

Following a 'round table' discussion with Justice Ritter in respect of the Review of the State Industrial System and the consideration of recommendations within the Interim Report conducted during April 2018 relating to the potential future jurisdiction of the Western Australian Industrial Relations Commission (WAIRC) to consider matters within the public service and broader public sector, the Public Transport Authority and Main Roads Commission respectfully submit the following response.

In considering recommendations relevant to the public service, broader public sector and the respective agencies, the Public Transport Authority and Main Roads Commission suggest that each of the recommendations dealt with below would be better informed through the conclusion of a review of the Public Sector Management Act 1994.

RECOMMENDATIONS PROPOSED

23. *The Public Service Appeal Board (PSAB), the Public Service Arbitrator (PSA) and the Railways Classification Board be abolished.*

24. *(a) Subject to (b), the 2018 IR Act include a single system for public sector employers and employees to refer industrial matters to the WAIRC so that all employees who are currently subject to the jurisdiction of the PSA and the PSAB will now be subject to the ordinary jurisdiction of the WAIRC.*

(b) The recommendation in (a) is subject to the prospect of there being a more limited jurisdiction for the referral of industrial matters involving a police officer, police auxiliary officer, Aboriginal police liaison officer or a special constable, in circumstances to be recommended following the receipt of additional submissions as requested below.

25. *Subject to the request for additional submissions below, there be consequential amendments to the Public Sector Management Act 1994 (WA) (PSM Act) and the Health Services Act 2016 (WA) (HS Act) to allow government officers to refer industrial matters to the ordinary jurisdiction of the WAIRC.*

26. *In exercising the jurisdiction referred to in [25] above, the WAIRC have the jurisdiction and powers to make the same orders as it may make in exercising its jurisdiction in relation to the private sector.*

Recommendations 23 – 26 supported

RECOMMENDATIONS PROPOSED

27. *Whether, and if so to what extent, there should be a division between the industrial matters that a public sector employee may refer to the WAIRC, as opposed to those a registered organisation may refer to the WAIRC on the employee's behalf, which affect the employment of an individual public sector employee.*

28. *The extent to which a breach of a public sector standard by an agency under the PSM Act may be referred, challenged or appealed by a public sector employee or an organisation on their behalf, to the WAIRC, and the remedies that may be awarded by the WAIRC.*

369 The restrictions that apply to divide the jurisdiction of the WAIRC from the jurisdiction of the Public Sector Commission, with respect to an alleged breach of the Public Sector Standards may or may not continue to apply (subject to further submissions on this issue as requested).

Recommendations 27, 28 and 369 not supported.

The agencies do not support the jurisdiction of the WAIRC being extended to cover those matters currently excluded by s. 80E(7) and s. 23(2a) of the IR Act.

Although not contemplated by the recommendations, the possibility of dual jurisdiction for such matters currently excluded from the WAIRC jurisdiction will result in further delays in the finalisation of such matters including appointment and promotion.

The recommendation and some of those proposing change to the current jurisdiction does not recognise the additional compliance requirements placed on public sector employers and employees when exercising their functions.

Of note is the requirement under Section 9(a) of the PSM Act requiring all public sector bodies and employees to comply with the provisions of the PSM Act, the Commissioner's Instructions, public sector standards and codes of ethics; and any code of conduct applicable to the agency.

The implication therefore is that public sector employees must engage in decisions that are "honest, fair, impartial, and timely, and consider all relevant information"¹ inclusive of matters currently excluded from the WAIRC's jurisdiction. No such legislative requirement to comply with codes of behaviour and conduct when making decisions applies to the private sector under the WAIRC jurisdiction.

In addition, public sector employees risk disciplinary action where it can be demonstrated they breached their responsibility to comply with Commissioner's Instructions, an agency's Code of Conduct or Code of Ethics.

The current PSC breach of discipline process allows for the review of process concerning such matters which ensures the oversight and expectations of employee behaviour when exercising their influence when making decisions currently excluded from the WAIRC's jurisdiction.

The Public Transport Authority and Main Roads Commission respectfully submit that the existing exclusion of jurisdiction of the WAIRC under s. 80E(7) and s. 23(2a) of the IR Act should be retained.

RECOMMENDATIONS PROPOSED

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

Recommendation 30 not supported.

¹ Commissioner's Instruction No 7 Code of Ethics

Agencies recognise workplace bullying as a health and safety matter which constitutes a risk to the health, safety and wellbeing of individual employees and can lead to serious psychological, and even physical, injury.

Section 19 of the *Occupational Safety and Health Act 1984* (OSH Act) requires all employers to provide a safe, hazard-free work environment as far as is reasonably practicable. Agencies therefore are committed to ensuring the health, safety and welfare of all individuals while at work including managing bullying, aggression and violence in the workplace.

