

## **Submission to Steven Amendola in relation to his review of the Western Australian industrial relations system**

### **Introduction**

This submission has been prepared by the Employment Law Centre of WA (Inc) (ELC).<sup>1</sup> ELC is a not for profit community legal centre which specialises in employment law. It is the only free legal service in Western Australia offering employment law advice, assistance and representation. Each year ELC provides advice and assistance to approximately 4000 non-union employees in Western Australia.

### **Background**

The Department of Commerce (DOC) expressed particular interest in reviewing the following areas of legislative reform:

- unfair dismissal;
- employment agreements;
- state awards;
- minimum wages;
- dispute resolution; and
- statutory minimum conditions of employment.

ELC will address the issues above as well as several other areas of legislative reform under the following headings:

- A) Rights of employees;
- B) Terms and conditions of employment;
- C) Enforcement and information bodies;
- D) Dispute resolution procedures; and
- E) Miscellaneous.

### **Industrial and Related Legislation Amendment Bill 2007 (IRLA Bill)**

ELC strongly supports the amendments to the *Industrial Relations Act 1979* (WA) (IR Act), the *Children and Community Services Act 2004* (WA) (CSS Act) and other related legislation<sup>2</sup> contained in the IRLA Bill which lapsed following the September 2008 State election. ELC recommends that this Bill be re-introduced or alternatively that the amendments of the IRLA Bill be integrated into any industrial relations reform program implemented by the State Government.

An exception to ELC's support of the IRLA Bill exists in regard to unpaid trial work, discussed below. ELC makes no comment on those elements of the IRLA

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<sup>1</sup> [www.elcwa.org.au](http://www.elcwa.org.au)

<sup>2</sup> *Magistrates Court (Civil Proceedings) Act 2004* (WA), *Occupational Safety and Health Act 1984* (WA), *Workers' Compensation and Injury Management Act 1981* (WA), *Minimum Conditions of Employment Act 1993* (WA) and *Public Sector Management Act 1994* (WA).

Bill related to workers' compensation, as this falls outside our scope of operation and expertise.

## **A) Rights of employees**

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### **1. Unfair dismissal**

#### *1.1 Limitation period*

Anecdotal evidence from the paralegals and the Principal Solicitor at ELC suggests that the majority of clients seeking legal advice in relation to unfair dismissal contact ELC towards the end of the current limitation period.

In ELC's experience, many recently dismissed employees do not have the emotional capacity to begin seeking redress for an unfair dismissal for days, and sometimes even weeks, after the event. When they are finally mentally ready to proceed, they may then find that obtaining legal advice can be a lengthy and difficult process. Even where both these hurdles are overcome, time is required to fill out and lodge the relevant documents. For many, this is not always a simple or brief task. This problem may be exacerbated where the dismissed employee is geographically isolated, and therefore limited in his or her ability to correspond and seek assistance. Even citizens of the larger regional centres such as Geraldton report periods of up to 5 working days for mail delivery to and from Perth.

As **Table 1** illustrates, comparable jurisdictions have implemented far longer limitation periods. It is also interesting to note that the United Kingdom, Canada and New Zealand, often considered the most appropriate comparison jurisdictions for Australia, have almost identical limitation periods.

**Table 1: Limitation periods for comparable jurisdictions**

<b>Jurisdiction</b>	<b>Section</b>	<b>Limitation period</b>
United Kingdom	s111(2) of ERA <sup>3</sup>	3 months
New Zealand	s114 of ERA <sup>4</sup>	90 days
Canada	s240 of CLC <sup>5</sup>	90 days
Sweden	ss40,41 of EPA <sup>6</sup>	14 to 28 days (for reinstatement) 4 months (for damages)
Germany	ss4,7 of PADA <sup>7</sup>	21 days

<sup>3</sup> s112(2), *Employment Rights Act 1996* (United Kingdom).

<sup>4</sup> s114, *Employment Relations Act 2000* (New Zealand).

<sup>5</sup> s240, *Canada Labour Code R.S.C. 1985* (Canada).

<sup>6</sup> ss40,41 *Employment Protection Act 1982* (Sweden).

### 1.2 *Allowing for an internal resolution*

A longer limitation period makes it more likely that an issue will be resolved internally.<sup>8</sup> This is because a short limitation period can encourage an employee to bring an action so as not to “miss out”. This can then potentially sour relations between the employee and employer and ruin the chance for a private resolution. Without adequate time to negotiate an alternative to the formal claim process, employers are more likely to end up defending a claim at the Western Australian Industrial Relations Commission (**WAIRC**) for each given circumstance involving a potentially unfair dismissal.

