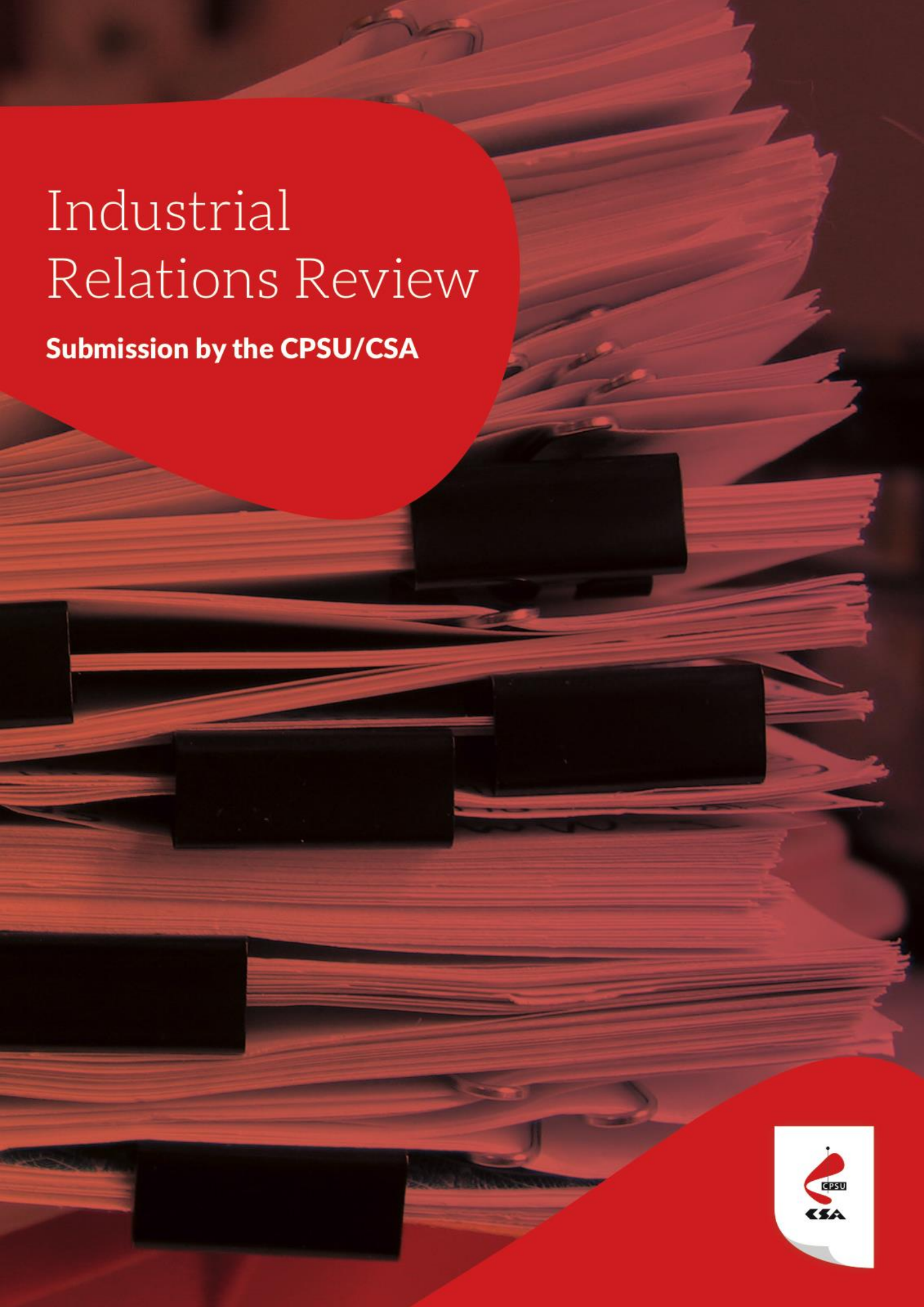
Industrial Relations Review

Submission by the CPSU/CSA



CPSU/CSA Submission to the Ministerial Review of the State Industrial Relations System 2017

The Civil Service Association of Western Australia (CSA) has been representing public sector employees since 1900; initially as an association incorporated under the *Associations Incorporation Act 1895*; and latterly in 1967 it was recognised by the *Industrial Arbitration Act* as an organisation.

Its federal counterpart is the Community and Public Sector Union, WA Branch (CPSU). Between the two entities there are around thirteen thousand members employed in the public sector and related areas.

The CSA represents many members who are covered by the *Industrial Relations Act 1979* (IR Act) and the *Public Sector Management Act 1994* (PSM Act), and thus it has an interest in any review or proposal concerning the operation of the Western Australian Industrial Relations system.

The CSA is the relevant Union for the purposes of this review, however we operate as a single body and will use the name CPSU/CSA to refer to the Union for the purposes of this submission.

The CPSU/CSA is also an affiliate of Unions WA, and independent of any political party.

The CPSU/CSA's strategic plan and vision

The CPSU/CSA operates in accordance with a strategic plan for its campaigns and other activities. Part of that plan is based on the following vision and mission statement:

> *Our Vision is a fair and just society built through the provision of quality public services.*
>
> *Our Mission: We are a union of workers organising to win better jobs, stronger communities, an inclusive fairer society and sustainable future.*

Consistent with our Vision and Mission, the CPSU/CSA makes these following submissions. We believe that a fair and just society are best served by a well-functioning public sector. To ensure that the workforce is treated fairly to enable the delivery of quality public services to the community of Western Australia, the role of the Western Australian Industrial Relations Commission (WAIRC) as an impartial umpire is important. It is particularly important that this body is empowered to independently review the industrial issues of the public service, to provide recommendations and to make orders in relation to industrial matters.

The CPSU/CSA also believes that this capacity for independent review should be extended more broadly to issues affecting the public service and its workforce, such as those areas currently under the purview of the Public Sector Commission's Public Sector Standards, including merit-based appointment and promotion. Job tenure and job security in the public service is an important element in maintaining the sector's independence from political influence and empowering public sector leadership to provide frank advice to government without fear of industrial impacts.

