UNIONSWA

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Submission of UnionsWA to the *Ministerial Review of the State industrial relations system – Interim Report*

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Summary

TOR 1: *structure of the Western Australian Industrial Relations Commission (WAIRC).* Preliminary opinion is that the WAIRC ought to be continued as a body that is available to resolve industrial disputes and make orders and awards that affect general terms and conditions of employment.

UnionsWA supports this recommendation, however we have concerns that the proposed new structure of the Commission will be neither streamlined nor efficient. We are also concerned that the implementation of these recommendations will result in the state Industrial Relations system no longer being a lay jurisdiction.

TOR 2: *access of public sector employees to the WAIRC.* The present regime is overly technical and complex, without good reason. The system separates different parts of the public sector into different pathways of rights, jurisdictions and remedies. Preliminary opinion is that this needs to change.

UnionsWA supports public sector workers having the same rights as other workers in the state industrial relations system. We also support the inclusion of a bullying jurisdiction within the state system that extends to both the public and private sectors. However we argue that changes will also need to be made to the Public Sector Management Act (PSM Act) *to address issues such as public sector standards, and what constitutes a genuine redundancy.*

TOR 3: *should there be an equal remuneration provision in WA industrial relations legislation?* Preliminary opinion of the Review is that there should be.

UnionsWA agrees with the Review, and supports the proposition of an equal remuneration provision based upon the model in the Industrial Relations Act 2016 (Qld). *We also support the WAIRC developing an equal remuneration principle to assist parties in bringing or responding to applications brought pursuant to the equal remuneration provision. The provision should include a requirement for equal remuneration in state awards and agreements.*

TOR 4: *exclusions of employees from coverage under the* IR Act *and the* Minimum Conditions of Employment Act *(MCE Act).* The preliminary opinion of the Review is that the exclusions should be removed.

UnionsWA supports this proposition. We also support legislative changes to ensure that households are considered as workplaces where workers need to directly enter people's home. While UnionsWA supports the creation of a 'Taskforce' that has been proposed to consider matters such as the 'gig' economy, we strongly believe that such Taskforces should only include the WAIRC, and the parties under section 50 of the Industrial Relations Act (IR Act) 1979*. Lawyers and representatives of the Department of Mines, Industry Regulation and Safety (DMIRS) should* not *be involved.*

TOR 5: *minimum conditions.* There should be a set of State Employment Standards (SES) that covers minimum conditions of employment and additional topics, most of which, at a Federal level are included in the National Employment Standards (NES).

UnionsWA is supportive of this proposal, provided that existing minimum conditions of employment, as contained in the MCE Act*, are retained or improved as a result of the process. There should be no reduction in conditions as a result of implementation of this recommendation. The SES should include a standard for Domestic Violence Leave (DVL) of at least 10 days paid leave. The inclusion of a*

standard for Long Service Leave (LSL) should not undermine the conditions available to WA workers in the Long Service Leave Act 1958*.*

TOR 6: *State Awards and their need for rejuvenation.* Preliminary suggestion is that, without any loss of current entitlements, over a period of three years, State awards ought to be reviewed and replaced by New Awards to be made by the WAIRC.

UnionsWA is opposed to this proposal for 'updating' state awards. The experience of award modernisation at the Federal level has shown that guarantees that 'no worker will be worse off' did not prevent workers from losing conditions. An Award updating process will consume the resources of all parties involved and will require substantial state government financial (and other) support. There is no need for a wholesale updating of State Awards in order to ensure that WA workers without current coverage become covered by awards. Our recommendation is for a more targeted and cost effective approach that will ensure Award coverage is extended to all WA workers, by adjusting the scope and respondency clauses of existing Awards.

TOR 7: *the mechanisms for enforcement of employment and industrial entitlements.* The Review is of the opinion that the tools are inadequate and out of date.

UnionsWA supports reinvigorating the mechanisms of enforcement in the state industrial relations system, and increasing the fines and penalties. UnionsWA argues that enforcement agencies need to be fully funded to carry out their tasks effectively. UnionsWA does not *support the proposals on Right of Entry, particularly those for a 'fit and proper person' test, which we believe are unnecessary in a system that is working.*

TOR 8: *the position of local government within the State industrial relations system.* Preliminary opinion is that local governments should be in the State system.

UnionsWA supports all Local Government employers and employees being regulated by the State Industrial Relations system. We join with our affiliate the ASU in submitting that Local Government should have two separate and distinct state awards covering the industry, rather than a 'deemed' inferior national modern award. UnionsWA does not *support the creation of a Local Government taskforce of various Departmental and representative organisations. Such a taskforce will only prolong the period of transition out of Federal System.*

Addressing the Terms of Reference

Below please find UnionsWA's detailed responses to the Interim report recommendations.

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

UnionsWA supports this recommendation, however we have concerns that the proposed new structure of the Commission will be neither streamlined nor efficient. We are also concerned that the implementation of these recommendations will result in the state Industrial Relations system no longer being a lay jurisdiction.

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

Supported.

We support amending and renaming the Act (if necessary), however, our view is that any amendments should be limited to only those matters that are required to give effect to new legislative changes identified by this review. We do not support a wide ranging review of the Act.

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

Not supported.

There should be no general review of the Act at a specified time period. Rather the Minister should ensure *ongoing oversight* of any legislative changes implemented by this review to ensure new provisions are working as intended.

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

Supported – only for *new* legislative provisions being gender neutral and drafted in plain English.

We do not support a complete review of the *existing* provisions of the Act to achieve this outcome. The current Act is well understood by the parties.

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

    (a) Appeals from decisions of single Commissioners of the WAIRC on the basis and grounds set out in s 49 of the *IR Act*.

    (b) Appeals from decisions of the Industrial Magistrates Court (IMC) on the basis and grounds set out in s 84 of the *IR Act*.

(c) Appeals under 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 [5] below.

Not supported.

See our response to recommendation 6.

5. **The position of the President of the WAIRC be abolished and instead:**

(a) The Presiding Member of the Judicial Bench be a Supreme Court Justice, allocated on a case by case basis, by the Chief Justice of Western Australia (the Presiding Member).

(b) The jurisdiction currently exercised by the President of the WAIRC under s 49(12) of the *IR Act* be exercised by the Presiding Member.

(c) The jurisdiction currently exercised by the President of the WAIRC under s 72A(6) of the *IR Act* be exercised by the Chief Commissioner.