In ELC’s view 90 days is the appropriate limitation period for dismissal applications.

### 1.3 *Eligibility of casual employees*

Casual workers should not be excluded from making unfair dismissal claims to the WAIRC. It is common for many employees designated “casual” to work a similar amount of hours as permanent employees and thus it is to be expected that an unfair dismissal will have the same impact on them as it would a permanent worker. Furthermore, even casuals employed on a seasonal or temporary basis should be able to expect not to be dismissed unfairly for the duration of the season or other time period.

The WAIRC should retain the discretion to ascertain when a dismissal is motivated by genuine economic concerns and an employer should retain the option to dismiss a casual mid season where he/she has a genuine reason. However, there should not be a blanket restriction on seasonal or casual employees generally, particularly at a time when global financial conditions are likely to be encouraging employers to shift permanent workers on to casual contracts.<sup>9</sup> It is also worth noting that around one quarter of the Australian workforce is casual,<sup>10</sup> and that Australia is estimated to have one of the most highly casualised workforces in the OECD, second only to Spain.<sup>11</sup>

Often casual positions will be the first form of employment undertaken by a young person, whether they are independent or not. An unjust experience in the early stages of an individual’s working life without any form of redress is a very

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<sup>7</sup> ss4,7 *Kündigungsschutzgesetz (Protection Against Termination Act) of 25 August 1969* (Germany).

<sup>8</sup> Barnett, Daniel, “A Guide to the Extension of Limitation Procedures”, *Employment Law Journal*, November 2004.

<sup>9</sup> The Australian Bureau of Statistic’s latest labour report does not mention casuals specifically but does estimate a full time employment decrease of 16,000 and a part time (including casual) increase of 48,200 for the month of May 2009: Australian Bureau of Statistics, *6202.0 - Labour Force, Australia*, July 2009.

<sup>10</sup> The Australian Bureau of Statistics, *4102.0 - Australian Social Trends*, June 2009.

<sup>11</sup> For example, see Campbell, Iain, *Casual work and casualisation: how does Australia compare?* Labour & Industry, Dec, 2004.

negative beginning to what will constitute a fundamental part of their livelihood in the future.

#### 1.4 *Small business code (SB Code)*

In the federal system, the *Fair Work Act 2009* (Cth) (**FW Act**) provides that a small business employer (one employing fewer than 15 full time equivalent employees) may be relieved from liability from an unfair dismissal claim if he or she has complied with the SB Code. A checklist for small business employers accompanies the SB Code and can be produced as evidence of compliance with the SB Code in the event of an unfair dismissal claim being made. ELC considers that a SB Code should not be introduced into the state system. If, however, a SB Code were to be introduced, there are certain issues with the federal version which should be addressed.

In particular, what constitutes “serious misconduct” and what amounts to a “reasonable period of time” with regard to an employee responding to a warning is not sufficiently defined in the federal SB Code. If a state equivalent were to be introduced, it might prove helpful to refer employers to an easily obtainable set of guidelines which more comprehensively define serious misconduct and reasonable time, and give a more exhaustive set of examples. The state SB Code and/or the checklist would include the reference, but not the guidelines themselves. Alternatively, the checklist could include a nominal time frame for a reasonable period of time, with space below for an explanation as to why a lesser period was justifiable in the circumstances, if the time frame wasn’t complied with.

ELC is able to provide clients with advice based on experience in relation to what is “reasonable in the circumstances” or “common sense.” However, this judgment often differs markedly between an employer and an employee and often constitutes the crux of the claim itself. Therefore, more objective and concrete terms and language would be preferable for dispute resolution both prior to and during the claim process, provided it does not unreasonably stifle the ability of the tribunal to consider each case on its merits.

A further problem with the federal SB Code is the elevation of a completed checklist to the status of “evidence” within the SB Code itself. As a result, the impression is given that a completed checklist establishes at the outset that there is an evidence-based assertion that the dismissal was fair, effectively establishing an onus of proof on the employee to displace that assertion. This problem is compounded by the fact that it will often be difficult for the tribunal to determine whether or not an employer filled out and complied with the checklist in good faith, or simply went through the motions after the fact.

One way to reduce the potential for this type of abuse is to stipulate in the checklist that the warning given to an employee prior to dismissal must be in writing. The employer should be encouraged to archive a copy of the warning.