Past Submissions

In the past the CPSU/CSA has made submissions to the following reviews or proposed legislative changes, for example:

- The Workforce Reform Bill 2013;
- Labour Relations Legislation Amendment and Repeal Bill 2012;

- Industrial Relations Amendment Bill 2010; and
- The Amendola Review of WA Industrial Relations system 2009.
- The Gavin Fielding review 1995

Terms of Reference

Our submission responds to items 1, 2 and 3 of the Terms of Reference as articulated in the document *Terms of Reference for the Ministerial Review of the State Industrial Relations System* and published on the website for Labour Relations at the Department of Mines, Industry Regulation and Safety in relation to this review.

The complete Terms of Reference are as follows:

> 1. Review the structure of the Western Australian Industrial Relations Commission with the objective of achieving a more streamlined and efficient structure.
>
> 2. Review the jurisdiction and powers of the Western Australian Industrial Relations Commission with the objective of examining the access for public sector employees to the Western Australian Industrial Relations Commission on a range of matters for which they are currently excluded.
>
> 3. Consider the inclusion of an equal remuneration provision in the *Industrial Relations Act 1979* with the objective of facilitating the conduct of equal remuneration cases and other initiatives in the Western Australian Industrial Relations Commission.
>
> 4. Review the definition of "employee" in the *Industrial Relations Act 1979* and the *Minimum Conditions of Employment Act 1993* with the objective of ensuring comprehensive coverage for all employees.
>
> 5. Review the minimum conditions of employment in the *Minimum Conditions of Employment Act 1993*, the *Long Service Leave Act 1958* and the *Termination, Change and Redundancy General Order* of the Western Australian Industrial Relations Commission to consider whether:
>
> (a) the minimum conditions should be updated; and
> (b) there should be a process for statutory minimum conditions to be periodically updated by the Western Australian Industrial Relations Commission, without the need for legislative change.
>
> 6. Devise a process for the updating of State awards for private sector employers and employees, with the objectives of:
>
> (a) ensuring the scope of awards provide comprehensive coverage to employees;
> (b) ensuring awards reflect contemporary workplaces and industry, without reducing existing employee entitlements;
> (c) ensuring awards are written in plain English and are user friendly for both employers and employees; and
> (d) ensuring that any award updating process is driven by the Western Australian Industrial Relations Commission, with appropriate input from the award parties and other relevant stakeholders.
>
> 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.

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.

Scope of submission

In respect of the above Terms of Reference, the CPSU/CSA will make submissions on the following topics:

- Eliminating jurisdictional impediments to the WAIRC jurisdiction to hear breach of standard claims [Abolish s. 80E(7) (IR Act and amend Part 7 PSM Act].
- Vesting the unfair dismissal jurisdiction of the Public Service Appeal Board (PSAB) in the general jurisdiction giving claimants the right of reinstatement and compensation in lieu [Abolish the PSAB jurisdiction]. Hearings to remain de novo.
- Vesting the Arbitrator's jurisdiction in the general jurisdiction without changing the current scope.
- Establishing an equal remuneration jurisdiction in the WAIRC.
- Reforming the reclassification jurisdiction by updating the job evaluation procedures; e.g. BIPERS and by changing the work value policy to permit a review of improper classifications.
- Permitting the WAIRC to hear disputes concerning public sector discipline [Abolish s. 78 PSM Act]
- Widening the scope of the WAIRC to hear redundancy and redeployment disputes in the public sector [Make consequential changes to Part 6 PSM Act].
- Having uniform rules for the transmission or succession from one agency to another in respect of parties to awards and agreements, and on-going disputes or claims without being affected by machinery of government changes.
- Establishing effective rules of transparency for the privatisation of public assets, goods and services.
- Importing the best elements of the Fair Work regime on general protections and adverse actions.
- Establishing an anti-bullying procedure in the WAIRC similar to the provisions of the Industrial Relations Act 2016 (Qld).
- Modernising and consolidating public sector awards and agreements.

Our submission draws upon our previous submissions concerning the Workforce Reform Bill 2013, Labour Relations Legislation Amendment and Repeal Bill 2012 and Industrial Relations Amendment Bill 2010.

Eliminating jurisdictional impediments to WAIRC jurisdiction to hear breach of standard claims [Abolish s. 80E(7) and s. 23(2a) IR Act and amend Part 7 PSM Act]

Relevant to Term of Reference 2: *Review the jurisdiction and powers of the Western Australian Industrial Relations Commission with the objective of examining the access for public sector employees to the Western Australian Industrial Relations Commission on a range of matters for which they are currently excluded.*

The CPSU/CSA advocates for a widening of the jurisdiction of the Public Sector Arbitrator in relation to matters affecting government officers which are currently excluded, including alleged breaches of public sector standards and decisions made in relation to the regulations affecting redeployment and redundancy.

Section 80E establishes a broad jurisdiction of the Public Sector Arbitrator to enquire into or deal with industrial matters relating to government officers. There is also a power of referral of these matters to the Commission in Court session of the Full Bench of the Commission. The expansive definition of industrial matter in section 7 of the Act confirms this as a broad jurisdiction of the Public Sector Arbitrator. However, the scope of this jurisdiction is limited by section 80E(7) which states:

> *(7) Despite subsections (1) and (6), an 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.*

In relation to s80E(7)(a), the references to sections 94 and 95A of the Public Sector Management Act are to regulations concerning redeployment, redundancy and termination of registered employees. The effect is that s80E(7)(a) limits the power of the Public Sector Arbitrator to enquire into, deal with or refer matters regarding decisions made under the Public Sector Management (Redeployment and Redundancy) Regulations 2014. This means that accountability and ability to monitor compliance for the correct application of these Regulations is limited.