(d) Any other powers or duties of an administrative nature currently exercised by the President under the *IR Act* be exercised by the Chief Commissioner.

Not supported.

Retention of the president within the WAIRC is needed to ensure that Presiding Members have industrial relations experience. The Presiding Member on WAIRC appeals should have experience in industrial relations. The only current Supreme Court Justice with any notable experience in industrial relations is Acting Justice Smith, who is the current President of the WAIRC. This recommendation suggests that the Presiding Member of the proposed Judicial Bench would not be a fixed Supreme Court Justice, but rather a rotating one, which would mean that there would also be no opportunity for that Supreme Court Justice to reliably build up experience in industrial relations.

This recommendation does not address UnionsWA's concern about listing times for WAIRC matters should the Presiding Member also be the Supreme Court Justice. These recommendations also mean that the Chief Justice would be effectively choosing a member of the WAIRC, rather than the elected government of the day which is the convention that applies for all other judicial appointments.

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

This recommendation reflects the general tone of the Interim Report, namely making the Industrial Relations jurisdiction more legalistic and less accessible to lay practitioners.

A possible alternative approach would be to have a serving WA Industrial Commissioner join the Supreme Court. This would make the current situation with Acting President Smith permanent practice, and guarantee judicial standing and industrial relations experience in WAIRC appeals. This arrangement would also provide for an extra Supreme Court Justice to deal with that Court's workload.

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

   (a) To hear and determine the State Wage Case, applications for a General Order, and other matters presently heard by the CCS.

   (b) To exercise the jurisdiction currently exercised by the Full Bench under sections 53, 54, 55, 58, 59, 60, 62, 68, 71, 72, 72A and 73 of the *IR Act*.

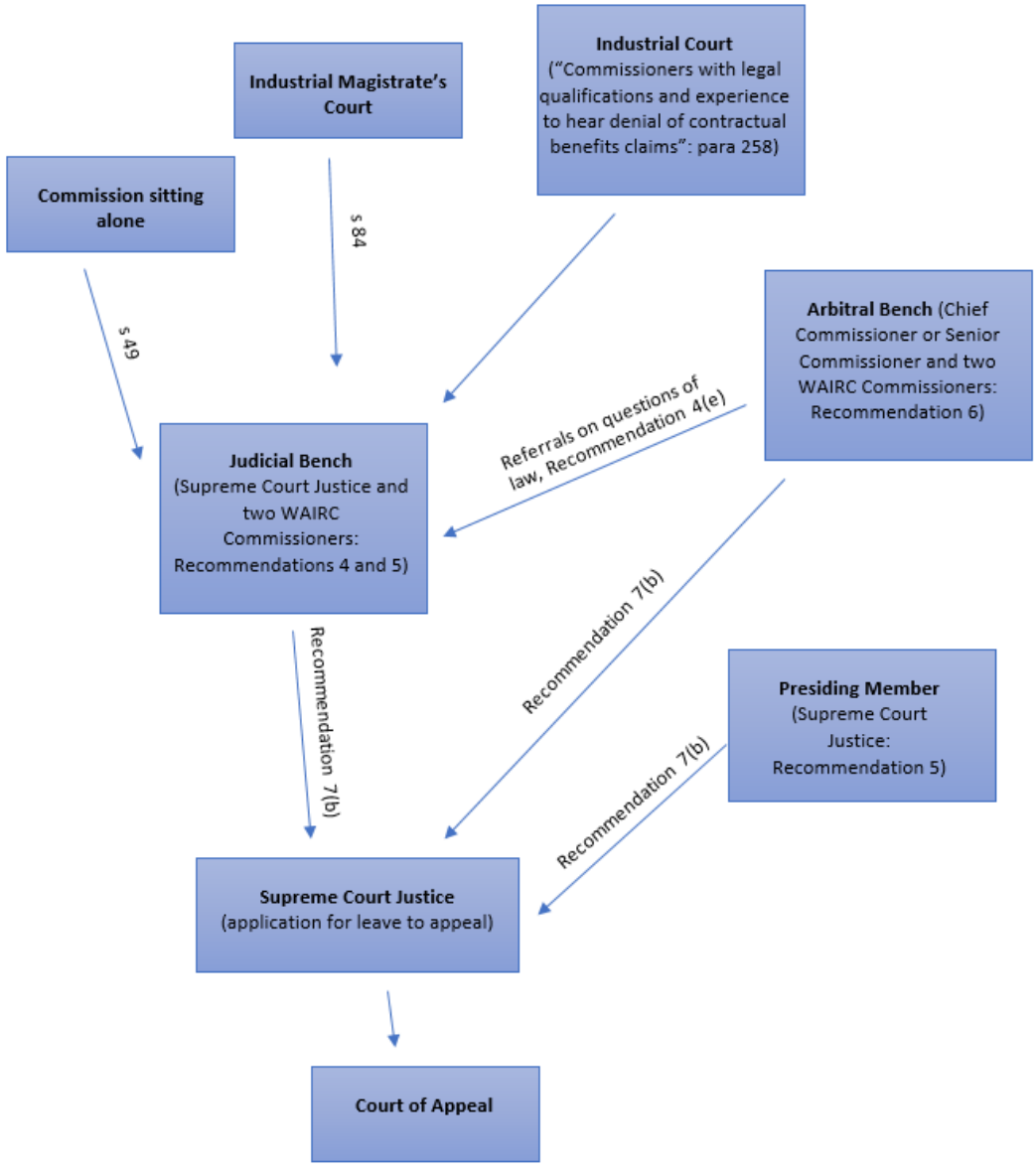
Not supported.

This recommendation, along with recommendation 4, effectively creates two appellate bodies in the WAIRC, with the division of jurisdiction as follows:

Section	**Industrial Commission Judicial Bench**	**Section**	**Industrial Commission Arbitral Bench of the WAIRC** (three Commissioners, Chief Commissioner or Senior Commissioner presiding)
49	Appeals from a Commissioner		State Wage Case
69(1)	Election for an office in an organisation		Applications for a General Order
84	Appeals from the IMC		Any other matter currently heard by the CCS
84A	Contraventions of the Act	53	Registration of employee organisations
		54	Registration of employer organisations
		55	Applications under ss 53 and 54
		58	Registering an organisation's rules
		59	Restrictions on an organisation's name
		60	Incorporation of an organisation
		62	Altering an organisation's rules
		71	Dealing with State and Federal organisation counterparts
		72	Organisation amalgamations
		72A	Organisation representation orders
		73	Cancelling/suspending an organisation

The resulting structure, in our view, will be neither streamlined nor efficient. Our affiliate, the AMWU, has provided us with the following diagram that represents our understanding of how the proposed structure would work.