Such a requirement should not be considered onerous, given that only one warning is required and that a dismissal would presumably be a relatively infrequent occurrence in a business with fewer than 15 employees. This would form a requirement of the checklist, but not the SB Code itself. If the warning was not given in writing, the employer could still demonstrate that they complied with the SB Code, but would be prevented from using the checklist as evidence of compliance.

An additional benefit of requiring a warning in writing is that it generally carries more weight for an employee when it is delivered in this manner. This increases the likelihood of improved performance and reduces the possibility of an employee reaching the decision that a warning was not adequate (and therefore that a dismissal was unfair) in the event of termination.

### *1.5 Qualification periods*

ELC does not support the introduction of statutorily prescribed qualification periods for unfair dismissal claims in the state system. The current qualification periods for unfair dismissal in the federal system are excessive and unnecessary, given the option for businesses to implement probationary periods for all new employees. Under the FW Act, small business employees are subject to a 12 month qualification period and all other employees are subject to a 6 month qualification period. It is unusual that small business employees are subject to an increased qualification period, given that it would arguably take less, rather than more time to assess the suitability of an employee in a small business environment. The federal qualification periods exceed the time necessary to assess the suitability of a new employee and encourage unscrupulous employers to exploit the imbalance of power created by immunity from unfair dismissal laws for a significant period.

### *1.6 Out of time applications*

An employee who has filed a claim in the incorrect jurisdiction should be permitted to transfer his or her claim to an appropriate jurisdiction and be given an automatic extension. Often employees are unsure which jurisdiction applies to them, due to the complex constitutional issues which must be addressed in ascertaining the appropriate jurisdiction. Furthermore, residence in a remote, regional or rural location should be a special circumstance in granting an automatic extension for a specified period of time.

## **2. Unlawful termination for lack of notice at state level**

The Federal Government acknowledges that a newly unemployed person is particularly vulnerable. To minimise the impact on an employee's livelihood and the impact of any dependants of the employee, adequate notice or payment in lieu of notice of termination is protected in order to assist the employee in finding alternative employment.

Although the federal requirement to provide notice of termination applies to all employees, ELC considers that this protection should be enforceable under state laws. Claims for unlawful termination for lack of notice frequently accompany unfair dismissal applications. Under the current system employees in the state jurisdiction need to submit separate claims in each jurisdiction.

The provisions of the FW Act have also made it more costly and complex to lodge a claim in the federal jurisdiction. The claim process has been moved from the AIRC to the Federal Magistrate's Court (**FMC**), increasing the filing fee from \$59.50 to \$374.00 (including in the Small Claims Division). For employees who have only been denied one week's notice, the filing fee alone is likely to make an action impractical. Although the newly established Fair Work Division of the FMC includes a small claims division, there is, at present, no reduction in the general FMC filing fee for this division.

Allowing for enforcement at the state level would require legislation or amendments to be passed by the State to reproduce the lack of notice protections in the FW Act. ELC considers that the most effective method of achieving this aim would be to include minimum periods of notice in the *Minimum Conditions of Employment Act 1993* (WA) (**MCE Act**). This would allow for enforcement in the WAIRC through a denial of contractual benefits (**DCB**) claim, if Part 2 of the IRLA Bill (discussed below at 3.3) were to be implemented.

### **3. Denial of contractual benefits claims**

#### **3.1 National system employees and DCB claims**

Prior to the introduction of the "Work Choices" amendments<sup>12</sup> to the *Workplace Relations Act 1996* (Cth) (**WR Act**), a far greater number of Western Australian employees had access to the WAIRC for the purposes of making a DCB claim.<sup>13</sup> ELC supports the view that all options should be considered that might assist national system employees to utilise the WAIRC's DCB claims process. One potential option is the operation of s27(2)(o) of the FW Act, which identifies "claims for enforcement of contracts of employment" as non-excluded content in regard to state legislation. This means that s29(1)(b)(ii) of the IR Act, which provides for DCB claims to be made to the WAIRC, might be applicable to federal employees in Western Australia. In light of this, the State Government should publicise this avenue to potential claimants for the purpose of effecting a test case.

