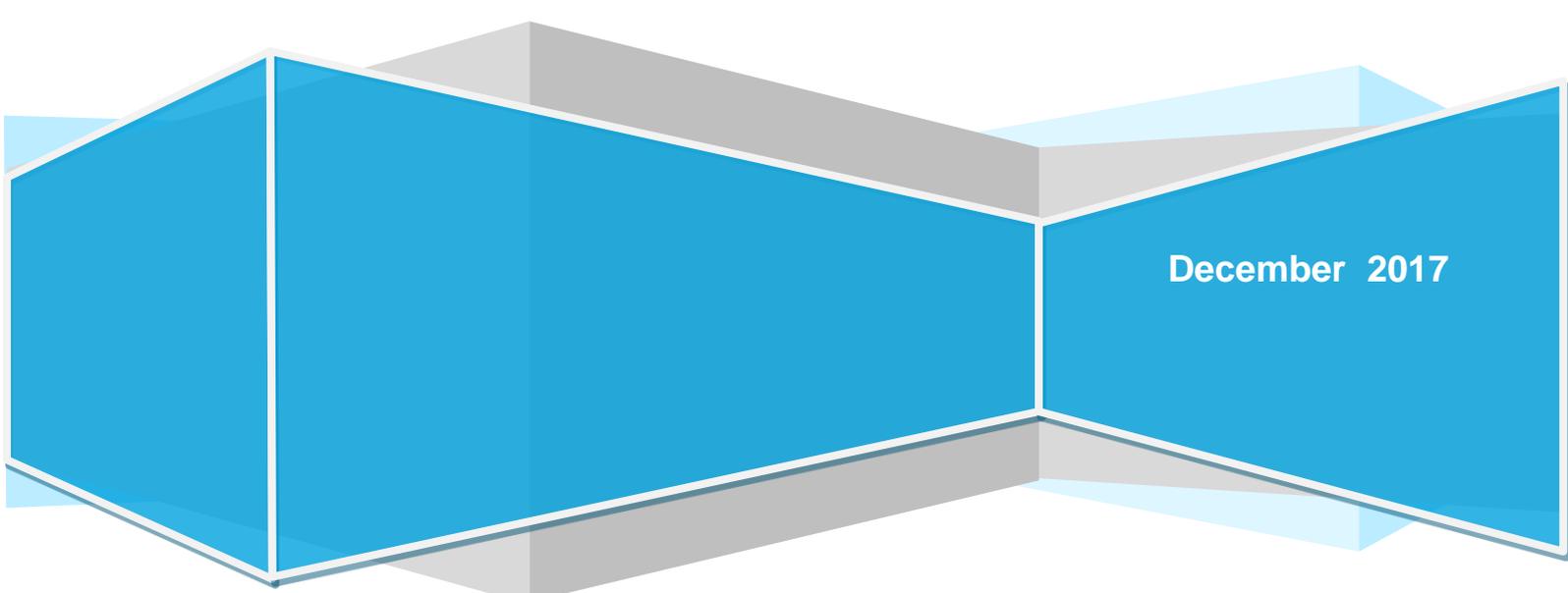


Submission

Ministerial Review of the State Industrial Relations System



December 2017

Ministerial Review of the State Industrial Relations System
Mr Mark Ritter SC
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8 December 2017

Dear Mr Ritter

Ministerial Review of State Industrial Relations System

The Employment Law Centre of Western Australia (Inc) (**ELC**) welcomes the opportunity to make a submission to the Ministerial review into the State industrial relations system (**Review**).

ELC is a community legal centre that specialises in employment law. It is the only not-for-profit legal service in Western Australia offering free employment law advice, assistance, education and representation. ELC assists thousands of callers each year through our Advice Line service and provides several hundreds of employees with further assistance from a solicitor each year.

Please see our submission below. We would be happy to provide further information to the Review and participate in further consultation should there be any opportunity to do so.

Yours sincerely

Rowan Kelly
Principal Solicitor

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Principal Solicitor

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Glossary

DMIRS means the Department of Mines, Industry Regulation and Safety

FW Act means the *Fair Work Act 2009* (Cth)

FWC means the Fair Work Commission

ILO means the International Labour Organisation

IR Act means the *Industrial Relations Act 1979* (WA)

LSL Act means the *Long Service Leave Act 1958* (WA)

MCE Act means the *Minimum Conditions of Employment Act 1993* (WA)

MCE Regulations means the *Minimum Conditions of Employment Regulations 1993* (WA)

NES means the National Employment Standards under the FW Act

OSH Act means the *Occupational Safety and Health Act 1984* (WA)

PSM Act means the *Public Sector Management Act 1994* (WA)

SACS case means *Re Equal Remuneration Case* (2011) 208 IR 345; *Re Equal Remuneration Case* (2012) 208 IR 446; and *Re Equal Remuneration Case* (2012) 223 IR 410

TCR Order means the *Termination, Change and Redundancy General Order 2005 WAIRC 01715*

WAIRC means the Western Australian Industrial Relations Commission

Summary of recommendations

ELC recommends as follows:

Recommendation 1: That the constituent authorities be abolished and their powers and functions instead be transferred to the general jurisdiction of the WAIRC.

Recommendation 2: That public sector employees should generally have the same rights as private sector employees, subject to the proviso that no employees should lose their existing entitlements.

Recommendation 3: That public sector workers should have the same rights to make unfair dismissal claims under section 23A of the IR Act as private sector employees.

Recommendation 4: That the Public Service Arbitrator be abolished and its powers and functions transferred to the general jurisdiction of the WAIRC.

Recommendation 5: That the scope of the Public Service Arbitrator jurisdiction be expanded to hear issues of substance in decisions of redeployment and redundancy.

Recommendation 6: That the scope of the Public Service Arbitrator jurisdiction be expanded to hear redeployment and redundancy matters in circumstances where the employment of the employee has already come to an end.

Recommendation 7: That the scope of the Public Service Arbitrator jurisdiction be expanded to hear breach of public sector standards.

Recommendation 8: That the limitation period for unfair dismissal claims be extended to 90 days.

Recommendation 9: That the IR Act be amended to include additional equal remuneration provisions, broadly in line with those in the *Industrial Relations Act 1999* (Qld).

Recommendation 10: That the definition of “employee” in the IR Act and the MCE Act be amended so as not to exclude persons engaged in domestic service in private homes.

Recommendation 11: That the MCE Regulations be amended so as not to exclude pieceworkers and commission-only workers from the definition of an “employee” under the MCE Act.

Recommendation 12: That consideration be given to what protections should be afforded to workers in the gig economy.

Recommendation 13: That the minimum conditions of employment in the MCE Act, the LSL Act and the TCR Order be reviewed to consider whether they should be updated.

Recommendation 14: That there be a process for regularly considering and updating statutory minimum conditions of employment, provided that employees do not lose existing entitlements and that the review process not occur too frequently so as to be overly onerous for the parties involved.

Recommendation 15: That Parliament enact a single piece of simplified legislation dealing with workplace relations in Western Australia, including comprehensive minimum employment standards and the TCR General Order.

Recommendation 16: That the MCE Act be amended to prescribe additional limitations on when an employer is authorised to make deductions from an employee’s pay.

Recommendation 17: That the MCE Act be amended to increase casual loading to at least 25%.

Recommendation 18: That the LSL Act be amended to provide greater clarity around the characterisation of payment in lieu of notice and continuity of service associated with the transmission of business.

Recommendation 19: That the MCE Act be amended to include at least the minimum conditions of employment and protections in the national system where a new or better entitlement is provided.

Recommendation 20: That a process be devised for the updating of State awards for private sector employers and employees, as set out in Term of Reference 6.