Structure proposed by Interim Report



That the Review would propose such a complex structure only adds to the concern UnionsWA has already expressed about the state Industrial Relations system no longer being a lay jurisdiction. Working people who are unfamiliar with legal processes will have a far more difficult time accessing such a system, and obtaining just outcomes.

7. (a) The Industrial Appeal Court (IAC) be abolished.

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

Not supported.

It is our view that the Appeal Court should not be abolished without ensuring that matters it previously dealt with can be handled in an expeditious manner, with the requisite Industrial Relations experience, by the WA Court of Appeal. As we discussed in our response to recommendation 5, we are not confident that adding industrial relations matters to the work of other Courts is a practical or effective approach. These Courts have their own workload issues already, and do not necessarily have the background or experience in industrial relations that will ensure matters are properly considered.

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

Not supported.

The state system should retain the current jurisdiction of the IMC. This amendment will mean that counter-claims and set offs will be used to unfairly pressure workers to deter them from pursuing their rights. It will allow difficult employers to resist enforcement of Agreement breaches via threats to counter-sue and counter claim.

9. **The *2018 IR Act* provide for the dual appointment of WAIRC Commissioners to the Fair Work Commission (FWC), as contemplated by s 631(2) of the *Fair Work Act 2009 (FW Act).***
10. **The *2018 IR Act* provide for the dual appointment of FWC members to the WAIRC, as contemplated by s 631(1) of the *FW Act*.**

Both of recommendations 9 and 10 are supported.

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

Supported.

However we note that the compulsory retirement age for Fair Work Commission members is 65 years of age, which would raise the question of how to treat dual appointments.

12. The *2018 IR Act* specify that any section equivalent to the current 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.

Not supported.

Equity and good conscience should not be removed or diluted. Section 26(1)(a) of the *IR Act* reads:

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

We argue that this provision makes the WAIRC *more* streamlined and efficient by enabling cases to proceed without being held up by technical or procedural deficiencies. This is integral to ensuring that the state Industrial Relations system is accessible and affords justice to working people.

The current requirements to act with equity, good conscience and substantial merits of the case, contribute to the unique and successful operation of the WAIRC. Commissioners are able to *resolve* disputes, rather than get hindered by legal technicalities. This reduces the scope for disputation of the Commission's outcomes.

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

Supported.

14. The *2018 IR Act* contain:

(a) A "slip rule" for orders made by the WAIRC.

(b) An amendment to the current requirement for a "speaking to the minutes" of orders, to give discretion to the WAIRC to dispense with a speaking to the minutes in a particular case if it is warranted in the opinion of the WAIRC.

(c) An amendment to the requirement for a "speaking to the minutes" of orders that would permit the WAIRC to specify that unless parties indicate by a specified time that a speaking to the minutes is requested, that the WAIRC may issue the order in the terms of the minutes.

(d) Power for the WAIRC to conduct conciliations by telephone.

Recommendation 14(a) is supported.

Recommendations 14(b) and (c) are not supported as their basis is not explained in the Interim Report

Recommendation 14(d) is supported *provided* that telephone conciliations should only be used in exceptional and limited circumstances. Telephone or video conferencing technology should be principally used to deal with uncontested procedural matters or to assist parties who are in regional and remote areas or are otherwise unable to attend WAIRC matters in person.

The experience of our affiliates in the Fair Work Commission (FWC), where both Commissioners and Conciliators routinely hold telephone conciliations on substantive matters, is that such an approach can disadvantage all parties, including the Commissioner.

The telephone is an impersonal way of dealing with complex and emotional issues. The experience of affiliates is that conciliations held in person will progress more effectively and more likely reach mutually satisfactory resolutions.

The current WAIRC is able to convene conciliations in person relatively quickly compared to the FWC. It would be a perverse outcome of this Review for the WAIRC to substitute a more effective method in conciliation for a less effective method.

15. **The *2018 IR Act* is not to include any equivalent of the privative clause provisions contained in s 34(3) and s 34(4) of the *IR Act*, which purport2 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".**

Supported.

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

As this concerns State Awards, please see our submissions on TOR 6.

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)*;4 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*.

Not supported.

There is no justification to change the way the WAIRC deals with the denial of contractual benefits, interpretation of awards, orders and industrial agreements jurisdictions.

Recommendations 17(b), (c), and (d) essentially propose that only Commissioners who were practicing lawyers prior to appointment exercise the jurisdictions. UnionsWA strongly disagree with this proposal. The strength of industrial tribunals such as the WAIRC is that the Commissioners are experienced in industrial relations, and come from a variety of backgrounds, such as government, employer representatives and the trade union movement. Both major political parties when in government highlight prior industrial experience as a prerequisite when making appointments to the WAIRC.

Recommendation 17 would restrict non-lawyer Commissioners, so that they in effect would only be 'half-Commissioners'. In this situation why would a government of the day to appoint non-lawyers to the Commission at all? The wealth of experience from non-lawyer industrial relations specialists who work as trade union representatives, or employer representatives, would be denied to the WAIRC.

We note that a number of current and recent WAIRC Commissioners were not lawyers prior to appointment. This includes the current Chief Commissioner, former Chief Commissioner Beech, Commissioner Harrison and Commissioner Mayman. These Commissioners were fully capable of properly exercising their jurisdictions. Indeed, Commissioners Scott and Beech were both recognised as being exceptional and were accordingly appointed to the role of Chief Commissioner.

Recommendations 17(c) and (d) also propose that the jurisdiction be exercised by the IMC, specifically by people with a legal background. UnionsWA also disagrees with this suggestion. As previously stated, one of the strengths of the WAIRC is that Commissioners are sourced from the WA industrial relations scene. Also, the IMC's resources are already at capacity, and it would not be well placed to take on such a significant increase in jurisdiction and corresponding workload.

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.**

Not supported.

Parties already have the ability to request permission to be represented by a legal practitioner. This is very rarely denied at the hearing stage, which is where the more technical issues are discussed.

UnionsWA and our affiliate the AMWU do not believe parties should have an automatic right to lawyers in the conciliation stage. Conciliation is about trying to drill down on the parties' interests and positions and trying to help them come to a mutually satisfactory outcome. The automatic inclusion of Lawyers does not assist in this process.