Currently, the primary method for national system employees in Western Australia to recover unpaid contractual benefits is an action against their employer in the Magistrate's Court (**MC**). This is a time consuming and expensive process which many aggrieved employees are unwilling to undertake. The necessity to either retain a lawyer or face the difficulty of self representation

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<sup>12</sup> *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

<sup>13</sup> s29(1)(b)(ii) *Industrial Relations Act 1979* (WA).

is often enough to discourage action from being taken, even where a significant debt is owed. A denied contractual entitlement is often not the result of a dispute over contractual interpretation, but simply a refusal from an employer to pay out an entitlement which is clearly owed. The fact that many employees must bear the loss of such a fundamental and obvious wrong unless they commence a process which is financially and technically beyond their means is an unacceptable flaw in the system which needs to be addressed.

Aside from difficulties faced by claimants, the WAIRC is the preferable forum for DCB issues to be considered because it deals exclusively with industrial and employment issues. This allows for a considerable degree of expertise to be developed, which is not possible in a more generalised jurisdiction such as the MC.

### *3.2 Salary cap*

ELC also proposes that the salary cap to make a DCB claim should be removed. The cap is, in part, the result of a now anachronistic presumption that high income earners are almost exclusively professionals who have a strong understanding of basic legal issues and are therefore more capable of redressing legal wrongs. More recently however, ELC has observed that a large proportion of high income earners work in fields which operate exclusive of legal or business concerns and as a result are less familiar with the law and legal processes. The nature of the Western Australian economy has also resulted in many individuals swiftly becoming high income earners in a short amount of time, particularly in the mining and related services sector. These new high income earners are vulnerable to issues of job instability and an accompanying high cost of living, particularly those who are based in regional, rural and remote areas. This geographic isolation, coupled with a lack of disposable income commensurate with their salary, can make it difficult to engage a private solicitor.

### *3.3 Scope of DCB claims – Part 2 of the IRLA Bill*

The scope of the DCB claims that the WAIRC may deal with should extend beyond industrial matters to any express or implied condition of the employment contract, including implied MCE provisions in some circumstances.

## **4. Bullying**

### *4.1 Expanded powers of Occupational Safety and Health Tribunal – Division 3 Part 5 of the IRLA Bill*

“Bullying” is defined by the WorkSafe Code as “unreasonable or inappropriate behaviour at a workplace that is repeatedly directed towards an employee or contractor (or group of employees or contractors) and creates a risk to health and safety”. Bullying should not encompass “reasonable managerial prerogative” exercised by an employer or principal in relation to an employee or contractor.

The powers of the OSH Tribunal should be expanded to adequately assist an employee subjected to workplace bullying where he or she cannot otherwise make out a claim to the WAIRC. Conciliation should be an option made available

at the outset. ELC understands that currently WorkSafe only investigates a case of bullying where an aggrieved person has exhausted all avenues to stop the bullying. WorkSafe investigators then address the issue by determining whether all parties have met their obligations under the *Occupational Safety and Health Act 1984 (WA)* (**OSH Act**).

A conciliating function by an external party would be valuable to an aggrieved employee. ELC is often contacted by employees who feel they are being bullied by superiors who “have the ear” of management (or who constitute the management itself) and as such feel that an internal mediation process is not enough to relieve the problem. To address this issue, the OSH Tribunal should have extended powers to conciliate and resolve alleged bullying.

Aside from its powers to enforce the obligations of parties under the OSH Act, the OSH Tribunal should also have the power to make specific orders for incidents of bullying including:

- ordering a person to do, or refrain from doing something;
- ordering specified arrangements to deal with bullying;
- ordering a person to complete a course relevant to bullying (at the person’s expense); and
- making a declaration that the person has engaged in bullying.

## **5. Misleading or deceptive conduct (MDC)**

Cases of misleading or deceptive conduct brought before the courts should be referred to the WAIRC where an employment relationship is the focus of the alleged conduct. The *Fair Trading Act 1987 (WA)* would need to be amended to enable this. Such an amendment would make the process easier and less intimidating for claimants, and would allow the issue to be determined by a Commissioner with expertise in the area of employment relationships.

## **B) Terms and conditions of employment**

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### **6. Employment agreements**

ELC is of the view that Employer-Employee Agreements (**EEAs**) are not suitable for vulnerable employees. EEAs allow employers to contract below award conditions and the MCE Act in some circumstances. Whilst this may not be problematic for employees with high incomes and significant bargaining power, EEAs expose ELC’s vulnerable client base to the potential for exploitation. EEAs should be abolished in the state system, or restricted to employees on high incomes. The high income threshold relating to unfair dismissal is a recognition of the increased bargaining power of high income earners and would be the most appropriate figure to be used in determining a “high income earner” for the purpose of allowing EEAs.