Recommendation 21: That Term of Reference 6 be expanded to include:

(a) the updating of State awards for public sector employers and employees; and

(b) the requirement that no employee be worse off in respect of each entitlement, rather than considering it on an overall basis.

Recommendation 22: That the WAIRC undertake the review of the State awards.

Recommendation 23: That there be a process for public consultation and submission regarding the process of updating any awards, and that the process of updating State awards occur periodically, provided that employees do not lose existing entitlements and that the review process not occur too frequently so as to be overly onerous for the parties involved.

Recommendation 24: That statutory compliance and enforcement mechanisms be flexible, informal and drafted so that they are easily understood by the layperson.

Recommendation 25: That the penalties for non-compliance be significantly increased.

Recommendation 26: That further enforcement options be introduced, such as enforceable undertakings and accessorial liability provisions, similar to the national system.

Recommendation 27: That industrial inspectors have the power to enforce contractual matters relating to statutory minimum entitlements.

Recommendation 28: That an anti-bullying jurisdiction be introduced in the WAIRC, similar to that which exists in the FWC. However, bullied workers should be able to make a bullying complaint even after their employment has ended and should be able to seek compensation for the bullying that has occurred.

Recommendation 29: That further consideration be given to whether any legislative changes could be made which would give local government employers and employees further certainty as to which system of laws they fall into.

1. The structure of the WAIRC

Term of Reference 1: Review the structure of the WAIRC with the objective of achieving a more streamlined and efficient structure.

1.1 Constituent authorities

1. One of the features of the existing industrial relations system in Western Australia is that, in addition to the WAIRC itself, there are a number of constituent authorities established under the IR Act, including the Public Service Appeal Board, the Public Service Arbitrator and the Railways Classification Board.
2. Several reviews of the State industrial relations system have recommended that these constituent authorities be abolished, including the Amendola, Fielding and Cawley reviews.¹ Similarly, the Chief Commissioner of the WAIRC has recently expressed the view that “the work of the [Public Service Appeal Board] would be best absorbed into the work of the Commission under its general jurisdiction.”²
3. ELC is also of the view that these constituent authorities should be abolished and their functions and powers transferred to the general jurisdiction of the WAIRC for a range of reasons. For example, the existing system is overly complex and confusing, and seems to be less efficient than dealing with these matters through the general jurisdiction of the WAIRC (as discussed further below). Additionally, ELC is of the view that public sector employees should generally have the same rights as private sector employees, subject to the proviso that employees should not lose any of their existing rights. This is discussed further under Terms of Reference 2 and 6 below.

1.1.1 Complexity and confusion in relation to jurisdiction

4. Where a public sector employee is a “government officer” within the meaning of the IR Act, he or she falls within the jurisdiction of the Public Service Appeal Board. This means, for instance, that a government officer can appeal a decision to dismiss him or her to the Public Service Appeal Board under section 80I(1)(d) of the IR Act. Although this is described as an appeal, it is de facto a claim at first instance challenging the decision.
5. The consequence of being a government officer (and falling within the jurisdiction of the Public Service Appeal Board) appears to be that such an employee is ineligible to make certain other types of claims under the WAIRC’s general jurisdiction, such as an unfair dismissal claim (as discussed further below).³
6. The term “government officer” is defined in such a way that it is necessary to consult numerous other sections of the IR Act and the PSM Act for definitions of other key terms, and there are multiple exclusions – such as teachers, railway officers and academic staff at post-secondary education institutions.⁴ Determining whether a public sector employee is a government officer can therefore be a complex and convoluted process, potentially leading to confusion for all involved.

¹ S Amendola, *Review of the Western Australian Industrial Relations System: Final Report*, 30 October 2009, see e.g. p. 24; G L Fielding, *Review of the Western Australian Labour Relations Legislation: A report to the Hon. G.D. Kierath, MLA, Minister for Labour Relations*, July 1995; S Cawley, *The Industrial Relations Act 1979 and the Western Australian Industrial Relations Commission: A paper, with recommendations, presented to Hon J Kobelke, MLA, Minister for Consumer and Employment Protection*, May 2003, see e.g. p. 44.

² Report of the Chief Commissioner of the Western Australian Industrial Relations Commission, Annual Report 2015/16, 15 September 2016.

³ IR Act, s 23(3)(d). See also discussion further below under Term of Reference 2.

⁴ See, for example, IR Act s 80C; and PSM Act, s 3

7. This complexity and confusion potentially impacts on an employee's fundamental capacity to initiate proceedings in the correct jurisdiction.

1.1.2 **Efficiency**

8. The Chief Commissioner of the WAIRC recently noted a number of issues which prevent the Public Service Appeal Board from operating as efficiently as possible, and which supported the view that the Board's work would be best absorbed into the WAIRC's work.⁵

9. For example:⁶

- (a) each time a government officer lodges an appeal with the Public Service Appeal Board, a new Board must be formed;
- (b) the process of forming a new Board often leads to delay due to the process of having to find suitable employer and employee representatives, and finding a time that all three Board members are available for hearing;
- (c) the potential for delay in organising a suitable hearing date limits the Board's capacity to deal with urgent matters;
- (d) in practice, the Board often operates as if it were a Commissioner sitting alone in any case, in the sense that employer and employee representatives generally provide little input into the Board's deliberations as the Commissioner provides the deciding vote.

10. ELC shares these views that the existing system is lacking in efficiency and that the Public Service Appeal Board's functions should instead be transferred to the WAIRC's general jurisdiction.

Recommendation 1: That the constituent authorities be abolished and their powers and functions instead be transferred to the general jurisdiction of the WAIRC.

⁵ Report of the Chief Commissioner of the Western Australian Industrial Relations Commission, Annual Report 2015/16, 15 September 2016.

⁶ See discussion in Report of the Chief Commissioner of the Western Australian Industrial Relations Commission, Annual Report 2015/16, 15 September 2016. See also IR Act, s 80H.

2. Jurisdiction and powers of WAIRC

Term of Reference 2: Review the jurisdiction and powers of the WAIRC with the objective of examining the access for public sector employees to the WAIRC on a range of matters for which they are currently excluded.

2.1 Public sector employees

11. In ELC's view, public sector employees should generally have the same rights as private sector employees, subject to the proviso that no employees should lose their existing entitlements.
12. Below ELC sets out some of the limitations on public sector employees' rights and the ways in which, in ELC's view, their rights should be extended.

2.1.1 Public Service Appeal Board

13. As discussed above, ELC is of the view that the Public Service Appeal Board should be abolished and its functions and powers should be transferred to the general jurisdiction of the WAIRC.
14. In our view, in addition to abolishing the Public Service Appeal Board, there are other reforms that should be made in relation to the causes of action or remedies available to public sector employees, especially in cases of dismissal.

2.1.1.1 Appeals under section 80I(1)(d) of the IR Act

15. As noted above, government officers can appeal a decision to dismiss them under section 80I(1)(d) of the IR Act.
16. As a result of the operation of section 23(3)(d) of the IR Act, government officers appear to be prevented from making unfair dismissal claims to the WAIRC because they are potentially eligible to appeal to Public Service Appeal Board under section 80I of the IR Act. Section 23(3)(d) provides that the WAIRC shall not:

regulate the suspension from duty in, discipline in, dismissal from, termination of, or reinstatement in, employment of any employee or any one of a class of employees if there is provision, however expressed, by or under any other Act for or in relation to a matter of that kind and there is provision, however expressed, by or under that other Act for an appeal in a matter of that kind...

17. There are significant limitations on the circumstances in which an appeal 80I(1)(d) can be lodged and the remedies available for such an appeal, compared to unfair dismissal. Some of the key limitations are outlined below.