This would also be a departure from the FWC, where parties need to request permission to be represented by an agent under section 596 of the FW Act

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.

Not supported.

The no cost jurisdiction of the WAIRC is an essential component of the right for all workers to access justice. UnionsWA rejects any move to a cost jurisdiction on the grounds that this would discourage workers from pursuing matters under threat of having a cost order made against them.

The practical implications of moving to a costs jurisdiction would be application for cost orders as a matter of routine at the conclusion of every proceeding – not just on 'vexatious' matters. Unions and workers would bear burden of defending the merits of a claim every time. Cost orders will discourage application to the WAIRC, with a disproportionate impact on the most vulnerable. Claimants would have to weigh up the possibility of having cost orders made against them, and accept the onerousness of defending against cost orders. Moving to a cost jurisdiction would unjustifiably tilt the WAIRC in favour of employers with the resources to withstand a cost order and mount routine argument against workers for cost orders

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.**

Not supported.

The Review's Interim Report has not made the case for this change.

21. **Whether:**

    (a) The *2018 IR Act* should include an amendment to s 84A(1)(b) of the *IR Act* to permit orders to be enforced by the party for whose benefit the order was made, in addition to the Registrar or a Deputy Registrar.

    (b) The *2018 IR Act* should contain a division equivalent to Part 5-1, Division 9 of the *FW Act*, about offences committed in and before the WAIRC.

Recommendation 21(a) is supported

Recommendation 21(b) is not supported as it undermines the discretion of the WAIRC.

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.**

Not supported.

There is already a mechanism to obtain discovery under the current Act's section 27(1)(o). Having it as a matter of right in industrial matters will too onerous, and will encourage 'fishing expeditions' and other abuse. Under the current system people can request documents, and the normal common law rules apply. Even in the Federal Court, discovery is not a right.

UnionsWA proposes as an alternative that greater consideration should be given to workers being able to more easily access documents that are relevant to their industrial matters. These could include both individual and collective disputes, and bargaining.

2. 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.

UnionsWA supports public sector workers having the same rights as other workers in the state industrial relations system. We also support the inclusion of a bullying jurisdiction within the state system that extends to both the public and private sectors. However we argue that changes will also need to be made to the Public Sector Management Act (PSM Act) *to address issues such as public sector standards, and what constitutes a genuine redundancy.*

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

Supported.

UnionsWA supports the position by our public sector affiliates. The existing system is complex and sometimes confusing, and it is not clear to us what benefit it provides that the WAIRC in its general jurisdiction could not.

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.

Supported.

UnionsWA supports the removal of limitations on the jurisdiction of the WAIRC that prevent public sector workers from accessing the WAIRC to the same extent as private sector workers.

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.

Supported.

26. In exercising the jurisdiction referred to in [24] 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

Supported.

UnionsWA supports the removal of limitations on the jurisdiction of the WAIRC that prevent public sector workers from accessing the WAIRC to the same extent as private sector workers.

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.**

There should be *no change* to the status quo, unions are recognised under the *IR Act* as the legitimate representatives of employees. This should continue unchanged.

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.**

There should be *no* restriction on what unions, as the legitimate representatives of employees, can bring to the WAIRC.

29. **Whether, and if so to what extent, 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*.**

UnionsWA will not comment on matters within the experience and coverage of the Police Officers Union, the ANF, or the AMA. UnionsWA will comment on commonalities of interest or overlapping concerns about the legislative situation of the public sector.

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.**

Supported.

The anti-bullying jurisdiction must be extended to private sector employees.

UnionsWA supports the submission of our affiliate the WA Prison Officers Union:

> *Anti-bullying claims are matters that ought properly be dealt with by way of conciliation at first instance. Inserting a new anti-bullying provision at section 29(1)(b) would ensure the*

anti-bullying claim is classed as an "industrial matter" for the purposes of being captured by section 32 of the IR Act which would allow the Commission to endeavor to resolve the matter by conciliation at first instance. This would also accord with the objects of the IR Act.

UnionsWA also supports our affiliate the State School Teachers Union (SSTU), who propose that powers provided to the WAIRC to deal with workplace bullying should be extensive enough to address the ongoing risk of bullying to other workers even in the event that the worker being bullied has left the workplace.

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).***

Supported.

Public sector employees should be able to object on the grounds of genuine redundancy.

32. **Whether the sections of the *Young 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.**

Supported.

Please also see our response to recommendation 29.

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*.**

Supported.

34. **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.**

Supported – but only for specific parts of the *PSM Act*.

Our affiliate, the CPSU/CSA, informs us that the parts of the *PSM Act* that need reviewing are:

- PART 3A -- Public Sector Commissioner
- PART 5 -- Substandard performance and disciplinary matters
- PART 6 -- Redeployment and redundancy of employees
- PART 7 -- Procedures for seeking relief in respect of breach of public sector standards

Any review of the *PSM Act* must be carried out in full consultation with the public sector unions.

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.

UnionsWA agrees with the Review, and supports the proposition of an equal remuneration provision based upon the model in the Industrial Relations Act 2016 (Qld). *We also support the WAIRC developing an equal remuneration principle to assist parties in bringing or responding to applications brought pursuant to the equal remuneration provision. The provision should include a requirement for equal remuneration in state awards and agreements.*

35. The *2018 IR Act* is to include an equal remuneration provision based upon the model in the *Industrial Relations Act 2016 (Qld)*.

Supported.

The 2018 IR Act is to include an equal remuneration provision based upon the model in the Industrial Relations Act 2016 (QLD)

The experience of affiliates with equal remuneration order (ERO) applications under the Fair Work Act (FW Act) is that they are lengthy, costly and protracted. The requirement for a predominantly male comparator industry is widely acknowledged as being unduly limiting on an application, because it fails to consider the historical, institutional and cultural undervaluation of feminised work and how industrial standards and benchmarks have been set in Australia. By contrast, the Queensland ERO system under Queensland's *Industrial Relations Act 2016* does not require male comparators in order to establish undervaluation on a gendered basis.

This recommendation ensures that the provision is available and not subject to the State Wage Order, and increases the legal protection of this principle.

The current provision in State Wage Order is insufficient as it has not resulted in any practical outcomes to reduce pay inequity.

This recommendation will enable public sector unions to initiate equal remuneration cases for classifications predominantly occupied by females such as Dental Clinic Assistants (DCAs), Child Protection workers and Social Trainers.