In relation to s80E(7)(b), the reference to section 97(1)(a) of the Public Sector Management Act regards the recommendations and procedures prescribed by the Public Sector Commissioner in relation to employees obtaining relief for breaches of public sector standards. The effect is that s80E(7)(a) limits the power of the Public Sector Arbitrator to enquire into, deal with or refer matters in relation to the public sector standards.

The following public sector standards in force are:

- Employment (applies when filling a vacancy by way of recruitment, selection, secondment, transfer and temporary deployment [acting])
- Performance Management
- Grievance Resolution
- Redeployment
- Termination
- Discipline

In relation to the general jurisdiction of the Commission to enquire into and deal with industrial matters under section 23, there are also limitations when it comes to jurisdiction in relation to public sector standards. Section 23(2a) states:

> *Notwithstanding subsections (1) and (2), the Commission does not have jurisdiction to enquire into or deal with any matter in respect of which a procedure referred to in section 97(1)(a) of the Public Sector Management Act 1994 is, or may be, prescribed under that Act.*

The effect of this section is to exclude matters in relation to the application and potential breaches of Public Sector Standards from the general jurisdiction of the Commission. This means matters in relation to public sector standards fall outside the scope of both the general jurisdiction and the jurisdiction of the Public Sector Arbitrator. The result is that relief for employees who are alleging breaches of public sector standards (for example, the Employment Standard) are limited to internal review via the Public Sector Commission's Breach of Standard claims. Given the importance of Public Sector Standards to the overall integrity and functionality of the sector and the relative lack of power of employees to hold their employers accountable to these standards, this is not sufficient relief.

All matters subject to a Standard except the Standards for Substandard Performance and Discipline result in excluding the Commission's jurisdiction under s. 80E(7) and s. 23(2a) IR Act. The Standard for substandard performance, termination and disciplinary matters are specifically excluded from the bar by s. 96 PSM Act, which enables relief in respect of breaches of public sector standards "in respect of substandard performance or disciplinary matters."

The extent of the exclusion of the jurisdiction of the WAIRC has been an evolving matter. In the period between 1996 and 2007 the CPSU/CSA, the ARU and the WA branch of the Australian Nursing Federation (ANF) initiated 10 matters in aggregate where a public sector standard may have been involved. The types of cases and their citation are set out in the Table – WAIRC Hearing 1996 – 2007 at Appendix 2.

Legislative amendment is now required as a result of the Industrial Appeal Court overturning the decision of the Full Bench in the *Department of Justice v CSA* (2006) WAIRC 03650. That decision inhibited any further attempts to challenge employer based decisions where a public sector standard existed.

In 2010 the CPSU/CSA assisted the then WA Labor Opposition in the drafting of the Industrial Relations Amendment Bill 2010, which proposed the removal of this fetter to the Arbitrator's jurisdiction. We also assisted in the draft of the explanatory memorandum and provided information which assisted in the Leader of the Opposition's second reading speech. A copy of this material is attached in Appendix 1. The Parliament did not pass the Bill.

In the period between 2012 and 2016 the Public Sector Commission (PSC) received and determined a total of 325 breach claims. The types of claims by year received by the PSC are set out in the table at Appendix 3. This table indicates that further inquiry into the PSC's breach claims process is warranted, particularly given the fact that no breaches were substantiated in the 2016/17 financial year, despite 90 claims made overall, and similar numbers leading to substantiated claims in previous years. This suggests a number of possibilities: that the claims process is becoming more difficult for employees to engage with, that there may be more onerous requirements in terms of evidencing claims, and workload issues in terms of the PSC's capacity to process claims expeditiously. All of the above indicate that the number of claims is not dropping, however the pressure on the sector to respond to claims would be improved by expanding the jurisdiction of the Commission to hear these appeals.

In submissions to the Department of Commerce concerning the proposal in the Labour Relations Legislation Amendment and Repeal Bill 2012, the CPSU/CSA noted:

The repeal of the bar was a recommendation of the Whitehead review of the PSM Act in 2004. During that review the Department of Productivity and Labour Relations acknowledged deficiencies in breach claim determination relief, and proposed a gateway to the reviewer that if the agency rejected the PSC's recommendation, then access to the WAIRC should be granted to make a determination.

This contention is strengthened given the lack of confidence (or interest) demonstrated by Public Sector workers and their Unions in the alternative regime administered by the PSC. The system is massively underutilised. The 2011/12 PSC annual report advises only 125 claims were received in that 12 months. In the same period only 11 claims were upheld.

The inadequacies of the regime are well known. It reviews only process and ignores merit. Further the recommendations of the PSC concerning a proven breach are unenforceable.

The CPSU/CSA therefore affirms the findings of the Whitehead and Fielding reviews, both of which express concerns about deficiencies in the current system and recommend reform of the breach of standards process.

The CPSU/CSA's central interest is to inhibit arbitrary and capricious transfers for reasons other than disciplinary actions.

To effect this widening of the PSA's jurisdiction to incorporate relief for these excluded matters, the CPSU/CSA advocates for the abolition of section 80E(7) IR Act and for the amendment of Part 7 PSM Act to include a right of appeal to the Public Sector Arbitrator under section 80E IR Act.

Vesting the unfair dismissal jurisdiction of the Public Service Appeal Board (PSAB) in the general jurisdiction giving claimants the right of reinstatement and compensation in lieu [Abolish the PSAB]

Relevant to Term of Reference 2: *Review the jurisdiction and powers of the Western Australian Industrial Relations Commission with the objective of examining the access for public sector employees to the Western Australian Industrial Relations Commission on a range of matters for which they are currently excluded.*

The CPSU/CSA affirms its previously held position in relation to the Public Sector Appeals Board (PSAB), which is to welcome the proposal to include the jurisdiction in the general jurisdiction of the Commission and that the rights of government officers should be mainstreamed with the same rights and remedies of private sector employees under the general jurisdiction (s29) or the unfair dismissal jurisdiction under the Fair Work Act (FW Act).