2.1.1.1.1 Forced resignation unlikely to give rise to right to appeal

18. In cases where government officers have been forced to resign – i.e. no decision has been made to dismiss them, but the conduct of the employer is such that they are left with no other choice but to resign – it is unlikely that they can lodge an appeal under section 80I of the IR Act.⁷

⁷ See for example *Ex parte Public Service Commissioner* (Unreported, Supreme Court of Western Australia, Full Court, Rowland, Franklyn and Wallwork JJ, 14 February 1994, 24 May 1994).

2.1.1.1.2 Limited remedies available

19. Further, even where a government officer successfully appeals a decision that he or she be dismissed, at present the Public Service Appeal Board can only “adjust” the decision.
20. The word “adjust” has been interpreted as being a power to reform the decision in some way.⁸ In *State Government Insurance Commission v Terence Hurley Johnson*,⁹ Anderson J held that while it may be arguable that the power to adjust a decision of dismissal includes a power to adjust the period of notice, the Public Service Appeal Board does not have jurisdiction to provide remedies which do not relate directly to an adjustment of an employer’s decision – for instance, compensation where the employee does not seek reinstatement. Any appeal which seeks such relief will be dismissed.¹⁰
21. In ELC’s experience, many employees who have been dismissed do not wish to return to work with their employers because they feel that the relationship has broken down. The fact that government officers are unable to seek compensation for dismissal, unless they are also seeking reinstatement, is therefore a significant limitation.
22. The restrictions that apply to appeals under section 80I of the IR Act stand in contrast to the relative flexibility of unfair dismissal claims under section 23A of the IR Act. There is no doubt that employees who have been forced to resign can make unfair dismissal claims under section 23A and that the remedies available for unfair dismissal include compensation for loss or injury caused by the dismissal.¹¹

2.1.1.1.3 Limitation periods

23. Another key distinction between dismissal-based appeals to the Public Service Appeal Board and unfair dismissal claims is the limitation period.
24. Under regulation 107(2) of the *Industrial Relations Commission Regulations 2005 (WA)*, government officers can appeal within 21 days after the date of the decision, determination or recommendation in respect of which the appeal is made.
25. On the other hand, under section 29(2) of the IR Act, an employee has 28 days after the day on which the employee’s employment is terminated to refer a claim that he or she has been harshly, oppressively or unfairly dismissed from his or her employment to the WAIRC.
26. The issue of limitation periods for unfair dismissal is considered further below under heading 2.2: Unfair dismissal limitation periods.

2.1.1.1.4 Conclusion

27. In ELC’s view, government officers should have the same rights to make unfair dismissal claims under section 23A of the IR Act as private sector employees.
28. As discussed above, this is subject to the proviso that no employees should lose their existing entitlements. In ELC’s view, this could be done by either expanding section 23A of the IR Act to also ensure it includes the same rights as under section 80I(1)(d) of the IR Act (to replace the rights to appeal a dismissal to the Public Service Appeal Board under section 80I(1)(d) of the IR Act) or to give a public sector employee rights under both section 23A and section 80I(1)(d) of the IR Act.

⁸ Anderson J in *State Government Insurance Commission v Terence Hurley Johnson* (1997) 75 IR 195 at 197.

⁹ (1997) 75 IR 195.

¹⁰ See for example *Catherine Smit v Department of Education* [2010] WAIRC 00404.

¹¹ IR Act, s 23A(6).

2.1.2 Public Service Arbitrator

29. As discussed above under Term of Reference 1, ELC is of the view that the Public Service Arbitrator should be abolished and that its functions and powers should be transferred to the general jurisdiction of the WAIRC.
30. In our view, in addition to abolishing the Public Service Arbitrator, there are other reforms that should be made in relation to the causes of action or remedies available to public sector employees, especially in matters of redeployment and redundancy of employees and procedures for seeking relief in respect of breach of public sector standards.

2.1.2.1.1 Scope

31. The Public Service Arbitrator has exclusive jurisdiction to enquire into and deal with any industrial matter relating to a government officer, a group of government officers or government officers generally under section 80E(1) of the IR Act.
32. The scope of this jurisdiction is limited under section 80E(7) of the IR Act which states that the Public Service Arbitrator:

...does not have jurisdiction to enquire into or deal with, or refer to the Commission in Court Session or the Full Bench the following –

- (a) *any matter in respect of which a decision is, or may be, made under regulations referred to in the Public Sector Management Act 1994 section 94 or 95A;*
- (b) *any matter in respect of which a procedure referred to in the Public Sector Management Act 1994 section 97(1)(a) is, or may be, prescribed under that Act.*

2.1.2.1.2 Redeployment and redundancy of employees

33. Section 80E(7)(a) prevents the Public Service Arbitrator from hearing any matters of redeployment and redundancy.
34. Section 95(2) and 96A of the PSM Act provide a right of referral to the WAIRC on limited grounds, to public sector employees aggrieved by decisions taken by their employer in relation to redeployment and redundancy matters.
35. In exercising its jurisdiction in this regard the WAIRC must confine itself to determining whether or not the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* have been fairly applied to or in relation to the employee concerned.
36. The WAIRC does not have jurisdiction if the employment of the employee concerned is dismissed.¹²
37. This means public sector employees have no rights to causes of action: as to issues of substance in decisions of redeployment and redundancy; and, in circumstances where the employment of the employee has already come to an end. This contrasts with the rights of all non-public sector employees under the jurisdiction of the WAIRC.

¹² PSM Act, s.95(6). See also *Matthew Crowley v Department of Commerce [2016] WAIRC 00882*.

2.1.2.1.3 Breach of public sector standards

38. Section 97(1)(a) of the PSM Act provides the Public Sector Commissioner with the function to make recommendations to the Minister on the making, amendment or repeal of regulations prescribing procedures, whether by way of appeal, review, conciliation, arbitration, mediation or otherwise, for employees and other persons to obtain relief in respect of the breaching of public sector standards.
39. The public sector standards include Grievance Resolution, which arguably may include resolving grievances of bullying in the workplace. The Public Service Arbitrator is unable to hear matters under this public sector standard.
40. ELC supports the introduction of an anti-bullying jurisdiction in the WAIRC similar to that which exists in the FWC.¹³ See the more detailed discussion of this point below under Term of Reference 7. If such a jurisdiction were to be introduced, public sector employees may be excluded from accessing causes of action or remedies available to non-public sector employees. ELC would support the removal of the limitation of section 80E(7).

2.2 Unfair dismissal limitation periods

41. Although the focus of Term of Reference 2 is primarily on public sector employees, ELC has set out some general comments below in relation to the limitation period for unfair dismissal, given our recommendation above that public sector employees should be able to access unfair dismissal claims in the same way as private sector employees.
42. As noted above, the limitation period for unfair dismissal claims under the IR Act is currently 28 days.¹⁴
43. ELC is concerned that many employees with legitimate unfair dismissal claims are prevented from making a claim because of short limitation periods.
44. ELC collated some statistics for the purposes of our March 2015 submission to the Productivity Commission's inquiry into the national workplace relations framework. In the 2014 calendar year, at least 186 callers contacted ELC for advice on making an unfair dismissal claim under the FW Act after the limitation period had expired. While these statistics related to national system employees (who only have 21 days in which to lodge an unfair dismissal claim) they are nonetheless instructive in relation to State system employees and the 28 day limitation period.
45. In ELC's experience, many recently dismissed employees are not aware of their rights and do not know how to lodge an unfair dismissal claim or who to go to for advice or assistance. Some employees are in such a state of shock at having been dismissed that they do not seek redress for an unfair dismissal until days, weeks and sometimes months after the dismissal. Many employees prioritise finding new employment following a dismissal.
46. When dismissed employees finally do seek assistance, it may not be possible for them to obtain legal advice and prepare an unfair dismissal claim straight away. These problems are exacerbated where the employee is from a non-English speaking background, has literacy issues or a disability, is unfamiliar with the relevant laws and the Australian legal system, or is in a rural, regional or remote location.
47. ELC notes that the 28 day limitation period for unfair dismissal claims is in contrast to other liberal democratic states, as illustrated in the table below. The three most directly comparable jurisdictions, the United Kingdom, Canada and New Zealand, provide 3-month

¹³ FW Act, Part 6-4B.