The provision should include a requirement for equal remuneration provision in state awards and agreements.

36. The *2018 IR Act* is to include a requirement that the WAIRC develop an equal remuneration principle to assist parties in bringing or responding to applications brought pursuant to the equal remuneration provision.

Supported.

The *2018 IR Act* is to include a requirement that the WAIRC develop an equal remuneration principle to assist parties in bringing or responding to applications brought pursuant to the equal remuneration provision. This will ensure there is a clear process for the parties with guides on what the Commission would be considering.

Having an equal remuneration principle will also encourage consistency in the Commission's application of the ER provision.

4. Review the definition of "employee" in the* Industrial Relations Act 1979 *and the* Minimum Conditions of Employment Act 1993 *with the objective of ensuring comprehensive coverage for all employees.

UnionsWA supports this proposition. We also support legislative changes to ensure that households are considered as workplaces where workers need to directly enter people's home. While UnionsWA supports the creation of a 'Taskforce' that has been proposed to consider matters such as the 'gig' economy, we strongly believe that such Taskforces should only include the WAIRC, and the parties under section 50 of the Industrial Relations Act (IR Act) 1979*. Lawyers and representatives of the Department of Mines, Industry Regulation and Safety (DMIRS) should* not *be involved.*

37. The *2018 IR Act* 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*.

Supported.

UnionsWA supports our affiliate United Voice in pointing out that this exclusion it is out of step with the rest of Australia and presents a barrier to ratification the ILO's Domestic Workers Convention (No. 189) and Recommendation (No. 201) on forced labour. Given the heightened potential for exploitation of these workers, who are often low paid, work in isolation and have little bargaining power, it is remarkable that WA has retained this exclusion for so long.

38. The *2018 IR Act* not exclude from its coverage 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)*.

Supported.

39. The *2018 IR Act* not 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*.

Supported.

40. A taskforce be assembled and chaired by a representative of the Department of Mines, Industry Regulation and Safety (DMIRS), with representatives from the Chamber of Commerce and Industry WA (CCI), UnionsWA 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] above, and any proposed recommendations that might arise after the receipt by the Review of submissions in response to the requests in [42] – [45] below.

Supported, with the following qualification.

UnionsWA accepts the proposal for a Taskforce, however does not support the proposed approach for choosing its members. Lawyers and representatives of DMIRS should *not* be on such a Taskforce as they can be consulted *by* the Taskforce if needed. This Taskforce, along with others proposed in this Review, should *only* include the WAIRC, and parties under section 50 of the current *IR Act* (the Minister, UnionsWA, and the WA Chamber of Commerce and Industry).

41. Given:

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

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

(c) If these constitutional corporations engage someone as an independent contractor under a "services contract", as defined in s 5 of the *Independent Contractors Act 2006 (Cth) (IC Act),* so that s 7 of the *IC Act* applies to exclude State laws from 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

(e) The gig economy is a new and fast developing industry in Western Australia; but

(f) As the State Government has a legitimate interest in the engagement, working conditions and termination of engagement of people working in the gig economy in Western Australia; therefore

(g) A taskforce be assembled and chaired by a representative of DMIRS and include a member from the CCI, UnionsWA, the WAIRC, the State Solicitor's Office and a nominee of the President of the Law Society of Western Australia, 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.

Supported, with the qualifications about Taskforces in our response to recommendation 40. Such a Taskforce should only include the WAIRC, and parties under section 50 of the current IR Act (the Minister, UnionsWA, and the WA Chamber of Commerce and Industry). The President of the Law Society (or their representative) does not need to be on this Taskforce, as he/she can be consulted by the Taskforce if needed.

UnionsWA and our affiliates insist that people doing work using digital platforms deserve the same protections and rights as other workers. Automation and digital technology offer huge potential to make work and society better.

If left unregulated, the gig economy will continue to undermine the protections and safeguards that are at the heart of the Australian industrial relations system. Flexibility shouldn't mean forcing people to try and make ends meet with temporary or non-standard employment where workers have little social or economic security. There is no reason why technological change should invariably make jobs less secure. Technology and the gig economy can be readily integrated into social and legal structures that give primacy to job quality and security, provided these are matters that are collectively prioritised by those making decisions.

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.

Workers providing services in a private residence environment could be faced with:

- working in isolation without assistance for team handling
- the home not designed for health or personal care (e.g. low bed heights)
- working in restricted work spaces such as small bathrooms
- the home being laid out to suit the client's preferences
- a change in the client's physical and mental condition between visits
- workers from other agencies also providing assistance for the client.

According to Victorian occupational health and safety (OHS) laws, a workplace is defined as a place where employees work. In the case of employees working in private homes, while the worker is undertaking work, that home is a workplace. As part of the assessment for clients and carers, home care service providers should assess all homes, any work activity to be undertaken in the home, and OHS risks to workers. These risks should be addressed in order to support both the client and worker. Accordingly, industrial inspectors and right of entry permit holders should have their full rights regarding workplaces extended to places of work that are also private residences.

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*.

Not supported at this stage.

The current meaning of volunteers in regulation 3 of the MCE Regulations is:

Schedule 1

4. 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.

More work needs to be done before UnionsWA can respond to this interim recommendation. E.g. the meaning of 'paid' needs to be considered in light of honorarium and expenses payments. More work is also needed on whether these changes would leave volunteers vulnerable on health and safety grounds.

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*.

UnionsWA generally supports the expansion of the definition of employee to cover those who perform work duties.

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.

Proposals (a) and (b) are supported.

Workers on visas, and people working without a visa, are more vulnerable to workplace exploitation than their local counterparts. They also face higher barriers to accessing remedies. The power asymmetry that exists in any employer/employee relationship is exacerbated in the case of temporary migrant workers, because their right to remain in the country is contingent on them not being found to be in breach of the work conditions on their visa. Any legal irregularity in the employee/employer relationship, whether the fault of the employee or not, can trigger a chain of events that leads to a grievous result for the worker (detention and deportation) that is disproportionate to any negative outcome potentially faced by the employer and is insensitive to the power dynamics.

The systemic vulnerabilities that arise from our linked immigration and industrial relations regime are compounded by the range of other impediments commonly faced by temporary migrants in accessing justice, including: language and cultural barriers; economic vulnerability; geographical isolation; young age; lack of access to unions and/or legal services; lack of decent work opportunities; and the threat of more egregious levels of abuse in their home country.