In submissions to Commerce concerning the proposal in the Labour Relations Legislation Amendment and Repeal Bill 2012 to abolish the PSAB, the CPSU/CSA submitted:

The Amendola recommendations included reference to government officers having access to all remedies under the general jurisdiction of unfair dismissal. This includes (but is not limited to) reinstatement and compensation in lieu of reinstatement.

Previously the PSAB awarded compensation in lieu until the decision of the Industrial Appeal Court in Insurance Commission of Western Australia v Johnson (1997) 75 IR 195. This was based on the reasoning in the Pepler decision that because there was no express power in the general jurisdiction under the IR Act to award compensation in lieu, then such an exercise of power was invalid. The deficiency in the general jurisdiction was later amended by legislation. As streamlining is a justification for abolishing the PSAB, then the remedies should be streamlined as well.

In essence, with the abolition of the PSAB, the Commission would determine a claim of unfair dismissal by reference to the principles enunciated in the current general jurisdiction, and provide for the same remedies. However the character of a de novo hearing would be maintained in this new arrangement. Unlike the current appeal process to the PSAB, government officers would have the benefit of conciliation. The change would make an interim reinstatement order more readily available. Currently the PSAB has no power to issue interim reinstatement orders. As such, employees pursuing such claims are frequently in limbo on long periods of "gardening leave" pending the resolution of their matter. If interim reinstatement orders were more readily available, this would facilitate the return of an employee to the workplace if the Commission was satisfied their removal from the workplace has been in breach, pending the final outcome of the matter. This relief option halts any further contraventions, assists in encouraging early dispute resolution between the parties and mitigates the damages of the complainant.

Vesting the Arbitrator's jurisdiction in the general jurisdiction without changing the current scope

Relevant to Term of Reference 1: *Review the structure of the Western Australian Industrial Relations Commission with the objective of achieving a more streamlined and efficient structure.*

Relevant to Term of Reference 2: *Review the jurisdiction and powers of the Western Australian Industrial Relations Commission with the objective of examining the access for public sector employees to the Western Australian Industrial Relations Commission on a range of matters for which they are currently excluded.*

The CPSU/CSA supports a revised structure of the WAIRC which would vest the Arbitrator's jurisdiction in the general jurisdiction, thus simplifying and streamlining the structure of the WAIRC and promoting ease of access for public sector employees. In submissions to Commerce concerning the proposal in the Labour Relations Legislation Amendment and Repeal Bill 2012 to abolish the Public Service Arbitrator, CPSU/CSA welcomed the proposal to include the jurisdiction within the general jurisdiction of the Commission.

The CPSU/CSA submitted:

> *The CSA supports the vesting of the Arbitrator's jurisdiction in the Commission itself because the current practice of appointing arbitrators from the current Commissioners and drafting memoranda for matters to be referred has that effect.*
>
> *The CSA does not support the maintaining of the current bar to the jurisdiction based on the existence of a public sector standard. This bar is replicated in clause 80S(6) the Bill. The CSA has supported a campaign to have the bar reflected in s. 80E(7) and s. 23(2a) IR Act abolished. In 2010 a bill to that affect was introduced, but was defeated. Both government and public service officers should have the same rights of access to the Commission as a private sector or not for profit sector employee. The CSA endorses the submissions of Unions WA in particular – that clause 80S(6) should not be proceeded with.*

In Appendix 4, the CPSU/CSA provides an outline of a model draft bill – the Labour Relations Reform Bill 2017, which sketches how the structural changes and reforms to the general jurisdiction could be achieved.

Establishing an equal remuneration jurisdiction in the WAIRC

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

The CPSU/CSA welcomes the proposal to include equal remuneration as a subject of the review. In addition to the reform of the reclassification process, the CPSU/CSA is seeking an equal remuneration jurisdiction similar to the one provided under Chapter 5 of the Industrial Relations Act 2016 (Qld) or FW Act Chapter 2, Divisions 1 and 2. The former is the superior model as it provides greater scope for the Commission's provision of equal remuneration orders. This is due to the greater number of parties who can make an application for the order as well as the Commission not being constrained by annual wage reviews as is the case with the FWA model.

Reforming the reclassification procedure

The CPSU/CSA submits that the BIPERS classification tool used throughout the public sector requires reform because it is out of date due to rapid technological changes, and is inconsistently applied. The deficiencies of the tool mean that BIPERS in practical effect is used as a broad guide only and does not guarantee uniformity in the decision-making process. BIPERS does not assist in relation to skills which are more difficult to quantify, such as interpersonal skills, influencing, teaching, coaching, and attributes of emotional intelligence. An example of a role which requires the employee to possess a combination of these skills is Child Protection work.

In late July 2012, the CPSU/CSA wrote to the PSC about reclassification procedures in the public sector in response to a PSC proposal to convert Approved Procedure 1 into a Commissioner's Instruction: The letter states:

- ***Continued reliance on BIPERS***

  The CSA questions the need for the continued differentiation between salary Levels, where in effect Mercers or another tool is preferred for Level 8 and above.

  The CSA maintains that BIPERS is open to abuse or prone to considerable variation in application because it is decentralized to Departments or agencies. It does not take into account the fact that employees are using their skills above the minimum value prescribed by BIPERS.

  The CSA would like to see published a list of departments or agencies who have an exemption from using BIPERS, and the reasons for the exemption.

In addition, the WAIRCs Wage Fixing principles are in need of reform because there is no mechanism to reclassify positions which have been under-classified from the very beginning. Within the CPSU/CSA's coverage, this problem can affect occupations where women make up the majority of the workforce; e.g. Dental Clinic Assistants. In addition to remedying the WAIRC's Wage Fixing principles, an equal remuneration jurisdiction must be included as a matter of urgency to resolve the problem of systemic gender bias. The combination of these two interventions is required, because the existing reclassification process is not a sufficient tool for addressing systemic gender bias. This is due to the embedded work value principle requiring a change in duties and responsibilities to be demonstrated. In cases of gendered and/or feminised work, there has been a historic undervaluation of job classifications, such that the absence of a change in duties should not defeat the success of a reclassification outcome.