¹⁴ IR Act, s.29(2).

(in the case of the United Kingdom) and 90-day (in the case of Canada and New Zealand) limitation periods for unfair dismissal claims.

| Jurisdiction | Section | Limitation period |
|-------------------|-------------------------------|-------------------|
| Western Australia | s 29(2) of IR Act | 28 days |
| United Kingdom | s 111(2) of ERA ¹⁵ | 3 months |
| New Zealand | s 114 of ERA ¹⁶ | 90 days |
| Canada | s 240 of CLC ¹⁷ | 90 days |

48. In ELC's view, the limitation period for unfair dismissal claims under the IR Act should be extended from 28 days to 90 days, to ensure that employees are not unduly prevented from exercising their rights in relation to unfair dismissal, consistent with other comparable jurisdictions.

Recommendation 1: *(repeated here for convenience): That the constituent authorities be abolished and their powers and functions instead be transferred to the general jurisdiction of the WAIRC.*

Recommendation 2: That public sector employees should generally have the same rights as private sector employees, subject to the proviso that no employees should lose their existing entitlements.

Recommendation 3: That public sector workers should have the same rights to make unfair dismissal claims under section 23A of the IR Act as private sector employees.

Recommendation 4: That the Public Service Arbitrator be abolished and its powers and functions transferred to the general jurisdiction of the WAIRC.

Recommendation 5: That the scope of the Public Service Arbitrator jurisdiction be expanded to hear issues of substance in decisions of redeployment and redundancy.

Recommendation 6: That the scope of the Public Service Arbitrator jurisdiction be expanded to hear redeployment and redundancy matters in circumstances where the employment of the employee has already come to an end.

Recommendation 7: That the scope of the Public Service Arbitrator jurisdiction be expanded to hear breach of public sector standards.

Recommendation 8: That the limitation period for unfair dismissal claims be extended to 90 days.

¹⁵ *Employment Rights Act 1996* (UK) c 18, s 111(2).

¹⁶ *Employment Relations Act 2000* (NZ) s 114(1).

¹⁷ *Canada Labour Code*, RSC 1985, c L-2, s 240(2).

3 Equal remuneration

Term of Reference 3: Consider the inclusion of an equal remuneration provision in the IR Act with the objective of facilitating the conduct of equal remuneration cases and other initiatives in the WAIRC.

3.1 Pay inequality in Western Australia

49. Western Australia currently has the widest gender pay gap of all the states and territories of Australia at 22.8%.¹⁸ The average gender pay gap across Australia is 15.3%.¹⁹
50. In our view, Western Australia's current approach to equal remuneration needs improvement.

3.2 Equal remuneration under the current IR Act

51. The principle of equal remuneration is already present to a limited extent in the current IR Act.
52. Section 6(ac) of the IR Act states that one of the Act's principal objects is "to promote equal remuneration for men and women for work of equal value".
53. Under section 50A(3)(a)(vii) of the IR Act, the WAIRC is also required to consider the need to "provide equal remuneration for men and women for work of equal or comparable value" in setting minimum wages under section 50A.
54. However, these sections do not go far enough to give the WAIRC the clear authority to conduct equal remuneration cases and make equal remuneration orders, or to give Western Australian workers in the State system an effective mechanism by which to achieve equal remuneration.²⁰
55. Other jurisdictions' approaches to equal remuneration provide useful examples of how Western Australia's legislation could be improved. Below is a discussion of the approaches under the FW Act and in Queensland.

3.3 Equal remuneration under the Fair Work Act

56. Under Part 2-7 of the FW Act, a national system employee can apply for, and the FWC has the power to make, an equal remuneration order in certain circumstances.
57. Section 302(1) of the FW Act provides, for instance, that the FWC may make any order it considers appropriate to ensure that, for employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value.
58. In 2010, the Australian Services Union relied on the equal remuneration provisions of the FW Act to apply for an equal remuneration order for workers in the female-dominated social and community sector – see SACS case.
59. The SACS case resulted in an equal remuneration order²¹ that delivered significant wage increases for national system employees in the social and community sector.

¹⁸ ABS (2017), Average Weekly Earnings, May 2017, cat. No. 6302.0, viewed 20 November 2017, <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6302.0/>.

¹⁹ Ibid.

²⁰ See e.g. second reading of the Industrial Relations (Equal Remuneration) Amendment Bill 2011 (WA).

²¹ *Re Equal Remuneration Case* (2012) 223 IR 410.

60. Despite the success of the SACS case in 2012, the equal remuneration provisions of the FW Act have their limitations.
61. For instance, in 2015, the FWC made a preliminary ruling in a subsequent equal remuneration case that in order to make an equal remuneration order under the FW Act, FWC “must be satisfied that an employee or group of employees of a particular gender to whom the order would apply do not enjoy remuneration equal to that of another employee or group of employees of the opposite gender who perform work of equal or comparable value.”²²
62. In that case, this meant that the union that brought the case on behalf of female childcare workers needed to be able to identify a group of male employees, doing work of equal or comparable value, who were receiving higher remuneration.
63. Some commentators have outlined the problems with this approach (of needing to refer to a comparator of the opposite gender) and have argued that equal remuneration should instead be approached by considering whether the relevant work is undervalued.²³

3.4 Equal remuneration in Queensland

64. Queensland’s approach to equal remuneration is regarded as one of the most advanced within Australia.²⁴
65. In 2002, the Full Bench of the Queensland Industrial Relations Commission issued the Equal Remuneration Principle,²⁵ which was to be applied when the Commission made equal remuneration orders under the then *Industrial Relations Act 1999* (Qld).
66. The Equal Remuneration Principle expressly states that gender discrimination and male comparators are not necessary to establish undervaluation of work on a gender basis.²⁶ The Principle was relied upon in subsequent cases, which resulted in increases in pay for dental assistants and child care workers.²⁷
67. The key concepts in the Equal Remuneration Principle were incorporated into the *Industrial Relations Act 2016* (Qld), which provides (amongst other things) that:
 - (a) the Queensland Industrial Relations Commission must ensure that work under modern awards is appropriately valued and that awards provide for equal remuneration for work of equal or comparable value;²⁸
 - (b) the Queensland Industrial Relations Commission must make an order for equal remuneration where an award does not provide for equal remuneration for work of equal or comparable value.²⁹

²² *Equal Remuneration Decision* (2015) 256 IR 362 at [158].

²³ M Smith and A Stewart, “Shall I compare thee to a fitter and turner? The role of comparators in pay equity regulation”, (2017) 30 *Australian Journal of Labour Law*.

²⁴ See e.g. A Stewart, *Stewart’s Guide to Employment Law*, Fifth edition, The Federation Press, 2015, 216; A review of the industrial relations framework in Queensland: A report of the Industrial Relations Legislative Reform Reference Group, December 2015, 89; Queensland Industrial Relations Commission, *Pay Equity: Time to Act*, September 2007, 1.

²⁵ Queensland Industrial Relations Commission, Equal Remuneration Principle, 29 April 2002.