There should be a fundamental principle and expectation that exploitation should not result in deportation. People working without a visa or contrary to the terms of their visa have a right to seek justice without fear of deportation. That workers from overseas are granted the right to remain in the community until civil and/or criminal claims are resolved is especially important when indicators of modern slavery are found.

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.

Proposals (a) and (b) are supported.

UnionsWA joins with our affiliate United Voice in supporting the inclusion of sex workers in the WA industrial relations system. Sex workers experience unique workplace health and safety demands and issues. Formalised application of industrial relations legislation will in part recognise these needs and experiences. UnionsWA agree with United Voice that any legislative change to the legal or industrial relations position of sex work should foreground the experiences and concerns of sex workers. Therefore we encourage the Review to seek further consultation with Magenta and Scarlet Alliance as representative organisations for sex workers in WA.

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

(a) the minimum conditions should be updated; and

(b) 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.

UnionsWA is supportive of this proposal, provided that existing minimum conditions of employment, as contained in the MCE Act*, are retained or improved as a result of the process. There should be no reduction in conditions as a result of implementation of this recommendation. The SES should include a standard for Domestic Violence Leave (DVL) of at least 10 days paid leave. The inclusion of a standard for Long Service Leave (LSL) should not undermine the conditions available to WA workers in the* Long Service Leave Act 1958*.*

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

Supported in Principle

Our affiliate the CPSU/CSA suggests using an alternate name [e.g. State Minimum Conditions (SMC)] as SES in the context of the WA public service already refers to the Senior Executive Service.

48. The SES include:

(a) The minimum wage (including for employees who have a disability that has been assessed to affect their productive capacity to perform their particular job).

(b) Subject to (d), the National Employment Standards (NES), as contained in the *FW Act*, other than the long service leave NES.

(c) Conditions comparable to those contained in Part 3-6, Division 3 (Employer obligations in relation to employee records and pay slips) and Part 2-9, Division 2 (Payment of wages and deductions) of the *FW Act*.

(d) Any minimum condition of employment, as contained in the *MCE Act*, if the condition is, on the issue to which it relates, more beneficial to an employee or in addition to any NES condition of employment.

(e) The conditions set out in the *Termination, Change and Redundancy General Order* of the WAIRC (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 [49] below, provision for long service leave.

(g) Provision for Family Domestic Violence (FDV) leave as a minimum condition of employment, in accordance with recommendations to be made after receiving additional submissions as requested in [54] below.

Supported.

49. The SES condition with respect to long service leave include the following:

(a) Express provision for casual employees to be entitled to receive long service leave and guidance on how to calculate their continuous employment.

(b) Express provision for seasonal workers to be entitled to receive long service leave and guidance on how to calculate their continuous employment.

(c) A provision that no long service leave may be "cashed out" until it is an entitlement that has accrued or crystallised as a legal entitlement.

(d) Provision for all forms of paid leave to count towards an employee's continuous employment.

(e) Provision for continuous employment to apply in circumstances equivalent to when there has been a transfer of business under Part 2-8 of the *FW Act*.

(f) A provision that an employer be obliged to provide a copy of an employee's employment records, relevant to an assessment of 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.

(g) Provision for the taking of long service leave in alternative ways.

(h) Express provision that service as an apprentice counts towards an employee's continuous employment.

(i) Expressing that the term "one and the same employer" in s 8(1) of the *Long Service Leave Act 1958 (LSL Act)* includes related bodies corporate within the meaning of s 50 of the *Corporations Act 2001 (Cth)*.

Supported – provided that the conditions contained in the current *WA LSL Act* are not undermined and/or replaced for any worker.

Unfortunately the Interim Report does not address whether portable LSL should be extended to industries such as cleaning, security and community based workers. There is substantial evidence on the need for extending portable LSL to these industries to be reflective of modern employment engagement models and to be inclusive for the whole workforce. UnionsWA joins with United Voice

in calling for the Review to make clear recommendations in support of portable LSL for cleaning, security and community based workers in its final report.

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

Supported.

There is currently no avenue for employees or the Union to enforce LSL entitlements and no relief for non-compliance. This is a clear legislative gap that needs to be filled, particularly in the context of the pervasiveness of wage theft (more of a problem in the small business contingent of the state IR system, than the public sector).

51. (a) Subject to (b), 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*.
(b) The SES review referred to in (a) is to be on notice to stakeholders and other members of the public who are to have the opportunity to make submissions on the issues to the WAIRC.

Supported.

52. In addition to the initial review of the SES referred to in [51]:

(a) The WAIRC will 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.

(b) The SES review referred to in (a) is to be on notice to stakeholders and other members of the public who are to have the opportunity to make submissions on the issues to the WAIRC.

(c) 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.

(d) The SES review referred to in (c) is to be on notice to stakeholders and other members of the public who are to have the opportunity to make submissions on

Not supported.

UnionsWA would support a more limited review process only. It should only consider *increases* to the minimum conditions of employees, and should only occur every 4-5 years

As we set out for TOR 6 regarding state award updating, any automatic review process will be costly for the government and resource intensive for union stakeholders. Despite having legislation that says minimum conditions cannot be reduced, our experience with reviews in both state and federal systems has shown how these protections can be worked around. The frequency of Award reviews in the Fair Work system has been onerous for all parties. So much so there has been common ground for repealing it. Reviews do not need to be as frequent as two years.

When reviews of the SES occur, they should only be allowed to consider improvements in working conditions. State Minimum Wage adjustments should continue to happen each year in accordance with current practice.

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.

The review should recommend the increase in casual loading to 25%. This should be legislated as required by the MCE Act.

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.

FDV leave should be at least 10 days paid leave.

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

(a) ensuring the scope of awards provide comprehensive coverage to employees;

(b) ensuring awards reflect contemporary workplaces and industry, without reducing existing employee entitlements;

(c) ensuring awards are written in plain English and are user friendly for both employers and employees; and

(d) ensuring that any award updating process is driven by the Western Australian Industrial Relations Commission, with appropriate input from the award parties and other relevant stakeholders.

UnionsWA is opposed to this proposal for 'updating' state awards. The experience of award modernisation at the Federal level has shown that guarantees that 'no worker will be worse off' cannot prevent workers from losing conditions. An Award updating process will consume the resources of all parties involved and will require substantial state government financial (and other) support. There is no need for a wholesale updating of State Awards in order to ensure that WA workers without current coverage become covered by awards. Our recommendation is for a more targeted and cost effective approach that will ensure Award coverage is extended to all WA workers, by adjusting the scope and respondency clauses of existing Awards.