The abolition of Australian Workplace Agreements (**AWAs**) at the federal level was met with widespread public support throughout the nation. This reaction

demonstrates the extent to which the Australian public is not prepared to accept individual workplace agreements which exploit an imbalance of power and allow for the breach of statutory minimum conditions of employment.

If individual agreements of any nature are to be introduced or retained, they must be subject to a comparison test prior to registration to protect against the erosion of minimum conditions. ELC favours the “better off overall” test (**BOOT**) introduced by the FW Act, due to commence at the beginning of 2010. The BOOT requires that any agreement results in each employee being “better off overall” than they would be under the most relevant comparison instrument, which will most often be an applicable modern award. Obviously, if such a test were to be introduced at state level, state awards rather than modern federal awards would be the relevant comparison instruments for the purposes of the test.

## **7. State awards**

ELC believes that state awards in Western Australia should be modernised, primarily to improve clarity of expression and structure.

Many awards are ambiguous in their coverage. When assisting clients, ELC is often required to identify which, if any, state award may apply to the client. This ambiguity makes it difficult to determine whether or not a specific award is applicable to a client. In some instances several state awards may be similar enough with regard to their intended scope of coverage that it is unclear which is applicable to the client.

Any modernisation process should include a re-drafting of the awards using plain English. This would make awards easier to use for both employers and employees and assist both parties in understanding their rights and responsibilities.

## **8. Minimum wages**

ELC encourages a wage increase for youth. Currently, young people may be paid as little as 40% of minimum wage (see **Tables 2 and 3**). For many, this may not be enough to maintain a satisfactory living standard. Many minors do not live under the care of their parents or guardians and are wholly self reliant. ELC recommends an inquiry into the current needs and standard of living of employed children in Western Australia. This could be conducted as a single inquiry designed to consider a permanent alteration to the percentages governing the differential between child and adult wages. Alternatively, a regular review conducted as a part of the normal minimum wage review process could be implemented.

**Table 2: Minimum wage from 1 July 2009 until the first pay period on or after 1 October 2009**

Age		Full time week rate (38 hours)	Hourly rate	Casual hourly rate
Adult (21 years or more)		\$557.40	\$14.67	\$17.60
20 years	90%	\$501.70	\$13.20	\$15.84
19 years	80%	\$446.00	\$11.74	\$14.08
18 years	70%	\$390.20	\$10.27	\$12.32
17 years	60%	\$334.50	\$8.80	\$10.56
16 years	50%	\$278.70	\$7.33	\$8.80
Under 16 years	40%	\$223.00	\$5.87	\$7.04

**Table 3: Minimum wage as of the first pay period on or after 1 October 2009**

Age		Full time week rate (38 hours)	Hourly rate	Casual hourly rate
Adult (21 years or more)		\$569.70	\$14.99	\$17.99
20 years	90%	\$512.73	\$13.49	\$16.19
19 years	80%	\$455.75	\$11.99	\$14.39
18 years	70%	\$398.79	\$10.49	\$12.59
17 years	60%	\$341.82	\$8.99	\$10.79
16 years	50%	\$284.85	\$7.50	\$9.00
Under 16 years	40%	\$227.88	\$5.99	\$7.19

Under the current system, rates of pay for apprentices and trainees differ from those of employees and often fall below the minimum wage. Contracts of apprenticeship and other contracts of service under which a minor acquires skills should not be harsh, oppressive or unconscionable.

## **9. Minimum Conditions of Employment**

It is ELC's view that the MCE Act should be expanded to include all elements of the federal National Employment Standard (**NES**) introduced by the FW Act. In the federal system the NES applies to:

- hours of work;
- parental leave;
- flexible work for parents;
- annual leave;
- personal, carer's and compassionate leave;
- community service leave;
- public holidays;

- information in the workplace;
- notice of termination in employment and redundancy; and
- long service leave.

To meet the standard set by the FW Act with regard to an acceptable “safety net” of minimum entitlements, ELC proposes that the MCE Act should be extended to cover:

- redundancy;
- information in the workplace;
- notice of termination in employment;
- jury and community leave;
- an extra 12 months of unpaid parental leave; and
- unpaid parental leave at least equivalent to that in the NES.

Other requirements of employers in the FW Act outside of the NES should also be implemented in the state system. Specifically, the requirements to:

- provide employees with a meal break of 30 minutes if an employee works for longer than 5 consecutive hours; and
- display a copy of any relevant award at the workplace.