²⁶ Queensland Industrial Relations Commission, Equal Remuneration Principle, 29 April 2002, items 7 and 8.

²⁷ See e.g. *Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees v The Australian Dental Association (Queensland Branch) Union of Employers* [2005] QIRComm 183; (2005) 180 QGIG 929; *Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees v Children’s Services Employers Association* (2006) 182 QGIG 318.

²⁸ *Industrial Relations Act 2016* (Qld), s 248.

²⁹ *Industrial Relations Act 2016* (Qld), s 249.

- (c) the Queensland Industrial Relations Commission may make any order it considers appropriate to ensure employees covered by the order receive equal remuneration for work of equal or comparable value;³⁰
- (d) a wide range of persons are empowered to apply for equal remuneration orders, including an employee, union, State peak council, the anti-discrimination commissioner;³¹
- (e) comparisons within and between occupations and industries may be used, but are not required, to establish whether the work has been undervalued on a gender basis, and are not restricted to similar work;³² and
- (f) discrimination on the basis of gender is not necessary to establish the work has been undervalued.³³

68. The Queensland approach overcomes some of the problems identified above in relation to the FW Act, in the sense that it would not be necessary to identify a group of male employees, doing work of equal or comparable value, who were receiving higher remuneration in order to make an equal remuneration order for the benefit of female employees.

3.5 Conclusion

69. In our view, the IR Act should be amended broadly in line with the *Industrial Relations Act 1999* (Qld) as a means of improving pay equity for Western Australian employees.

Recommendation 9: That the IR Act be amended to include additional equal remuneration provisions, broadly in line with those in the *Industrial Relations Act 1999* (Qld).

³⁰ *Industrial Relations Act 2016* (Qld), s 252.

³¹ *Industrial Relations Act 2016* (Qld), s 253(1).

³² *Industrial Relations Act 2016* (Qld), s 248(4).

³³ *Industrial Relations Act 2016* (Qld), s 248(4).

4 Definition of “employee”

Term of Reference 4: Review the definition of “employee” in the IR Act and the MCE Act with the objective of ensuring comprehensive coverage for all employees.

4.1 Domestic workers

70. The term “employee” is currently defined in the IR Act and the MCE Act in such a way that it excludes “persons engaged in domestic service in a private home.”³⁴
71. In other words, domestic workers (such as cleaners and carers) are generally not considered to be “employees” for the purposes of Western Australia’s State industrial relations system.
72. The only circumstances in which domestic workers in private homes will be considered employees for the purposes of the IR Act and the MCE Act is where:³⁵
- (a) more than 6 boarders or lodgers live in the private home; or
 - (b) the domestic worker is employed by someone other than the owner or occupier of the private home.
73. The effect of this exclusion is that domestic workers in Western Australia generally do not have any of the same protections as other employees under the IR Act and the MCE Act. This means that generally:
- (a) they are not entitled to a minimum rate of pay;³⁶
 - (b) they do not have any minimum conditions of employment – e.g.:
 - (i) there is no upper limit on the number of hours they can be asked to work;³⁷
 - (ii) they can potentially be compelled to accept something other than money as pay (e.g. accommodation or goods);³⁸
 - (iii) an employer can potentially deduct money from their pay in a wide range of circumstances;³⁹
 - (iv) they are not entitled to annual leave, sick leave, public holiday pay, bereavement leave, or parental leave;⁴⁰ and
 - (c) they do not have any protection if they are unfairly dismissed.⁴¹
74. Additionally, where domestic workers are not paid their wages, or are paid less than promised, they generally do not have the same avenues for recourse as other employees in Western Australia. Such workers cannot make a claim for unpaid minimum wages against their employers in the Industrial Magistrates Court or seek assistance in enforcing

³⁴ IR Act, s 7(1); MCE Act, s 3(1).

³⁵ Ibid.

³⁶ Cf. other employees who are entitled to minimum rate of pay under Part 3 of the MCE Act.

³⁷ Cf. other employees – MCE Act, Part 2A.

³⁸ Cf. other employees – MCE Act, s 17B.

³⁹ Cf. other employees – MCE Act, s 17D.

⁴⁰ Cf. other employees – MCE Act. Note that some of these entitlements are only available to permanent employees.

⁴¹ Cf. other employees – IR Act, s 29(1)(b)(i).

their wages through the industrial inspectorate at DMIRS; their main option for pursuing unpaid or underpaid wages is to make a breach of contract claim.

75. A breach of contract claim relies on proving the existence of a contract and on proving the terms of the contract, which can be difficult given the types of informal employment arrangements that are likely to exist in private homes – for example, there may be no written contract or other records and workers may be paid cash in hand. Additionally, there is no obligation for employers in private homes to keep records for domestic workers.⁴²
76. In ELC’s view, it is highly problematic that domestic workers in private homes in Western Australia are generally not treated as employees and therefore do not have the same basic employment protections as other employees. This creates a situation in which domestic workers may be readily exploited.
77. Domestic workers are in many ways more vulnerable to exploitation than other workers (irrespective of the existing legislative framework in Western Australia), in the sense that their work is hidden away in private homes, they are isolated, and they often live where they work. Indeed, research conducted by the ILO has indicated that domestic work is one of the industries in which forced labour is more likely to be present worldwide.⁴³
78. The Australian government reported in 2015 that “[c]ases of men and women exploited in situations outside the sex work industry, such as in the **domestic work**, hospitality and construction industries...are now being identified by Australian authorities on a comparable basis to those exploited within the sex work industry.”⁴⁴ [emphasis in bold added]
79. Similarly, according to The Salvation Army and the Walk Free Foundation, there have been “several serious cases of domestic worker exploitation” in Australia in recent years.⁴⁵ Between 2008 and 2015, The Salvation Army assisted 20 domestic workers who had been subjected to “degrading and humiliating conditions, including deprivation of food, withholding of identity documents, physical and sexual abuse, threats, and intimidation.”⁴⁶
80. The Australian government has indicated that it is committed to tackling modern slavery and human trafficking, as outlined in the *National Action Plan to Combat Human Trafficking and Slavery 2015-2019*.
81. In ELC’s view, any attempt to tackle modern slavery and human trafficking in Australia must include efforts to protect domestic workers, for the reasons provided above.
82. ELC cannot see any justification for continuing to exclude domestic workers from the definition of “employee” in the IR Act and the MCE Act.

4.2 Pieceworkers and commission-only workers

83. Pieceworkers and workers paid wholly by commission are also deemed under the MCE Regulations⁴⁷ not to be employees for the purposes of the MCE Act.⁴⁸

⁴² Cf. other employees – part 6 of the MCE Act.

⁴³ International Labour Office, *ILO Global Estimate of Forced Labour: results and methodology*, Geneva: ILO, 2012, p. 13.

⁴⁴ *National Action Plan to Combat Trafficking and Slavery 2015-19*, p. 6.

⁴⁵ The Freedom Partnership to End Modern Slavery, Walk Free Foundation, *Improving Protections for migration Domestic Workers in Australia*, Policy Brief, June 2015, p. 2.

⁴⁶ *Ibid.*

⁴⁷ MCE Act, s 3(1); MCE Regulations, regulation 3, Schedule 1, items 1 and 2.

⁴⁸ While pieceworkers and commission-only workers are deemed not to be employees under the MCE Act, they are *not* excluded from the definition of an “employee” for the purposes of the IR Act. This means that they *are* eligible to lodge unfair dismissal claims and denial/denied contractual benefits claims, in contrast to domestic workers.