55. Subject to recommendation 56, the *2018 IR Act* is 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 following basis:

(a) Subject to (b) the current conditions of employment of employees under existing awards are not to be reduced under the New Awards.

(b) Despite (a) the New Awards should not include any work practice or condition of employment that is obsolete and/or would breach any Australian or Western Australian equal opportunity legislation.6

(c) Similar to the *FW Act*, the New Awards have either industry based or occupational scope clauses, in accordance with (d).

(d) The industries and occupational groups covered by the New Awards are, subject to the WAIRC deciding otherwise, to be those set out in Schedule A.

(e) Subject to (a), although a New Award should specify that conditions of employment are included in the SES they should not otherwise provide for any condition of employment contained in the SES, unless the WAIRC is of the opinion that the condition is required to be included in a New Award because of the particular circumstance or requirements of the industry or occupational group to be covered by the New Award.

(f) The New Awards are to be drafted in a plain English style, with the aim of being user friendly for employers and employees.

(g) In the process of making the New Awards, the WAIRC will give registered organisations and employer groups whose membership includes employees 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.

Not supported.

UnionsWA joins with its affiliates in strongly rejecting any need in the State award system for periodical award review process that replicates the failed Federal award modernisation.

Such a process will come at a huge cost to the state government and will deliver reduced pay and/or conditions for workers. The overwhelming experience of our affiliates with past award reviews in the Federal system has been that the process is burdensome, unnecessary, time-consuming, and negatively impacts working people's entitlements. We join with our affiliates in advocating that, instead of the recommended review process, there should be a mechanism that enables parties to apply for an award variation where necessary to address gaps in award coverage and instances where award conditions fall below minimum conditions. This would address the principal concerns with State awards in a far more efficient and cost effective manner.

As our affiliate United Voice points out about the national award modernisation process:

> *… hundreds of thousands of Australian workers have had their pay cut, in some instances by up to 30%, as a direct result of the cuts to penalty rates under the federal award review process. This is despite the fact that the Fair Work Act 2009 (Cth) (FW Act) explicitly states that the award modernisation process is not intended to result in reductions to take home pay.*

If any recommendations around award updating are adopted, a substantial resource allocation from State Government, employers and unions will be required in order to adequately engage in the proposed process. These are not expenses that the union movement or the State Government can afford. Furthermore, even if governments *did* provide such funding for unions, past experience has shown that it will only go part of the way to mitigating the strain on union resources. Past award reviews have shown that this process is not something that can be completed in isolation and will require substantial input from across each individual union including union members, officials and their executives.

UnionsWA acknowledges the issues with State awards with respect to coverage and minimum conditions of employment. There are also issues concerning the workers identified by the Review who are essentially award free. However, these issues do not require a complete rewrite of the State award system in order to be addressed. Sections 40 and 40B of the current *IR Act* enable awards to be varied by application from parties or by the WAIRC on its own motion.

UnionsWA and its affiliates argue that current legislation therefore provides sufficient scope to modify and update state awards without endangering award entitlements. State awards can be amended to address gaps in award coverage and lift employment conditions where they do not

meet minimum conditions of employment. This process will mean that State awards will be able to meet their intended objectives for working people, with a less expensive process for all stakeholders. With appropriate resources to enable stakeholders to engage, including the provision of at least one FTE to UnionsWA and concerned affiliates, this would be a viable alternative to the proposed award updating process.

UnionsWA's proposal is as follows:

That the scope clauses of State awards be modified so that they are no longer defined by reference to the award's respondents (many of whom will either no longer exist, or will no longer operate within the WA industrial relations system). Instead there should be a description of their broader industry, consistent with the award's existing operation, usually expressed in its title.

In carrying out this process, the object should be to make all State awards common rule awards. It is not the object of the process to amalgamate or cancel any existing State awards. Rather the process should ensure that no WA worker is award-free in regard to the state industrial relations system.

56. Within the first year of the three year period, the WAIRC, after consultation with and giving the organisations and people referred to in [55g] the opportunity to provide submissions, decide upon a priority list of the order in which the New Awards will be made, having regard to:

(a) The requirement to make the New Awards cover the industries and occupational groups set out in Schedule A, subject to the WAIRC deciding otherwise.

(b) The likely application and coverage of the New Award over employers and employees actually working in the State industrial relations system.

(c) The extent to which there is an existing State award that applies to the employment that is in need of being updated.

(d) The extent to which the industry or occupational group, or sections of it, are not covered by an existing State award.

Not supported.

UnionsWA supports our affiliate, the SDA, in arguing that here cannot be a 'low priority' Award, and that regardless of the order in which Awards are made, the first Award will effectively serve as a template for those that follow.

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.

There is no need for a wholesale updating of State Awards in order to ensure that WA workers without current coverage become covered by awards. This can be achieved far more effectively at far lower cost by adjusting the scope and respondency clauses of existing Awards.

7. 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 inspectors' powers and tools of enforcement to ensure they are able to effectively perform their statutory functions.

UnionsWA supports reinvigorating the mechanisms of enforcement in the state industrial relations system, and increasing the fines and penalties. UnionsWA argues that enforcement agencies need to be fully funded to carry out their tasks effectively. UnionsWA does not *support the proposals on Right of Entry, particularly those for a 'fit and proper person' test, which we believe are unnecessary in a system that is working.*

58. Under the *2018 IR Act*, industrial inspectors are to be empowered to:

(a) Issue infringement notices for breach of record-keeping and pay slip obligations.

(b) Issue 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) Issue enforceable undertakings, based on the model contained in s 715 of the *FW Act*, if it is in the public interest to do so.

Supported, provided infringements are limited to technical breaches only. There should be legislative protections that ensure fines do not become a substitute for circumstances where prosecutions should otherwise occur.

59. The penalties in enforcement proceedings brought in the IMC be amended to be equivalent to the penalties set out in s 539 of the *FW Act*, and contain a method for indexation of the penalties, so that the maximum penalties change over time to take into account inflationary change.

Supported.

Matching and indexing penalties for enforcement proceeding in IMC with penalties under s. 539 FW

60. The *2018 IR Act* is to include provisions comparable to s 550 of the *FW Act* to enable those involved in any contravention of a relevant breach to be penalised and/or ordered to rectify any non-payment, or ordered to pay compensation or any other amount that the employer may have been ordered to pay.

