in accordance with recommendations to be made after receiving additional submissions as requested in Section [54].

(g) SES condition with respect to long service leave include the following:

- Express provision for casual employees to be entitled to receive long service leave and guidance on how to calculate their continuous employment.
- Express provision for seasonal workers to be entitled to receive long service leave and guidance on how to calculate their continuous employment.
- A provision that no long service leave may be "cashed out" until it is an entitlement that has accrued or crystallised as a legal entitlement.
- Provision for all forms of paid leave to count towards an employee's continuous employment.
- Provision for continuous employment to apply in circumstances equivalent to when there has been a transfer of business under Part 2-8 of the FW Act.
- A provision that an employer be obliged to provide a copy of an employee's employment records, relevant to an assessment of if, and when, they will be entitled to long service leave, to any subsequent employer to whom the first employer's business has been transferred, at the time of or within one month of the transfer of the business
- Provision for the taking of long service leave in alternative ways.
- Express provision that service as an apprentice counts towards an employee's continuous employment.
- (i) Expressing that the term "one and the same employer" in s 8(1) of the Long Service Leave Act 1958 (LSL Act) includes related bodies corporate within the meaning of s 50 of the Corporations Act 2001 (Cth).
- The law in Western Australia be amended so that, under the 2018 IR Act, a failure to comply with the long service leave SES will, like the other SES, be able to be enforced by the imposition of a pecuniary penalty, compensation and/or associated orders made by the IMC, on application by an industrial inspector, the person who was the subject of the alleged failure to comply or an industrial organisation of which the person is a member.
- within 12 months of the passing of the 2018 IR Act, the WAIRC, sitting as the Arbitral Bench, is to review the SES in the 2018 IR Act and decide whether any of the SES ought to be enhanced or clarified by a General Order, including by reference to the comparable conditions that then apply under the FW Act.
- In addition to the initial review of the SES the WAIRC be required to review the SES every two years (after the initial review) and decide by a General Order whether, and to what extent, the SES ought to be added to and/or enhanced.
- The WAIRC may, in exceptional circumstances, of its own motion or on application, review any or all of the SES at any time and decide by a General Order whether, and to what extent, the SES ought to be added to and/or enhanced.

Additional submissions
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.

ECCWA believes there is a case for increasing the casual loading and supports the view that 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.

ECCWA is of the view that FDV leave be included in the SES, and believes that the leave should include both paid and unpaid. It does not have a firm view on the length of the leave but it should provide for a **minimum of 14 days**

Term of Reference 6
Process for the updating of State awards for private sector employers and

Employees.

ECCWA supports the proposed recommendation for the 2018 IR Act to include a Part, or Transitional Provision, that requires the WAIRC to, within three years, review and replace the existing private sector awards of the WAIRC with New Awards, on the basis outlined in the Review report.

ECCWA strongly supports the view that the New Awards be drafted in a plain English style, with the aim of being user friendly for employers and employees

It also supports the view that in the process of making the New Awards, the WAIRC should give registered organisations and employer groups whose membership includes employee and employers to be covered by the New Award, and peak body organisations, the Minister and any other interested person or stakeholder the opportunity to make submissions about the terms of the New Award.

Term of Reference 7
Statutory compliance and enforcement mechanisms

ECCWA supports the recommendation under the 2018 IR Act, to empower industrial inspectors to issue:

(a) Infringement notices for breach of record-keeping and pay slip Obligations.
(b) Compliance notices, based on the model contained in s 716 of the FW Act, if it is in the public interest to do so.
(c) Enforceable undertakings, based on the model contained in s 715 of the FW Act, if it is in the public interest to do so.

It also supports the inclusion of a section in the 2018 IR Act, comparable to:

- s 557C of the FW Act, to the effect that, if, in a contravention proceeding against an employer where an applicant makes an allegation in relation to a matter and the employer was required to make and keep a record, make available for inspection a record or give a pay slip, in relation to the matter, and the employer has failed to comply with the requirement, the employer has the burden of disproving the allegation.
- s 535(4) and s 536(3) of the FW Act prohibiting an employer from wilfully making, keeping or maintaining a false or misleading employment record or wilfully providing a false or misleading pay slip.

It supports the proposal that the right of entry provisions in the 2018 IR Act be amended to:

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

Term of Reference 8
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.

ECCWA supports the proposal to extend the coverage of Local government employers and employees by the State industrial relations system.
Accordingly it supports the recommendation for the State Government to introduce legislation into the State Parliament consistent with s 14(2) of the FW Act that declares, by

way of a separate declaration, that each of the bodies established for a local government purpose under the Local Government Act 1995 (WA) is not to be a national system employer for the purposes of the FW Act (the declaration).

Conclusion:

As the peak umbrella body in WA that represents the interests of culturally and linguistically diverse communities ECCWA strongly supports the recommendations of the Review report. This is particularly so because people of CaLD backgrounds are disproportionally represented in vulnerable sections of the workforce i.e. casual workers, gig economy "workers", those working in private homes i.e. people employed by those "self-managing" under the NDIS and Aged care programs etc. A further reason for its support of the recommendations is because its constituency includes those who are not proficient in English and or have difficulties in understanding and navigating the industrial relations system.

For further information please contact ECCWA via admin@eccwa.org.au