84. Similarly to domestic workers, this means that pieceworkers and commission-only workers are not entitled to a minimum rate of pay⁴⁹ or to any of the minimum conditions of employment to which other employees are entitled.⁵⁰
85. Some pieceworkers and commission-only workers may be covered by an award and may therefore be entitled to certain minimum conditions under an award.⁵¹
86. However, it seems problematic that pieceworkers and commission-only workers do not benefit from the same legislative safety net as other employees.
87. As with domestic workers, ELC can see no reason why pieceworkers and commission-only workers should continue to be excluded from the definition of an “employee” under the MCE Act.

4.3 Workers in the gig economy

88. ELC notes that the labour market in Western Australia has changed rapidly in recent years and that new types of workers have recently emerged as part of the “gig economy” – for example, Uber drivers, Deliveroo drivers, Airtasker workers and so forth.
89. ELC does not yet have a firm view on how the State industrial relations system should deal with such workers.
90. Nonetheless, in our view, consideration needs to be given to what protections such workers should be afforded to protect them from exploitation, particularly since they are typically engaged in low-paid work.

Recommendation 10: That the definition of “employee” in the IR Act and the MCE Act be amended so as not to exclude persons engaged in domestic service in private homes.

Recommendation 11: That the MCE Regulations be amended so as not to exclude pieceworkers and commission-only workers from the definition of an “employee” under the MCE Act.

Recommendation 12: That consideration be given to what protections should be afforded to workers in the gig economy.

⁴⁹ Cf. other employees who are entitled to minimum rate of pay under Part 3 of the MCE Act.

⁵⁰ See references above in relation to domestic workers.

⁵¹ See e.g. *Brick Manufacturing Award 1979*.

5 Minimum conditions

Term of Reference 5: Review the minimum conditions of employment in the MCE Act, the LSL Act and the General Order 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 WAIRC, without the need for legislative change.

5.1 General comments

91. ELC supports a review of the minimum conditions of employment set out in the MCE Act, the LSL Act and the TCR Order.
92. The MCE Act, the LSL Act and the TCR Order operate as part of the safety net of minimum conditions of employment for various Western Australian employees. These instruments prescribe terms and conditions that employers must comply with as a minimum.
93. Although the minimum conditions of employment cannot be contracted out of,⁵² an employer and an employee can contractually agree that a greater condition be provided. However, in ELC's experience, few employers provide leave entitlements (such as annual leave and sick leave) that exceed these minimum conditions of employment.
94. ELC is also of the view that if these minimum conditions of employment were not prescribed by law, many employees would not contractually receive these entitlements. Indeed, the increased prevalence of the gig economy demonstrates that some enterprises look to promulgate business structures where such minimum conditions are not required to be provided.⁵³
95. As such, while the minimum conditions of employment operate as a minimum, for the majority of ELC's clients they importantly operate as the only conditions of employment for each matter they cover.
96. Despite the importance of the minimum conditions of employment set out in the MCE Act, the LSL Act and the TCR Order, the minimum conditions of employment have not been substantively amended for over 10 years. In this period, there have been a number of substantive changes to the Western Australian economy, to the basis on which work is undertaken (such as the increased prevalence of the gig economy) and to the federal employment laws.

5.1.1 Introduction of, and changes to, the MCE Act, LSL Act and TCR Order

97. The MCE Act was enacted on 23 November 1993, and has been amended on various occasions with the last substantive changes to entitlements occurring in 2006 to provide, among other things, for reasonable hours of work provisions to incorporate the outcome of the Australian Industrial Relations Commission decision of 23 July 2002 in the *Reasonable Hours Test Case* (PR072002).
98. The LSL Act was:
 - (a) assented to on 12 December 1958, and provided the first entitlement of long service leave of 13 weeks' leave after 20 years' service,⁵⁴

⁵² MCE Act, s 5(3).

⁵³ *Aslam, Farrar & Others v Uber B.V, Uber London Ltd & Uber Britannia Ltd* [2015] 2202550/2015, [8].

⁵⁴ LSL Act, s 8(2)(b) as in force on 12 December 1958.

- (b) amended in 1964,⁵⁵ to provide for the first entitlement of 13 weeks' long service leave after 15 years' service,⁵⁶ and
- (c) amended in 2006,⁵⁷ to provide for the first entitlement of 8 2/3 weeks' long service leave after 10 years' service.⁵⁸ Relevantly, while this shortened the period to when long service leave could be taken, on a pro rata basis it is the same entitlement per year of service as was implemented in 1964.

99. The TCR Order was a General Order issued by the Commission in Court Session of the WAIRC on 1 June 2005,⁵⁹ following application by the Trades and Labor Council of Western Australia (and has not been updated or amended since that date).

100. In stark contrast to the lack of review and amendment to the minimum conditions of employment set out in the MCE Act, the LSL Act and the TCR Order; the WAIRC of its own motion makes a General Order (the State Wage order) before 1 July in each year pursuant to section 50A of the IR Act.

5.2 Process for updating statutory minimum conditions

101. ELC is generally supportive of the statutory minimum conditions of employment being periodically updated, subject to the following provisos:

- (a) that no employees be worse off under any changes; and
- (b) that such updates not occur too frequently, so as to be overly onerous for the parties involved in the review process.

102. The ELC notes that historically there has been a previous lack of regular consideration **and** updating of those minimum conditions of employment (despite previous State IR review recommendations).

103. ELC does not have a view as to what body is best placed to undertake this process, but submits the following matters be considered:

- (a) There should be an opportunity for public consultation (ELC would welcome the opportunity to provide submissions on any proposed updated statutory minimum conditions).
- (b) Parliament should not derogate from its duty (and its ability) to update statutorily prescribed minimum conditions of employment by reason of it also providing the WAIRC with the power to update minimum conditions.

Example: Casual loading

- Section 11 of the MCE Act provides for a casual loading of 20%, with the ability of the WAIRC to set a higher percentage under section 511 of the IR Act (on application).
- ELC submits that the statutory casual loading should be increased to at least 25%.

⁵⁵ *Long Service Leave Act Amendment Act (No. 2) 1964* (WA) amending LSL Act.

⁵⁶ *Ibid*, s 8(2)(a).

⁵⁷ *Labour Relations Legislation Amendment Act 2006* (WA), s 56.

⁵⁸ LSL Act, s 8(2)(a).

⁵⁹ *Trades and Labor Council of Western Australia v Minister for Consumer and Employment Protection* (2005) WAIRC 01715

- ELC submits that the WAIRC should have the ability under its own motion to review and set a higher percentage for casual loading.
 - However, ELC is of the view that even if the WAIRC has the ability to set a higher percentage for casual loading, this still remains an issue and obligation for Parliament to regularly consider and, if required, to amend the legislation to provide a higher entitlement.
- (c) The WAIRC is already required on its own motion to make the State Wage order before 1 July in each year, with a process set out in the IR Act as to what matters the WAIRC is required to consider.⁶⁰ The WAIRC is well experienced in reviewing and updating these matters, to the benefit of State employment arrangements.
- (d) The ability to make and vary General Orders, such as State Wage Cases and the TCR Order, should be retained by the WAIRC.⁶¹
- (e) Updated State awards, which also form part of the safety net of minimum conditions for various Western Australian employees, should be reviewed periodically by the WAIRC, so that reviews can occur independently of the parties to any award (see submissions on Term of Reference 6).