All public sector employees have the requirement to not engage in behaviour that characterised as bullying as this may constitute a breach of the Public Sector Code of Ethics and/or each agency codes of conduct.

As stated above, existing legislative requirements provide the additional public sector oversight of employee behaviour not presently found in the private sector to prevent workplace bullying. Further employers may take disciplinary action against employees engaging in behaviour that does not meet these expectations.

RECOMMENDATIONS PROPOSED

31. Whether proposed recommendation 25 should include the repeal of s 96A(1) of the PSM Act, and the amendment of s 96A(2) and s 96A(5)(b) of the PSM Act insofar as they restrict the rights of public sector employees to refer to the WAIRC a decision to terminate their employment under the Public Sector Management (Redeployment and Redundancy) Regulations 2014 (WA).

Recommendation 31 is supported

It is understood this change would also repeal the reference in s95 (6) of the PSM Act.

RECOMMENDATIONS PROPOSED

33. Whether the jurisdiction of the WAIRC should be expanded to allow the WAIRC to make General Orders for public sector discipline matters, with the consequent repeal of s.78 of the PSM Act.

Recommendation 33 is not supported.

Transport agencies do not support the creation of a jurisdiction allowing the WAIRC to make general orders for public sector discipline matters.

Public sector discipline matters are often considered in the context of the public sector being an industry of itself. Existing provisions within the PSM Act had their origins with a focus on the requirements that needed to be met with respect to a public *servant* and not necessarily a public sector officer. Over time, the application of the PSM arrangements have crept across a broad range of callings.

The uniform application of such provisions may make sense in the context of a Department of State or all Departments of State and the public servants (or public service officers) therein.

In the context of the broader public sector the existing (and potentially any future ‘general’ order) arrangements overlap, or may be at odds, with existing arrangements for the maintenance of professional membership – accounting, nursing, doctors, planners etc; or ‘industry’ norms – health, transport, disabilities, construction and so on.

Transport agencies consider that disciplinary matters, while acknowledging the need for underpinning principles of transparent process, natural justice, procedural fairness etc, would be better aligned to the relevant industry minimums or standards as opposed to a uniform structured approach across diverse callings and industries.

RECOMMENDATIONS PROPOSED

34. At p18, the *Interim Report* posits:

“Whether, given the discussion in Chapter 3 of the Interim Report, the recommendations proposed in response to Term of Reference 2 above, and any submissions provided in answer to the other questions in response to Term of Reference 2 above, the Review should recommend to the Minister that the PSM Act be reviewed.”

Recommendation 34 is supported.

As noted during the recent ‘roundtable’ discussion, there is already a suggestion that the PSM Act may be reviewed and therefore, some question as to the timing of recommendation from the Review given the potential for change.

With the recent registration of *General Agreement 7* (GA7) between Government and the Civil Service Association it seems that there may be also a commitment to ‘... *the review of redeployment and redundancy provisions* (cl 45.5).

During discussions it was suggested that as a result of GA7 a number of matters relating to redeployment may now fall within the auspices of the WAIRC. That is not actually the case.

The application of the *PSMA* and the *PSM (R&R) Regulations* displace inconsistent provisions within GA7. Some existing redeployee management arrangements are imported into the GA7 and may be enforceable in whole or in part as a result; however, the ‘jurisdiction’ directly (or indirectly through the questioning of the fairness of the applications of the *Regulations*) remains as it always has.

The apparent proximity of reviews of the *PSMA* and (at least) redeployment and redundancy ‘provisions’ suggests that it may be prudent for that part of State Industrial Relations Review which deals with the interplay of powers between the Public Sector Commissioner and the WAIRC to be deferred pending those reviews or, alternatively, that the existing Review be joined with those reviews in respect of industrial relations system changes relating to the public sector.

In the context of the *PSMA* generally, it was noted that Part 3 of that legislation was, in the main, an importation of the provisions of the previous *Public Service Act 1979* and presumably, the 1915 version of that Act. Indeed, a number of provisions within the *PSMA* today can be traced back to an 1854 report for the establishment of the British Civil Service.

The challenge in a review of the *PSMA* may be in clearly defining that which is the public service, comprising Departments of State in support of respective Ministers; the broader

public sector, comprising ‘operational’ or service provision arms of Government; and ‘enterprises or authorities’ and Boards. And indeed, whether such is considered a contemporary structure for the delivery of Government initiative, policy, services and enterprise.

The result of such a PSM review may result in the reconsideration of some recommendations relating to the industrial treatment of the public service and or public sector particularly in respect of the relevance or otherwise of constituent authorities in the context of a more contemporary public sector structure in whatever form.