Permitting the WAIRC to hear disputes concerning public sector discipline [Abolish s. 78 PSM Act]

Relevant to Term of Reference 1: *Review the structure of the Western Australian Industrial Relations Commission with the objective of achieving a more streamlined and efficient structure.*

Relevant to Term of Reference 2: *Review the jurisdiction and powers of the Western Australian Industrial Relations Commission with the objective of examining the access for public sector employees to the Western Australian Industrial Relations Commission on a range of matters for which they are currently excluded.*

Currently, there are two jurisdictions within the WAIRC for determining disputes in the public sector. There is no justification for two jurisdictions. If the Arbitrator's jurisdiction is transferred intact to the general jurisdiction, along with in the jurisdiction of the PSAB, then the logical consequence is that the provisions of s. 78 PSM Act should be repealed.

The CSA is seeking the repeal of s. 78 PSM Act, but the retention of s. 51A IR Act for the Commission to make general orders for public sector discipline. The benefit of this would be uniformity, and a more streamlined and efficient structure of the WAIRC.

Widening the scope of the WAIRC to hear redundancy and redeployment disputes in the public sector [Make consequential changes to Part 6 PSM Act]

Relevant to Term of Reference 2: *Review the jurisdiction and powers of the Western Australian Industrial Relations Commission with the objective of examining the access for public sector employees to the Western Australian Industrial Relations Commission on a range of matters for which they are currently excluded.*

The CPSU/CSA submits that there is an urgent need to widen the scope of the WAIRC to hear disputes over redundancy and redeployment in the public sector as the jurisdiction is limited by the provisions of the PSM Act and the Redundancy and Redeployment Regulations. The co-existence of the Act and the Regulations with the Commissioner's Instructions is unnecessarily complex and results in ambiguity.

In its submissions to the Legislative Council Committee, the CPSU/CSA made the following observations on the Workforce Reform Bill 2013:

> *The Union draws to the attention of the Committee that workers seeking to contest the involuntary redundancy decision before the WA Industrial Relations Commission, can only appeal on severely limited grounds related to process. The substance of the decision [for example its fairness], cannot be raised. This contrasts with the rights of all private sector employees under the jurisdiction of the WA Commission and even public sector workers facing forced redundancy in Queensland.*

In essence, while filling the gaps is a good step forward, there are now four layers of regulation, which need rationalising. The regulations need reforming to ensure that the conditions are benchmarked in relation to other Australian jurisdictions.

Having uniform rules for the transmission or succession from one agency to another in respect of parties to awards and agreements, and on-going disputes or claims without being affected by Machinery of Government changes

Relevant to Term of Reference 2: *Review the jurisdiction and powers of the Western Australian Industrial Relations Commission with the objective of examining the access for public sector employees to the Western Australian Industrial Relations Commission on a range of matters for which they are currently excluded.*

Like the comments made in relation to redundancy and redeployment disputes, the arrangements of transmission of business or succession in the public sector are ambiguous and require updating. There are no equivalent provisions to Chapter 2, Part 2-8, *Fair Work Act*.

Awards and general agreements do not provide for transmission from one agency to another. The Government Officers Salaries, Allowances and Conditions Award 1989 (GOSAC) is restricted to its listed parties by its scope clause, and there is a good case to permit a facilitative provision in its terms to permit an award variation.

When the name of the agency changes, or agencies merge, there is a gap in the ability to protect and enforce members' entitlements, and in the ability of the Union to enforce the relevant industrial instruments, if the employer will not agree to a variation being registered in the WAIRC. In this situation, the maintenance or the continuation of members' entitlements is subject to the employer's election and favour.

The problem of enforceability or statutory entitlement is further highlighted by the recent machinery of government changes that occurred in TAFE in 2016 and in the public service in 2017.

In the past the government has endeavoured to cover the situation by a special omnibus Act to cover Machinery of Government changes. This has happened retrospectively.

In the recent Machinery of Government changes in the public service, the government invoked the *Alteration of Statutory Designations Act 1974* (ASD Act) to cover the amalgamation of departments. However the statutory provisions are weak in respect of continuity of entitlements and the rights of the union to police the industrial instruments affected, or to maintain its litigation because the new agencies are not listed parties to the instruments. A similar situation occurred with the recent amalgamation of TAFES under the vocational training order.

Under s. 3(1) ASD Act that Governor by Order in Council directs that a reference to a *department or any law, any instrument or contract or legal proceedings made or commenced before the coming into operation of the order by a reference specified in the order shall be read and construed as a reference to a minister or office or department by the reference specified in that order, and effect shall be given to any such direction*. The Governor made an order for the changes to be effective on 1 July 2017. The order covered several public service departments which were to be amalgamated. The point is made readily with respect to the Order in relation to the new Department of Communities, which specified the following:

> *4) under the Public Sector Management Act 1994 section 35(1)(b), to amalgamate the departments designated the Department of Housing, the Disability Services Commission, the Department of Local Government and Communities, and the Department for Child Protection Family Support; and to designate the resulting department as the Department of Communities with effect on and from 1 July 2017;*

The order referred to the Department of Housing, and not to the Housing Authority, which the CPSU/CSA had been previously assured by the Authority and the Department of Commerce was the employer of the public service officers.

Following the Governor's order, the Public Sector Commissioner invoked section 22B PSM Act to give effect to the disposition of offices and posts. S. 22B PSM Act states:

> *When departments or organisations are established in place of existing departments or organisations or by the amalgamation or division of existing departments or organisations, the Commissioner may affect the disposition of offices posts and positions and employees and such other consequential changes as appear necessary to give effect the change of departments or the organisations.*

In respect of the Housing Authority, the disposition notice stated:

1. *All offices (other than that of chief executive officer) in existence as at midnight on 30 June 2017 within the Housing Authority, shall be taken to continue in the department designated the Department of Communities.*

2. *All existing employees (other than that of chief executive officer) within the Housing Authority whose employment or appointments have not otherwise expired or terminated as at midnight on the 30 June 2017, shall be taken:*

    a. *as retained in their current offices with their current substantive classifications and terms and conditions of employment; and*
    b. *to be performing their current functions within the Department designated the Department of Communities.*

3. *In relation to the above, all references to the housing authority as the employing authority, and instruments, notices and notifications operation is at midnight on 30 June 2017 shall be read and construed as references to the employing authority of the department designated the Department of Communities.*

In effect, Housing Authority staff were transferred to the Department of Communities, and then seconded back to the Housing Authority by the employing authority using his powers under the *Housing Act*, s 18 A. A copy of the relevant orders and notices is attached as Appendix 5.