5.3 Single piece of simplified legislation dealing with workplace relations, including minimum entitlements

104. ELC is generally supportive of reforms which result in a fair, simplified system of workplace relations, provided that employees do not lose existing rights and entitlements. This should include enacting a single piece of legislation dealing with workplace relations in Western Australia including comprehensive minimum conditions of employment.
105. These comprehensive statutory minimum conditions of employment should also include the TCR Order.
106. If the TCR General Order is not incorporated into a single piece of legislation dealing with workplace relations (or incorporated into the MCE Act), the TCR Order should:
- (a) be reviewed as if it was an award as part of Term of Reference 6; and
 - (b) be reviewed periodically by the WAIRC on its own motion, similar to the State Wage Case.
107. ELC further submits that, as part of enacting a single piece of legislation dealing with workplace relations in Western Australia:
- (a) The MCE Act, the LSL Act and the TCR Order be amended with the objective of ensuring the legislation and the TCR Order are written in plain English.

Example: the word cumulative

- The word '*cumulative*' is used throughout the MCE Act.
- In ELC's experience, people applying the MCE Act's provisions to their workplaces often misunderstand this word.

⁶⁰ IR Act s 50A(3)

⁶¹ IR Act Pt II Div 3.

- Wording such as '*Entitlements under this section carry over from week to week*' would be more easily understood.
- (b) The ancillary provisions of the minimum conditions of employment, such as the definitions of employee, rate of pay and transmission of business, also be reviewed and updated (see Term of Reference 4 in relation to the definition of employee).

5.4 Specific submissions on additional content

108. In addition to the general comments above, ELC makes the following specific comments in relation to the content of the minimum conditions of employment in Western Australia:

MCE Act

- (a) Except where otherwise stated in this submission, the substance of the provisions within the MCE Act should be retained.
- (b) Section 17D of the MCE Act (regarding authorised deductions from pay) should be amended to introduce additional limitations on when deductions can be made from an employee's pay, including at least the limitations set out in sections 324, 325 and 326 of the FW Act.
- (c) Section 11 of the MCE Act (regarding casual loading) should be amended to increase the prescribed percentage of 20% to at least 25%.

National system entitlements

- (d) The MCE Act should be expanded to include at least any of the conditions of employment and protections that exist in the national system, where such conditions or protections are new or more beneficial to employees, including:
- (i) The minimum conditions set out in the NES, such as:
- hours of work;
 - parental leave;
 - flexible working arrangements;
 - annual leave;
 - personal, carer's and compassionate leave;
 - community service leave;
 - public holidays;
 - information in the workplace;
 - notice of termination in employment and redundancy (noting ELC's submission that the TCR Order should be incorporated into a single piece of workplace relations' legislation); and
 - long service leave.

- (ii) Other protections for national system employees outside of the NES, such as the general protections provisions in Part 3-1 of the FW Act, (which protect employees from having adverse action being taken against them for prohibited reasons, from having undue influence, pressure or coercion applied to them, and from sham contracting, amongst other things);
- (e) In introducing a new entitlement based on the national system of workplace relations, the WAIRC should consider whether a better minimum condition of employment should be provided rather than merely replicating the national entitlement. For example, the right to request flexible working arrangements and the right to request an extension of unpaid parental leave are fairly limited under the FW Act. No penalties apply if the employer refuses the request, even if the refusal is not on reasonable business grounds.⁶² ELC is of the view that the right to request flexible working arrangements and an extension of unpaid parental leave should be strengthened in the State legislation by introducing sanctions where the employer refuses the request other than on reasonable business grounds.

LSL Act

- (f) The LSL Act should be amended to:
 - (i) 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; and
 - (ii) clarify and expand the provisions around transmission of business in section 6, making those provisions more easily understood and consistent with other legislation regarding transmission of business.

Recommendation 13: That the minimum conditions of employment in the MCE Act, the LSL Act and the TCR Order be reviewed to consider whether they should be updated.

Recommendation 14: That there be a process for regularly considering and updating statutory minimum conditions of employment, provided that employees do not lose existing entitlements and that the review process not occur too frequently so as to be overly onerous for the parties involved.

Recommendation 15: That Parliament enact a single piece of simplified legislation dealing with workplace relations in Western Australia, including comprehensive minimum employment standards and the TCR General Order.

Recommendation 16: That the MCE Act be amended to prescribe additional limitations on when an employer is authorised to make deductions from an employee's pay.

Recommendation 17: That the MCE Act be amended to increase casual loading to at least 25%.

Recommendation 18: That the LSL Act be amended to provide greater clarity around the characterisation of payment in lieu of notice and continuity of service associated with the transmission of business.

⁶² FW Act, s 76.

Recommendation 19: That the MCE Act be amended to include at least the minimum conditions of employment and protections in the national system where a new or better entitlement is provided.

6 State awards

Term of Reference 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 WAIRC, with appropriate input from the award parties and other relevant stakeholders.

6.1 General comments

109. ELC supports there being some process for the updating of State awards for private sector employers and employees, subject to the following provisos:

- (a) that no employees be worse off under any changes; and
- (b) that further updates not occur too frequently, so as to be overly onerous for the parties involved in the review process.

110. Where relevant, ELC also refers to its submissions on Term of Reference 5.

111. State awards form part of the safety net of minimum conditions of employment for a significant portion of Western Australian employees. Many awards are now outdated, and ambiguous or unclear in their coverage and operation.

112. Senior Commissioner S J Kenner reported⁶³ on 2 November 2017 that:

- (a) in Australia approximately 24.5% of employees are paid by award, citing a Western Australian Department of Commerce submission to State Wage Case 2017;
- (b) a total of 233 State Awards are in force; and
- (c) *“apart from action by the State Commission itself to update its awards in respect of wages and location allowances by general orders, most awards in the State Commission’s private sector jurisdiction have languished.”*

6.2 No worse off

113. ELC submits that as an award operates as a minimum safety net, any process of updating should not have the effect of reducing the safety net – no employee should be worse off as a result of this process.

114. ELC is further of the view that this point should not be examined under the prism of ‘being overall no worse off’. Rather, the WAIRC should examine separately and distinctly each entitlement provided by an award to ensure that no employee is worse off in respect of each entitlement.

⁶³ (Presentation to the UnionsWA Industrial Officers and Lawyers Network Annual Conference)
<http://www.wairc.wa.gov.au/images/State%20Awards%20-%20Are%20They%20Up%20to%20Date.pdf>

6.3 Clarity of expression and structure

115. ELC believes that State awards in Western Australia should be updated to some extent, primarily to improve clarity of expression and structure.
116. For instance, many awards are ambiguous or unclear 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.

Example: Shop and Warehouse (Wholesale and Retail Establishments) Award

- This Award covers different types of retail businesses in the State industrial relations system.
- The scope clause to this Award provides.⁶⁴

This award shall apply to all workers employed in any calling or callings herein mentioned in the industry or industries carried on by the Respondents named in Schedule "C" and to all employers employing those workers.

- The term "*callings*" is not a term easily understood by the layperson, and requires reference back to the IR Act.⁶⁵
 - The "*industry or industries carried on by the Respondents named in Schedule C*", has a list of 4 pages of respondents, with the nature of the work they perform not being immediately identifiable by the name of most of the respondents.
 - For one ELC client, ELC was unable to provide definitive advice on whether this Award covered the client. This is indicative of the complexity and uncertain operation of the Award scope clause, with the level of investigation required to form a view on this point.
 - In contrast, the federal General Retail Industry Award 2010⁶⁶ sets out various definitions which more easily identify the coverage of the award particularly for a layperson.
117. The State awards currently have a number of issues which make them difficult to interpret. For instance, many awards are not drafted in clear language and key terms are often not defined or are not used consistently. Any updating 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.

6.4 Award review process

118. ELC is of the view that the WAIRC is best placed to undertake an award updating process, given that the WAIRC has years of experience dealing with disputes in relation to State awards, and has previously undertaken a s40B award review process.

⁶⁴ *Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977* s 3.

⁶⁵ IR Act, s 7(1).