Supported.

The Review should also include provisions parallel to s. 55 FW Act for accessorial liability. This would create additional disincentive against breaches

61. **The *2018 IR Act* is to include provisions to enable the IMC to impose penalties for a breach of the SES or any applicable award, agreement, or other industrial instrument, including but not limited to breaches of long service leave obligations.**

Supported.

Give IMC ability to impose penalties for breaches of SES, Award, Agreement or any other industrial instrument

62. **The *2018 IR Act* is to include a section 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.**

Supported.

Comparable provision to s. 557C *FW Act* for reverse onus of proof in cases where employer has failed to keep records, make them available or provide a payslip. Employers are currently effectively protected from prosecution when they have breached the record keeping requirements as applicants are not able to obtain supporting evidence

63. **The *2018 IR Act* is to include sections comparable to 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.**

Supported.

64. **The *2018 IR Act* is to include provisions comparable to s 112 and s 113 of the F*air Trading Act 2010 (WA)* to provide for the ability of industrial inspectors to share information acquired during an investigation within DMIRS or with other State Government agencies, or to obtain relevant information within DMIRS or from another State Government agency.**

Supported.

65. Section 98 of the *IR Act* be amended so that there is no restriction on the powers of industrial inspectors only being exercised at an "industrial location". Instead, consistent with the *FW Act*, an industrial inspector may exercise their powers at either:

(a) The premises where work is or was being performed; or

(b) Business premises where the inspector reasonably believes there are relevant documents or records.

Supported.

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

Supported.

67. The right of entry provisions in the *2018 IR Act* be amended to:

(a) Include a requirement that a person must be a fit and proper person to obtain, hold or maintain a right of entry permit.

(b) Provide that an application may be made to the WAIRC by the Registrar or an industrial inspector for the suspension or revocation of a right of entry permit on the basis that the holder is no longer a fit and proper person to hold the permit; and

(c) In any application made under (b), or in considering an application for a right of entry permit, the WAIRC must take into account, as a relevant consideration, any suspensions, revocations or other sanctions imposed on the holder by or under the FW Act with respect to any corresponding rights of entry.

Not supported.

UnionsWA supports its affiliates such as the CFMEU in arguing that these proposed changes are not warranted. There is no need for a fit and proper person test for Right of Entry Permit holders. Union membership, freedom of association, the right to organise and the right to collective bargaining are meaningless unless employees have the right to be represented and advised by their union about workplace issues, and to be represented by their union in collective bargaining. There is no evidence of any problems with the current right of entry provisions in the State system that requires such a recommendation from the Review.

68. The *2018 IR Act* include a provision that amends what is presently s 49I of the *IR Act* to include:

(a) An entitlement under what is presently s 49I(2)(b) of the *IR Act* to make copies of entries in records and documents by way (that is relevant to the suspected breach of a photograph) video or other electronic means.

(b) An entitlement to photograph, or record by video, tape or other electronic means the work, material, machinery or appliance that is inspected under what is presently s 49I(2)(c) of the *IR Act*, that is relevant to the suspected breach.

(c) A civil penalty provision to apply in circumstances comparable to s 504 of the *FW Act*, for any misuse of any documents or other materials obtained in exercise of the rights contained in s 49I(2) of the *2018 IR Act*.

Supported – except for 68(c). No explanation has been provided about why a civil penalty is necessary in this situation. The recommendation also contains the potential for a wider characterization of 'misuse' than is fair or practical.

8. Consider whether local government employers and employees in Western Australia should be regulated by the State industrial relations system, and if so, how that outcome could be best achieved.

UnionsWA supports all Local Government employers and employees being regulated by the State Industrial Relations system. We join with our affiliate the ASU in submitting that Local Government should have two separate and distinct state awards covering the industry, rather than a 'deemed' inferior national modern award. UnionsWA does not *support the creation of a Local Government taskforce of various Departmental and representative organisations. Such a taskforce will only prolong the period of transition out of Federal System.*

69. Local government employers and employees be regulated by the State industrial relations system.

Supported

UnionsWA joins with our affiliate, the ASU, in supporting all Local Government employers and employees being regulated by the WA Industrial Relations system.

70. To facilitate recommendation 69, the State Government 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).

71. If the declaration is passed by the State Parliament, the State expeditiously attempt to obtain an endorsement under s 14(2)(c) and s 14(4) of the *FW Act* by the Commonwealth Minister for Small and Family Business, the Workplace and Deregulation, to make the declaration effective (the endorsement).

Recommendations 70 and 71 are supported.

Local Government was not intended to be governed by the Commonwealth Government, as per section 52 of WA's *Constitution Act 1889.*

72. As a counterpart to recommendation 70, the State enact legislation that has the effect, upon the endorsement, of deeming local government Federal industrial awards, agreements or other industrial instruments to be State awards, agreements or other industrial instruments for the purposes of the *2018 IR Act*.

Not supported for Federal modern awards.

UnionsWA accepts the practical need for agreements and other industrial instruments from the Federal system to be deemed as state instruments as part of a transition process from the Federal to the State system

However UnionsWA does not support the deeming of Federal industrial awards to be a State awards. The national *Local Government Industry Award 2010* in the Fair Work system is inferior to the current Local Government State Awards. These are: the *Local Government Officers' (Western Australia) Interim Award 2011*; and *the Municipal Employees (Western Australia) Interim Award 2011.*

73. If the endorsement is obtained, a taskforce be assembled and chaired by a representative of DMIRS and include a representative of the Department of Local Government, Sport and Cultural Industries, the WAIRC, the Western Australian Local Government Association, the Western Australian Municipal, Administrative, Clerical and Services Union of Employees, the Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth, the State Solicitor's Office and a nominee of the President of the Law Society of Western Australia, to oversee, monitor, assist, facilitate and progress the transition of local government employers and employees between the Federal and State industrial relations systems.

No Supported.

See our responses on Taskforces for recommendations 40 and 41. UnionsWA agrees with the ASU that such a Taskforce would be expensive both the Government and the union. If the taskforce was to proceed then the ASU would require additional funding from the State Government to engage in the Taskforce process.

UnionsWA supports the ASU's proposal for a Local Government transition process similar to that of Queensland. That involved recognising current registered industrial instruments, such as Enterprise Agreements, within the state system. As each agreement expired, they would be replaced with state agreements. Those councils without Industrial agreements currently should simply transition into the WA system.