The provisions of the Federal Government’s proposed paid parental scheme should also be incorporated into the state’s minimum conditions safety net.

## **10. Long service leave**

The current provisions of the *Long Service Leave Act 1958 (WA)* (**LSL Act**) should be retained. However, the Act should be amended to clarify whether payment in lieu of notice of termination forms part of the period of continuous employment for the purpose of accruing long service leave. There is currently uncertainty as to whether or not an employee’s period of continuous employment under the LSL Act includes the period of notice an employee would be eligible to work after a termination, in the situation where the employer has paid compensation in lieu of requiring the employee to work out the notice period.

## **11 Unpaid trial work and training**

### *11.1 Training bonds*

Training bonds should be regulated under the state system. It is common for employers to make agreements with their employees to pay for internal training or external courses during the course of the employment relationship. Problems arise when agreements are loosely made, and the exact terms of repayment (or non-repayment) are not sufficiently defined or understood. The regulation of training bonds, whether through amendments to the IR Act or otherwise, should address:

- the necessity for a clear and properly understood agreement to be made;
  - regulation of the quantum of damages able to be agreed to and recovered;
- and

- protection against dismissal for a refusal to make a training bond agreement (sufficient to cover all employees including those not eligible for unfair dismissal remedies).

### *11.2 Unpaid trial work*

Requiring any employee to complete unpaid trial work should be unlawful. This is particularly important in the context of children. Unpaid trial work refers to unpaid work which is carried out by a potential employee with a view to gaining ongoing employment with the employer for whom the unpaid work is carried out. It does not include volunteer work or work experience carried out in accordance with educational or vocational programs.

The IRLA Bill sought to establish an obligation on employers to ensure that children worked a maximum of one day of unpaid trial work per year. It is ELC's view that unpaid trial work should be banned entirely, as is the case in New South Wales and South Australia, as well as under many major industry state awards.

## **12. Conditions for children (under 18s)**

### *12.1 Vulnerability of children in employment relationships*

Children are particularly vulnerable in the employment context and as such special provisions should be introduced over and above the statutory minimum conditions in order to protect their rights in the workplace. Any power imbalance between employers and employees is likely to be greater where children are employees. This is because children are:

- less likely to question those in a position of power above them;
- less likely to be aware of their rights;
- less likely to know when their rights are being breached; and
- less likely to know how to remedy breaches of their rights.

This necessitates a stronger set of protections which are wide ranging in their application and operate effectively as preventative measures, as well as providing for remedies in the event of wrongdoing.

### *12.2 Protections for children who are national system employees – Subdivision 1, Division 2, Part 4 of the IRLA Bill*

The Work Choices amendments of 2006 have resulted in a significant proportion of Western Australian employees moving into the federal system. As a result, children employed by constitutional corporations in Western Australia are not covered by certain important protections, primarily those afforded by state awards and the IR Act. National system employers who employ children should be required to provide children with conditions that are no less favourable than a comparable state award, or the statutory minimum conditions where the award is less favourable.

A "comparable state award" refers to a state award which regulates the terms and conditions of employment of employees carrying out the same kind of work

as the work carried out by the child. Conditions under comparable state awards include:

- wages;
- meal breaks;
- overtime; and
- allowances.

### *12.3 Children as independent contractors*

Independent contracting arrangements place workers outside the scope of employment protections, due to the nature of the relationship essentially forming an agreement between two businesses, rather than an employee and employer arrangement. This implication of bargaining parity is unlikely to be accurate in the majority of instances where children are involved. A child's relative lack of education and experience in regard to their workplace rights makes them unacceptably vulnerable to exploitation in the pre-contractual bargaining phase of an independent contracting arrangement. Furthermore, these arrangements can allow employers to circumvent legislation directed at "employees" for the purpose of exploiting a child's diminished bargaining power during the operation of the contract.

It is ELC's experience that "sham contracting" arrangements, designed to make an employment relationship look like an independent contracting arrangement, are fairly common. These sham arrangements are designed to allow an employer to avoid meeting minimum conditions found in employment instruments and normally go unquestioned when children are involved. Accordingly, ELC believes that legislation should be passed or existing legislation amended to prevent businesses of any kind from entering into independent contracting arrangements with children.

### *12.4 Transfer of claim*

ELC also supports the introduction of a procedural system which makes it easy and simple to transfer a claim mistakenly made under the CCS Act on the basis that the employer is a constitutional corporation, to a claim made under the IR Act.