⁶⁶ *General Retail Industry Award 2010* MA000004, s 4.

119. Further, ELC submits that a process undertaken by the WAIRC would be perceived to be more independent than a process undertaken within government.
120. ELC makes these further submissions:
- (a) That the process for updating State awards include the public sector, which should be nominated as an industry division, encompassing public sector functions which might otherwise be covered by other industry divisions.
 - (b) That the award updating process be completed within a set period of time from receipt of the request and direction.
 - (c) That interested parties be able to make submissions during that period.
 - (d) That the updated State awards should be reviewed from time to time, so that reviews can occur independently of the parties to any award. However, ELC is of the view that it would be preferable for the review mechanism not to be triggered automatically after a set period of time. Further, any reviews should not occur too frequently so as to be overly onerous for those involved in the review process.

Recommendation 20: That a process be devised for the updating of State awards for private sector employers and employees, as set out in Term of Reference 6.

Recommendation 21: That Term of Reference 6 be expanded to include:

- (a) the updating of State awards for public sector employers and employees; and**
- (b) the requirement that no employee be worse off in respect of each entitlement, rather than considering it on an overall basis.**

Recommendation 22: That the WAIRC undertake the review of the State awards.

Recommendation 23: That there be a process for public consultation and submission regarding the process of updating any awards, and that the process of updating State awards occur periodically, provided that employees do not lose existing entitlements and that the review process not occur too frequently so as to be overly onerous for the parties involved.

7 Compliance and enforcement

Term of Reference 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.

121. ELC supports a review of the statutory compliance and enforcement mechanisms with the objectives stated in Term of Reference 7, to operate in addition to industrial inspectors engaging and educating industry and stakeholders.
122. It is vital that enforcement processes be clearly set out in the legislation and appropriate for laypersons to rely upon. They should be flexible and as informal as possible. In ELC's experience, procedural formality prevents vulnerable employees from accessing justice.
123. In ELC's view, members presiding over such matters should have relevant and specialist expertise in employment matters. Filing fees should be low (for example, no more than \$50), with a means of waiving fees for low income earners. Enforcement processes should attract no other fees (such as mediation and teleconference fees, as can be the case in the Federal Circuit Court).
124. In ELC's experience, the majority of our clients are focused primarily on ensuring they are paid their correct entitlements in circumstances where underpayment has allegedly occurred, rather than punitive action. The tools available to them to do so involve:
 - (a) Seeking to negotiate a resolution;
 - (b) Referring the matter to an industrial inspector to investigate and enforce on their behalf; or
 - (c) Bringing a claim.
125. Terms of Reference 7(b) and 7(c) are then relevant to ELC's clients in respect of ELC clients ensuring they are paid their correct entitlements as per Term of Reference 7(a).
126. In reviewing the statutory compliance and enforcement mechanisms, this review should look at what other regulatory and administrative tools are available to an inspector to achieve an effective and just result.

7.1 Penalties

127. ELC submits that the penalties for a contravention or failure to comply with statutory and industrial obligations are currently too low and should be increased.
128. Section 83 of the IR Act sets the maximum penalty for a contravention or failure to comply with an industrial instrument (such as an award) as \$2,000 for an employer, organisation and association and \$500 in any other case.
129. Section 83E of the IR Act sets the maximum penalty for contravention of a civil penalty provision, as \$5,000 for an employer, organisation or association and \$1,000 in any other case.

130. In comparison, under the FW Act the maximum penalty for a civil remedy provision which is not a serious contravention is \$63,000 for a corporate entity and \$12,600 for an individual.⁶⁷
131. On 15 September 2017, the FW Act was amended by the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth) to provide penalties for serious contraventions, for which the maximum penalty is increased tenfold to \$630,000 for a corporate entity and \$126,000 for an individual.⁶⁸
132. There is then a significant disparity between the penalties under the State and federal systems.

7.2 Other enforcement options

133. While penalties do have a specific and general deterrent effect, there needs to be a range of available enforcement mechanisms to achieve the outcome, such as enforceable undertakings,⁶⁹ and accessorial liability provisions.⁷⁰
- (a) Enforceable undertakings allow the parties to resolve matters before taking the matter to Court, and can resolve both the past breaches but set up mechanisms to prevent further breaches.
 - (b) Accessorial liability provisions allow individuals to be held responsible for the actions of their business.
 - (c) The Fair Work Ombudsman has recently emphasised its commitment to use the accessorial liability provisions to “ensure that all accessories to that conduct are held to account.” (<https://www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/november-2017/20171117-nsh-north-penalty-mr>)

7.3 Inspector enforcing contractual claims

134. Under ss 541 and 542 of the FW Act, 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 DMIRS to enforce above-minimum contractual entitlements relating to minimum conditions.

7.4 Bullying

135. As noted above, ELC is of the view that an anti-bullying jurisdiction should be introduced in the WAIRC, similar to that which exists in the FWC.⁷¹
136. While the OSH Act currently provides some protection against bullying, in our view, it is inadequate. To the best of ELC’s knowledge, there have been only a few bullying prosecutions in Western Australia since the introduction of the OSH Act in 1984.
137. In contrast, the anti-bullying provisions in the FW Act set out a reasonably clear process by which employees who are subject to workplace bullying can personally commence an application for a stop bullying order against their employers. The possibility of such applications may encourage employers to take steps to identify instances of bullying and to implement policies to improve the health and safety of their employees.

⁶⁷ FW Act, ss 539(2) and 546(2).

⁶⁸ *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth) s 2-13.

⁶⁹ See for example FW Act s 715

⁷⁰ See for example FW Act s 550

⁷¹ FW Act, Part 6-4B.

138. Having said this, the FW Act bullying complaints process also has its limitations.
139. For instance, the FWC may only issue a stop bullying order where a worker has been bullied and there is a risk that the bullying will continue.⁷² This means that a worker who has been dismissed or has resigned following bullying cannot seek a stop bullying order.
140. Further, even though the FWC is empowered to make any order it considers appropriate in an application for a stop bullying order, it is expressly prohibited from making orders requiring payment.⁷³ This means that aggrieved workers cannot be compensated for bullying that has occurred.
141. In our view, any bullying jurisdiction that is introduced for the WAIRC should allow the bullied worker to make a complaint even after he or she has been dismissed or resigned, and should allow the worker to seek compensation for the bullying.

Recommendation 24: That statutory compliance and enforcement mechanisms be flexible, informal and drafted so that they are easily understood by the layperson.

Recommendation 25: That the penalties for non-compliance be significantly increased.

Recommendation 26: That further enforcement options be introduced, such as enforceable undertakings and accessorial liability provisions, similar to the national system.

Recommendation 27: That industrial inspectors have the power to enforce contractual matters relating to statutory minimum entitlements.

Recommendation 28: That an anti-bullying jurisdiction be introduced in the WAIRC, similar to that which exists in the FWC. However, bullied workers should be able to make a bullying complaint even after their employment has ended and should be able to seek compensation for the bullying that has occurred.

⁷² FW Act, s 789FD(2).

⁷³ FW Act, s 789FF(1).

8 Local government

Term of Reference 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.

142. ELC does not have any particular views on whether local government employers and employees should be regulated by the State industrial relations system.
143. However, ELC notes that the dual system of employment laws that exists in Western Australia can be very difficult for local government employers and employees because of the lack of certainty as to whether each individual local government entity amounts to a constitutional corporation or not.
144. ELC submits that further consideration should be given to whether any legislative changes could be made which would give local government employers and employees more certainty as to which system of laws they fall into.

Recommendation 29: That further consideration be given to whether any legislative changes could be made which would give local government employers and employees further certainty as to which system of laws they fall into.