Hon Alison Xamon MLC Submission to the Ministerial Review of the State Industrial Relations System

Introduction

As the spokesperson on Industrial Relations for the Greens (WA) I thank the Minister for the opportunity to contribute to the vital work being undertaken by his office in reviewing the State Industrial Relations System. Industrial relations and the rights of workers in this State are of the utmost importance to The Greens (WA), and it is the position of the party that the industrial relations system in Western Australia is long overdue for a review. Appropriate reforms are necessary to ensure the protection of workers, their livelihoods, and their health.

While there are many aspects of the current Act which are worth preserving or which only need minor changes, such as right of entry and document inspection provisions, other definitions and sections require more serious attention, such as the definition of *employee* and equal remuneration powers for the Western Australian Industrial Relations Commission (WAIRC).

Responses to the Terms of Reference

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

A strong independent Industrial Relations Commission is imperative to ensure impartial resolution of workplace issues and with an enhanced capacity to award compensation over a broad range of industrial issues. Any changes to the structure of the WAIRC should enhance and not diminish the accessibility of the Commission to workers and unions. The Greens (WA) would be opposed to any changes which sacrifice fair outcomes for expediency.

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 community sector workers should be covered under the State Industrial Relations System. Current arrangements can cause confusion for employees when different employers come under different industrial relations jurisdictions. In some cases it can also lead to employers ‘cherry-picking’ which jurisdiction they consider most favourable.

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.

It has long been the position of The Greens (WA) that the Western Australian Industrial Relations Commission must be given the right powers and resources to hear pay equity cases, and make enforceable equal remuneration orders to ensure equal pay for men and women where the Commission is satisfied that work has been undertaken of equal or comparable value.

To this end, I previously tabled a Private Member's Bill - the *Industrial Relations (Equal Remuneration) Amendment Bill 2011* - that:

1. Creates equal remuneration orders that the Commission may issue upon a claim for equal remuneration for work of equal or comparable value;

2. Imposes a threshold requirement that the Commission be satisfied that there is not already equal remuneration before making an equal remuneration order;

3. Allows equal remuneration orders to be undertaken either immediately or progressively as provided in the order;

4. Prevents an equal remuneration order from permitting a reduction in an employee's rate of remuneration;

5. Prevents the power of the Commission to issue an equal remuneration order from being delegated to a Registrar; and,

6. Allows for a claim for equal remuneration to be referred to the Commission by an employer with a sufficient interest; a relevant organisation or association; the Minister; an employee; or the Commissioner for Equal Opportunity.

Similar provisions should be included in the *Industrial Relations Act 1979* (The Act) in order to ensure that there is substantive equality between the genders as a core part of the State Industrial Relations System, and that parties have appropriate recourse for systemic discrimination of pay.

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.

I am concerned with issues surrounding what has come to be termed the 'gig economy'. The dominant companies we have seen operating in this space are Uber, Airtasker,

Deliveroo, and Freelancer, though this model of 'contracting' is becoming increasingly common as businesses move from fixed-permanent arrangements to mass casualisation. It is the view of The Greens (WA) that the types of engagements under a gig economy setting constitute 'employment'; and, as such, the definition of "employee" in the *Industrial Relations Act 1979* and the *Minimum Conditions of Employment Act 1993* must be updated to apply.

The practice of terming these employees as 'contractors' or 'partners', in order to justify the trading off of minimum conditions, occupational health and safety protections, workers compensation protections, and the like, is a form of sham contracting, and highlights a widespread growth in attempts towards corporate avoidance of industrial relations regulations. It is a system that, while providing hyper-flexibility for employers, has generally led to the exploitation of workers.

I agree with the submission made by Unions NSW to *the Senate Inquiry into the Incidence of, and Trends in, Corporate Avoidance of the Fair Work Act 2009*, which outlines four main features that characterise this form of sham contracting:

1. Work is fragmented into specific individual tasks or jobs and workers are engaged on a task by task basis with no guarantees of continuous work;

2. Work is performed by individual workers, but may be commissioned by an individual or a business;

3. Labour transactions between workers and individuals/businesses are facilitated by a for-profit company who charge users for this service (e.g., Airtasker, Uber). These transactions are performed through web based applications which are managed and controlled by the for-profit company; and,

4. Workers are classified by the facilitating companies as independent contractors and are not afforded any employment protections or minimum standards in the performance of their work."

I have similar concerns about the increasing use of labour-hire and agency staff used by employers to avoid enterprise agreements and industrial protections. The practice is increasingly common both in the public and private sector and undercuts workers conditions and collective rights. As such the definition of *employee* needs to be broadened to also capture these workers.