Apart from the issue of whether the disposition notice could apply lawfully to the Housing Authority and its staff, there was no explicit provision made for the enforceable continuation of staff entitlements or the preservation of the Union's right under the Public Service Award or the General Agreement.

Another effect was that the Housing Authority used a combination of these notices to have the Arbitrator dismiss an impending arbitration hearing on the misuse of fixed term contracts within the agency, and a failure to convert fixed term contract staff to permanency under the Commissioner's Instruction – Filling a Public Sector Vacancy. A copy of that decision – *CSA v Housing Authority* (2017) WAIRC 00846 is attached as Appendix 6.The decision is under appeal.

However, the fallout from that decision, in the absence of a determination on appeal, is that there is also doubt about the scope of section 64(1) PSM Act as to who is the actual employer of public service officers employed by the Housing Authority and other agencies, the role of the State of Western Australia and the employing authorities, who are the nominal respondent parties to public sector awards and agreements. Section 64(1) states:

> *Subject to this section and to any binding award, order or industrial agreement under the Industrial Relations Act 1979….., the employing authority of the department or organisation may in accordance with the Commissioner's instructions appoint four and on behalf of the State a person as a public service officer…… On a full-time or part-time basis-*

The CPSU/CSA's position was that the proceedings against the Housing Authority could be maintained because the employing authority was a mere agent of the State. The Arbitrator held otherwise.

So it appears the rights of the CPSU/CSA and other unions to maintain existing disputes and litigation in the face of Machinery of Government changes in the current legislative context are non-existent. So negotiated rights and entitlements can be affected by administrative action without recourse, and the limbo can be maintained until the instrument is renegotiated or varied in the WAIRC.

The amalgamation of TAFE colleges demonstrates similar concerns. For the TAFE amalgamations, the Minister relied on her power under s. 35(b) *Vocational Education and Training Act 1996* and an Order was made in the Gazette in 2016. In doing so, the Minister was required under s.35(d)(ii) to make provision for *protecting the rights, interests and welfare of persons affected* by the order. For example, the order provided as follows:

> *9. Staff of closed colleges*
> *a. All persons who were employed or engaged by a closed college immediately before the transition day are, and after the transition day, to be taken to be employed or engaged by the replacement college for the closed college on the same terms and conditions, including the salary payable, as those on which they were employed or engaged immediately before transition date.*
>
> *b. A person to whom subclause (1) applies retains all of their existing and accruing rights, including any rights in relation to superannuation related benefits, as if their employment or engagement by the replacement college were a continuation of their employment or engagement by the close college immediately before transition day.*
>
> *13. Agreements and instruments generally*
>
> *(1) Subject to subclause (2), on and after transition day, any agreement or instrument that contains a reference to a closed college has effect as if the reference were to the replacement college for the closed college.*

A copy of the Order is attached as Appendix 7.

The CPSU/CSA received no prior consultation from the Minister that the TAFEs would be re-organised and when the notice would be issued. The publication of the order occurred when it was impossible to raise issues of the proposed amalgamation in the relevant Joint Consultative Committees (JCCs) that were operating. The decision was put as a fait accompli. The CPSU/CSA had to initiate an application in the WAIRC in order to get consultation operating as envisaged by clause 58, GOSAC award – *PSAC 4 of 2016*. This was after the horse had bolted.

While the Order appears to be more fulsome than those provided for the machinery of government changes, the rights of the union were unclear. Clearly, the plethora of instruments referred to in this part of the CPSU/CSA submissions indicates the need for uniformity and reform. On this basis and for these reasons, the CPSU/CSA is seeking to have incorporated into the IR Act provisions equivalent to Chapter 2, Part 2-8, FW Act.

Establishing effective rules of transparency for the privatisation of public assets, goods and services in the IR Act

Relevant to Term of Reference 2: *Review the jurisdiction and powers of the Western Australian Industrial Relations Commission with the objective of examining the access for public sector employees to the Western Australian Industrial Relations Commission on a range of matters for which they are currently excluded.*

The lack of transparency and accountability when it comes to the privatisation of public assets, good and services was discussed at length in the CPSU/CSA's 2016 submission to the People's Inquiry into Privatisation. A range of interventions the State government could take to resolving the issue was outlined which included the following industrial relations reform items:

- require any privatisation process to guarantee the privatised entity will result in no decrease in employed persons and their conditions and entitlements relative to the public sector, and a maintenance and improvement of the natural environment;

- commit to ensuring that both transferred employees and new employees to private sector and not-for-profit providers of public services maintain wages and entitlement equivalent to a public sector Award or Agreement as a minimum;

- remove any commercial confidentiality provisions and end the use of commercial confidentiality by Ministers, Members of Parliament, Government agencies and corporate providers. This limits accountability and transparency and can be used to withhold and conceal information about the operations of private and not-for-profit providers that are in the public interest;

- alter Freedom of Information laws to ensure greater transparency through allowing access to contracts with private sector providers of privatised or outsourced services (i.e. an end to 'commercial in confidence');

- require that any private sector provider of privatised or outsourced services is subject to equal scrutiny and responsibility as a public sector provider, including industrial relations, occupational health, equal opportunity, and customer complaint handling policies and procedures; and

- introduce legislation to allow the Auditor General to release public reports of audits conducted on the efficiency and performance of privatised and outsourced public services and the full costs involved compared to similar public sector provision.