### *12.5 Enforcement procedures*

If a child in the state or federal system is subject to conditions less favourable than those prescribed under the minimum statutory conditions, or under the relevant award, then the WAIRC should be able to conciliate an application in relation to whether the child has been subject to less favourable conditions. If such a conciliation is not successful, the WAIRC should be able to hear and determine the matter.

In these circumstances, the WAIRC should be able to make orders including:

- compensation for underpayment;
- that the employer do or refrain from doing something (i.e. refrain from engaging any other children on a trial basis);
- a declaration;
- an order dismissing the application; or
- any ancillary or incidental order necessary.

#### *12.6 WAIRC claims for children who are national system employees – Division 3 Part 4 of the IRLA Bill*

Children working as employees for constitutional corporations should also be able to make unfair dismissal claims and DCB claims to the WAIRC. Section 17 of the *Industrial Relations (Child Employment) Act 2006* (NSW) provides a useful example and precedent for effecting the unfair dismissal element of this goal.

The FW Act prescribes 6 and 12 month qualification periods for unfair dismissal. These are unsuitable for children, who are more likely to be engaged on seasonal or other short term arrangements. With regard to the denial of contractual benefits, the issues outlined above at 3.1 regarding the difficulty of making a claim in the MC are magnified in the case of children, who will in almost all situations be unable to self represent or afford legal representation. For this reason it is crucial that all children, both national system employees and state employees, are eligible to make a DCB claim to the WAIRC.

#### *12.7 Maximum hours of work for children*

There is no legislation in Western Australia which limits the number of hours of work per day or per week for children. Although children of school based age are prevented from working within school hours,<sup>14</sup> there is no limitation on the hours of work they might perform in a day or a week outside of those hours. ELC recommends that s5(3) of the *Child Employment Regulation 2006* (Qld) (**CER**) be reproduced in the Western Australian system to provide some regulation in this area. Section 5(3) of the CER limits school aged children to 12 hours of work during a school week and 38 hours in a non school week.

#### *12.8 Children's division for courts and commissions*

A separate division should be established for hearing and conciliating claims involving children in the WAIRC and the court system, as currently occurs within the family law court system. This need not involve the creation of a separate and independent system. Such a division might be limited to the allocation of cases involving children to specific personnel educated for and experienced with children's employment law issues. Such personnel need not deal exclusively with children and would continue to operate in the current system at times when no children's cases were allocated.

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<sup>14</sup> s29 *School Education Act 1999* (WA).

### *12.9 Regulation of contracts of employment for children*

ELC believes that it should be mandatory for all contracts of employment involving school aged children be signed by a parent or guardian of the contracting minor. Section 10 of the *Child Employment Act 2006* (Qld) provides a precedent in regard to this aim. ELC also recommends a further provision requiring any employment contract involving a minor be “principally for the benefit of the contracting minor”. These two provisions largely reflect the common law position and would add certainty and ease of redress to current protections.

### *12.10 Children’s Award*

ELC strongly supports the implementation of a separate children’s award to guarantee the recommendations made above and to allow for a general safety net catering to the special needs of children. This award would operate alongside any applicable existing or future state award but would only be enforced over any other applicable awards to the extent that it would provide for more favourable conditions. Such an award would be an alternative to amending or introducing legislation to effect the reforms mentioned above and its content would include occupational safety and health, mealtime breaks, maximum hours of work, trial work, unfair dismissal and overtime.

## **C) Enforcement and information bodies**

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### **13. Department of Commerce (DOC) inspectorate division**

The DOC inspectorate division is vital in maintaining and enforcing employment standards. The obstruction of industrial inspectors should continue to be classed as a civil penalty provision.

### **14. Department of Commerce above award and MCE entitlement**

Under ss541 and 542 of the FW Act, the federal enforcement body now known as the Fair Work Ombudsman may enforce contractual matters relating to the NES, even where the contractual entitlement is more generous than the NES. An equivalent provision should exist in the MCE Act to allow the DOC to enforce above-minimum contractual entitlements relating to minimum conditions.

### **15. Wageline**

Wageline is a valuable service for all private sector employees in Western Australia. It should continue to provide a free confidential information service in relation to:

- rates of pay;
- conditions of employment; and
- workplace awards and agreements.

## D) Dispute Resolution

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### 16 Conciliation - Part 3 of the IRLA Bill

#### 16.1 Referrals from the Magistrate's Court

If the MC determines that a claim is employment related, it should be referred to the WAIRC for mediation. The conciliation process at the WAIRC should be maintained for resolving DCB claims.