There have been a number of judgments at the federal level that serve as legal precedents for determining the difference between contractor and employee relationships in situations where non-traditional working arrangements are used.

Such judgments align with the position as outlined by Unions NSW above, and thus that non-traditional working arrangements such as those undertaken by Uber - both in its taxi and food delivery services -, Deliveroo, and the like, constitute employment relationships that must be regulated through State industrial instruments.

At a minimum, vehicle drivers must be benchmarked against the relevant taxi industry Award.

Similarly, in line with recent Federal Circuit Court rulings - specifically in relation to Z Transport and Boxbay - that workers in businesses such as UberEats, Deliveroo, and similar bicycle courier services should be considered Employees; however, these Employees should be regulated through the Federal Award system, namely, the Road Transport and Distribution Award 2010.

Further research and analysis must also be done to determine the exact extent of duties and work opportunities undertaken through other platforms such as Airtasker, and how these could possibly be regulated in an effective way.

Given the growth of the gig economy, it is also important to have an equivalent expansion to the definition of 'employer'.[1]

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;

(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.

There should be a process for the regular update of minimum conditions. However, the development and implementation of such a process would require union/ worker involvement. Furthermore, that in updating conditions primary regard should be given to the living standards of workers rather than to company profits or budget restraints. This does not mean that employers should not make a profit, or that the government could not reign in public sector wages when necessary, but that the living standards of workers are put at the forefront of decision making on minimum standards by the WAIRC.

[1] Andrew Stewart and Jim Stanford, "Regulating work in the gig economy: what are the options?" in Economic and Labour Relations Review 28(3) 2017; pp. 382-401.

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;

(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;

I am supportive of the development of a process for ensuring State awards are updated in a timely way to adapt to the fast changing nature of contemporary work.

Further I support making awards clear and accessible for employers and employees provided that simplifying the language does not generally impact negatively on the clarity of definitions or inadvertently result in a reduction in protections.

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;

(c) updating industrial inspectors' powers and tools of enforcement to ensure they are able to effectively perform their statutory functions;

Underpayment, withholding of superannuation and other forms of wage theft have become so common as to amount to a "business model" for some companies, while this systemic disregard for workers' rights and entitlements takes $3.6bn annually from the pockets of Australian workers.[2] The recovery of unpaid wages is often also a time-consuming process, placing disproportionate stress and financial strain on workers who have already been exploited by unscrupulous employers. I support strengthening relevant compliance and enforcement mechanisms to ensure workers receive their correct entitlements in a timely manner.

I am also supportive of ongoing state funded education campaigns to inform employees of their rights at work and to ensure employers are aware of their obligations as an employer about appropriate wage and award coverage, occupational health and safety, equal opportunity principles, workers compensation and sound human resource principles.

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[2] Australian Unions. "Wage theft - the new model for big business" [website] https://www.australianunions.org.au/wage_theft_factsheet. [Cited 20.11.2017]

Accordingly, it is imperative to ensure appropriate penalties and other deterrent mechanisms are in place for employers who fail to comply with State industrial laws.

I support reviewing, and updating the legislative framework along with the provision of additional resourcing required for industrial inspectors to best serve the interests of West Australian workers. In addition, support should be provided for employers who adopt best practice in workplace health and safety and who put in place appropriate injury management policies and procedures.

Section 49E of the Act outlines the rights and conditions for authorised representatives to access employment records. Generally these are good provisions which allow the records of any employee, including a past employee, to be inspected by a union official or the employee in question. Improvements could however be made by broadening whose documents can be inspected to allow for contractors and agency staff. This could be done through reworking this section or by broadening the definition of *employee* as has been suggested earlier.

Agency and contract staff are increasingly common both in the private and public sectors. This can cause problems when employers use them to subvert enterprise agreements coverage and other minimum conditions or provisions. It is in the interests of directly employed workers as well as agency staff and contractors that relevant unions have access to information about the use of these so they are not exploited or used as a means to avoid direct employment.

Section 49H outlines the rights of authorised representatives to enter employer premises to hold discussions with employees. Generally this would be interpreted to mean that an authorised representative can enter anywhere within the premises to hold discussions However disagreements can arise over the interpretation of this clause with employers sometimes trying to restrict representatives to isolated rooms or parts of the building. Clarifying this clause to explicitly ensure that representatives can access all areas of a premises where employees are located to hold discussions would be an important amendment.

49K restricts entry to premises used by an *"…employer that is principally used for habitation by the employer and his or her household."* This may cause problems when unions want to inspect farms or potentially problematic labour hire firms where the employees may work where the employer lives. Given all the recent examples of foreign workers being paid well under the award, expanding the inspection powers would be a useful step to assist in addressing this issue.