Importing the best elements of the Fair Work regime on general protections and adverse actions

Relevant to Term of Reference 2: *Review the jurisdiction and powers of the Western Australian Industrial Relations Commission with the objective of examining the access for public sector employees to the Western Australian Industrial Relations Commission on a range of matters for which they are currently excluded.*

In comparison to the FW Act, the freedom of association regime in Part VIA IR Act is relatively weak in protecting employees or union delegates from negative managerial actions when they make a claim under an industrial instrument or a workplace right. Awards administered by the CPSU/CSA contain a union facilities clause, which provides a measure of protection to union delegates in their role as follows:

> *36(6) the employer recognises that it is paramount that union representatives in the workplace are not threatened or disadvantaged in any way as a result of their role as a union representative.*

The CPSU/CSA invoked this clause against the Department of Transport, when it proceeded to take disciplinary action against a delegate who provided information in support of an industrial campaign. As the employing authority refused to desist from the disciplinary process, the CPSU/CSA obtained an interim injunction from the Industrial Magistrates Court (IMC) to prevent the disciplinary process from being continued: *CSA v Department of Transport* (2014) WAIRC 00166. The enforcement of the Award was discontinued as a result of the agency withdrawing the disciplinary process against the delegate. The CPSU/CSA viewed the exercise by the agency as an attempt to silence its delegates.

There have been other examples where agencies have attempted to put pressure on employees to withdraw their appeals to the PSAB by seeking an increased penalty, in circumstances which their position is factually or ethically untenable. On several occasions, a state government Department has attempted to

take action against employees to put pressure on them to withdraw their appeals to the PSAB in circumstances tantamount to a breach of a workplace right. There is a general attitude pervading that employee or delegate rights are not significant.

In contrast to Part VIA IR Act, the objects of FW Act in s. 336 focus on the protection of workplace rights and then the protection of freedom of association. The scope and nature of a workplace right is quite broad in s. 341, and would protect government officers challenging employer decisions or claiming benefits. There is no provision in Part VIA preventing adverse action, such as that described in s. 342, or coercion (s. 343) or undue influence (s. 344) or misrepresentation (s. 345). There is no prohibition on sham arrangements (s.357).

The CPSU/CSA is therefore seeking the incorporation of Chapter 3 FW Act into the IR Act with necessary modifications.

Establishing an anti-bullying procedure in the WAIRC

Relevant to Term of Reference 2: *Review the jurisdiction and powers of the Western Australian Industrial Relations Commission with the objective of examining the access for public sector employees to the Western Australian Industrial Relations Commission on a range of matters for which they are currently excluded.*

Over a number of years the CPSU/CSA has been assisting members with bullying complaints. The assistance is not very effective as statutory remedies or actions to counteract the activity is limited to making worker's compensation claims, if injury is caused, or an internal grievance, or a health and safety complaint or a discrimination complaint, if discrimination is the underlying cause of the bullying. The CPSU/CSA has attempted to use the dispute settling procedure under its general agreements to resolve bullying issues, but short of having a bullying clause in the agreements, this process is unavailing.

In previous negotiations for new general agreements, the CPSU/CSA has made claim for an anti-bullying clause to be inserted into the agreements, but the employing authorities have baulked at the proposal. In the last negotiations, which led the 2014 general agreements, the employing authorities through the Department of Commerce indicated that the issue would be dealt with by legislation. The State government produced a proposal to amend the *Workers' Compensation Act*, which was to extend the exclusions to the definition of injury by having reasonable managerial action as a barrier to a claim. This proposal was rejected.

A review of statistics kept by WorkSafe and WorkCover reveal the following for the period 2015-16:

- Mental stress has increased by 11% from 2011-12 to 2015-16;
- The number of WorkCover stress-related claims increased 25% from 2012-13 to 2015-16 by 25%;
- The top three industry groups for stress-related claims were:
    - Health care and social assistance -25%;
    - Public administration and safety – 24%;
    - Education and Training – 16%.
- The causes of stress-related claims were:
    - Work pressure – 39%;
    - Harassment and bullying – 23 %;
    - Exposure to a traumatic event – 19%;
    - Exposure to workplace violence – 14%;
    - Other – 5%.
- Male and female bullying claims represented 23% of all claims respectively.

A copy of the materials, which support the submission, is attached as Appendix 8.

The PSC has recognised that bullying is a problem in the public sector because in the period 2016-17 it conducted an evaluation of 18 public sector agencies in relation to their practices to prevent and manage bullying. The PSC then commissioned KMPG to conduct another evaluation in 6 public authorities.

The figures indicate that bullying, if is not rife, is nevertheless a significant problem in the public sector. There is an urgent need for reform. The current remedies or interventions provided by WorkSafe or WorkCover are inadequate. The victims have to wait until WorkSafe acts on an incident report or a pin, or for WorkCover to determine that the injury sustained is compensable. The internal grievance procedures are insufficient, and are currently not amenable to the jurisdiction of the WAIRC because of the existence of a Public Sector Standard. There is a need for alternative remedy to have a more proactive effect. The Federal Parliament recognised the need and amended the FW Act.

In a recent presentation to Unions on the Fair Work Act's anti-bullying jurisdiction Commissioner Bull stated that initial fears that the Fair Work Commission (FWC) would be inundated with applications had proved not to be the case. Advantages of the FW Act provision are clear definitions and a focus on dealing with bullying in the workplace in the early stages. A copy of the data on FWC workplace bullying claims from 2014-2016 is attached as Appendix 9.

The reform can be achieved by incorporating the anti-bullying regime from the FW Act, Chapter 6, Part 6-4B, with adaptation.

Modernising and compacting awards in the public sector

The current provision in s. 40B IR Act provides explicit grounds to modernise awards, and the CPSU/CSA also understands that awards can be modernised under s. 32 as well. In the context of modernisation, it would be useful to permit explicitly the compaction of awards into one instrument. The CPSU/CSA currently is party to 12 public sector awards. As a starting point it would be useful to compact both the Public Service and the GOSAC award into one instrument. Both are also in need of modernisation, so the exercise could involve both processes. The CPSU/CSA notes that both types of employment are covered in a single general agreement – the Public Service and Government Officers Agreement 2014.