The WAIRC should be able to:

- compulsorily require parties to attend the conciliation;
- hear and determine any set-off and counterclaim by an employer;
- make orders for the payment of a sum of money found to be owing or by way of compensation or restitution;
- make orders for specific performance of the relevant contract; and
- order a party to do or refrain from doing something.

#### 16.2 Two conciliation conferences before hearing

The conciliation process is an efficient and useful way for employees and employers to resolve their employment law dispute.

Conciliation conferences should be the preferred dispute resolution model as they are:

- faster;
- cheaper;
- more flexible; and
- less formal than a hearing.

ELC favours two conciliation conferences being held before a hearing to increase the chance of a resolution.

### 17. Voluntary mediation

It is ELC's view that the mediation of employment-related claims in the MC by the WAIRC Commissioners is beneficial to employees and employers alike, particularly where small businesses are involved. Mediations should be conducted free of charge and no costs be awarded in relation to employment-related mediation.

A free voluntary mediation service is an effective, quick, inexpensive and flexible means of resolving workplace disputes. ELC encourages enforceable mediation settlement agreements which may be made with the consent of the parties.

## E) Miscellaneous

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### 18. No costs jurisdiction

A no costs jurisdiction is beneficial as it encourages efficiency and protects small businesses and employees who self represent. It is ELC's view that

employment - related claims brought in both the WAIRC and the courts should be exempt from costs awards.

### **19. Modernise all forms**

ELC supports the modernisation of all forms necessary for the initiation of proceedings in an industrial commission or court. Plain English drafting principles should be used to make the forms as simple and as easy to understand as possible. In their current state, the language used in the forms is outdated and not easily understood by the layperson. The language and format of the forms need to be modified to accommodate people who are not legally trained, as there is a significant number of self-represented litigants moving through the state industrial relations system.

Because of this, ELC conducts regular self-help sessions for employment law litigants and has done so since its inception. Anecdotal evidence from the paralegals and Principal Solicitor suggests that one of the difficulties in self-advocating in either the WAIRC or the MC is the outmoded prescribed forms. It is ELC's view that the simplification of these forms will ease the legal processes for both litigants and decision makers. The new Fair Work Australia forms are a good example of simplified forms.

### **20. Information statement**

Many employees are unaware of their legal rights, and this lack of knowledge can be exploited by unscrupulous employers. The NES requires employers to provide all new employees with an "information statement" outlining their basic rights and this requirement should be duplicated in the IR Act. Such a statement should be required to contain:

- a general statement regarding minimum entitlements and conditions;
- information on how to access further assistance or advice, including contact details for Wageline, Worksafe and WorkCover;
- a brief statement on unfair dismissal, highlighting the limitation date and advising how to submit a claim in the event of dismissal; and
- a statement on the requirement for employers to give adequate notice when terminating an employee's employment, including a table illustrating notice requirements according to length of service.

In addition to the information statement, the IR Act should require that where a written contract of employment has been executed, employers must provide employees with a copy of this contract at the commencement of employment.

### **21. Post-employment restraints**

Generally the scope of a post-employment restraint is determined by reference to its:

- duration;
- area of coverage; and
- activities restrained.

The extent to which a post-employment restraint can legitimately operate with regard to the above factors is currently determined by the courts in accordance with the common law. Legislation in regard to this issue would provide greater certainty in this area, allowing employers and employees to gain an understanding of what should be considered fair and reasonable at the contracting stage, and therefore reducing the likelihood of litigation at a later date. Such legislation would also discourage employers from using unreasonably wide restraints. Overly general restraints do little to protect an employer's business, stifle competition and prevent an employee from earning a living.

## **22. Creating one piece of legislation**

ELC supports the view that many pieces of legislation governing the rights of Western Australian employees could be integrated into a single Act. A well-structured employment/industrial relations Act can greatly simplify the process of determining an employee's rights. Western Australian employees may be governed by a variety of instruments including WA collective agreements, state awards, a General Order, a common law contract and a variety of Acts. While agreements, awards, common law contracts and legislation cannot be integrated, the complex process of determining which are applicable and how they operate respective to each other can be streamlined by the creation of a single Act containing the most fundamental rights and governing these interactions. At a minimum, a modernised industrial relations Act could combine the content of the current IR Act, the MCE Act, the LSL Act and the General Order on Redundancy.