Other Reforms required to the Public Sector Management Act in particular

- The actual employer under s. 64 PSM Act.
- Giving government officers the same rights as private individuals to comment on policies or issues or to make submissions to their MPs or relevant Minister without reprisal on the basis of presumed confidentiality or a prohibition in an Administrative Instruction or policy.
- A statutory procedure for government officers to seek conversion to permanency on the basis of adhered to criteria for conversion.

Executive Summary

In short the CPSU/CSA is seeking amendment and reform of the IR Act and the PSM Act in respect of (but not limited to):

- The placement of the Arbitrator's jurisdiction in the general jurisdiction of the WAIRC;
- The abolition of the Public Service Appeal Board, and the hearing of unfair dismissal claims under the general jurisdiction;
- Abolishing the fetters on the general jurisdiction to hear redundancy and redeployment disputes arising in the public sector;
- Abolishing the fetters on the general jurisdiction to hear disputes over the application of public sector standards;
- Reforming reclassification processes and procedures, including the state wage principles relating to reclassification;
- Establishing equal remuneration, and anti-bullying jurisdictions;
- Establishing a coherent code to cover transfer or transmission or succession of business or service delivery in the public sector;
- Ensuring the proper citation of parties to awards and agreements in the public sector, and resolving the liability of the State of Western Australia as the actual employer of government officers;
- Establishing a coherent code for freedom of association, employment protections and adverse actions.

The proposed changes to the IR Act and the PSM Act need to be expressed as reforms to prevent the reforms from being read down or subject to jurisdictional objection.

Appendix 1

Industrial Relations Amendment Bill 2010

Industrial Relations Amendment Bill 2010

CONTENTS

Western Australia

Industrial Relations Amendment Bill 2010

Act to amend the Industrial Relations Act 1979 by providing the Public Service Arbitrator jurisdiction to enquire into or deal with, or refer to the Commission in Court Session or the Full Bench, any matter in respect of which a procedure referred to in section 97(1) (a) of the Public Sector Management Act 1994 is, or may be prescribed under that Act.

The Parliament of Western Australia enacts as follows:

1. Short title

This Act may be cited as the *Industrial Relations Amendment Act 2010*.

2. Commencement

This Act shall come into operation on the day on which it receives the Royal Assent.

3. Section 80E – Jurisdiction of Arbitrator amended

(1) Amend subsection (1) by deleting reference to *"and (7)"*

(2) Amend subsection (6) by deleting reference to *"but subject to subsection (7),"*

Appendix 2

WAIRC Hearings 1996 – 2007

	Title	Citation
	Minister of Education v CSA	1997 WAIG
	ARU v WAGRC	1998 WAIG
	CSA v Managing Director, SMC, Tafe	1999 WAIG
	ARTBIU v WAGRC	CR 76(1) of 2000
,	Commissioner of Police v CSA	2001 WAIRC 04107
	CSA v Director General, Department of Justice	2002 WAIRC 06231
	CSA v Director General, Department of Justice	2004 WAIRC 10979
	CSA v Director General, Department of Indigenous Affairs	2003 WAIRC 09401
	CSA v Director General, Department of Culture and the Arts	2004 WAIRC 10642

Appendix 3

Breach claims received by the Public Sector Commission

	Employment	Employment Acting	Employment Secondment	Employment Transfer	Performance Management	Grievance Resolution	Redeployment	Termination
2012-2013	46				3	15	0	1
2013-2014	73	10	0	1	0	20	6	0
2014-2015	94	1	0	0	2	25	0	0
2015-2016	68	0	0	0	3	27	0	0

Breach of Standards								
	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16	2016/17	2016/17
Not valid		7						
Declined		30		20	15	15		
Withdrawn or lapsed		9		11	9	5		
Dismissed		65		65	82	60		
Declined		30		20	15	15		
Withdrawn or lapsed		9		11	9	5		
Dismissed		65		65	82	60		
Conciliated		6		3	5			
Upheld as a breach of standard		11		6	3	7		
Completed	157	128	100	105	114	88	90	

Appendix 4

Labour Relations Reform Bill 2017

Proposed draft to amend parts of the Industrial Relations Act, Public Sector Management Act and other legislation

Short title: Labour Relations Reform Bill 2017

Long Title:

An Act to reform and amend the Industrial Relations Act, Public Sector Management Act, and other legislation, and to provide for general protections and relief against adverse action, and equal remuneration orders.

Amend s. 23A(1)

- Insert the expression of or government officer after the word employee

Insert s. 23C to power to deal with public service arbitration

(1) In this section insert the following definitions from s. 80C:
    - Employer
    - Employing authority
    - Government officer
    - Parties to an award or order

(2) The Commission 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.

(3) Without limiting the generality of subsection 2 the jurisdiction conferred by that subsection includes jurisdiction to deal with –
    (a) a claim in respect of salary, range of salary or title allocated to the office occupied a government officer and, where a range of salary was allocated to the office occupied by, in respect of the particular salaries within the range of salary allocated to him, and
    (b) a claim in respect of decision of an employer to downgrade any office that is vacant.

(4) Nothing in subsection 1 or two shall affect or interfere with the exercise by an employer in relation to any government officer, or office under his administration, of any power in relation to any matter was the jurisdiction of the commission but any act, matter or thing done by an employer in relation to any such matter is liable to be reviewed, nullified, modified or varied by the commission in the course of the exercise of jurisdiction in respect of that matter under this section.

(5) All existing matters before the Public Service Arbitrator shall be heard and determined under s. 80E

Item	Parts or sections repealed
1	Part II A Constituent Authorities, Division 2 - Public Service Arbitrator and Appeal Boards
2	Delete s. 23(2a) – public sector standards
3	Delete s. 22A – Terms used as being redundant