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Our Ref: DAS4:DOS1:M523655

8 May 2018

Mr Mark Ritter SC
Francis Burt Chambers
L 23, 77 St Georges Terrace
PERTH WA 6000

By email

Dear Mr Ritter SC

Ministerial review of State Industrial Relations System

Thank you for inviting Slater & Gordon to make comments and submissions in response to the Interim Report in the above review.

A. Submissions on proposed recommendations

We refer to the proposed recommendations and requests for additional submissions section of the Interim Report. Please find at the Schedule to this letter an outline of our submissions in that regard. You will see that we have made not made submissions in respect to all of the areas in which further submissions have been sought, but have confined our comments to the areas of our experience and that are of relevance to our clients.

After considering the Schedule, should you require a more comprehensive submission to any of those areas, please contact us and we will be able to prepare a comprehensive submission to that effect.

B. High Court Decision

You sought submissions with respect to the implications of the recent High Court of Australia decision in *Burns v Corbett*[1], referred to in footnote 93 to paragraph [143] of the Interim Report.

1. The Interim Report sets out the structure and nature of the WAIRC under the *Industrial Relations Act 1979 (WA)* ("the IRA"). It is therefore unnecessary to repeat those matters, save to note that:

    a. Section 12 of the IRA provides that the WAIRC is a court of record;

    b. The WAIRC acts judicially in respect of at least some matters: for instance in the determination of disputes regarding denied contractual benefits under s 29(1)(b)(ii) and the interpretation of Awards under section 46. However, it is not bound to act judicially in all matters within its powers and there are limitations on the ability to appeal decisions of the WAIRC.

    c. It is therefore likely that the WAIRC is not a State court as that term is referred to in Chapter III of the Commonwealth Constitution.

[1] *Burns v Corbett* [2018] HCA 15.

2. While the High Court was divided as to the source of the exclusion of jurisdiction over matters between residents of different states, whether that be a negative implication in Chapter III of the Constitution itself, or by virtue of the enactment of the *Judicature Act 1903* (Cth), all members of the Court concluded that a tribunal which is not a State court cannot adjudicate such disputes.

3. In our experience, the WAIRC has to date routinely accepted and determined applications in respect of denied contract benefits which have involved parties that are not resident in Western Australia, so long as there is "sufficient connection" with Western Australia.[2] For example, the WAIRC has determined it has jurisdiction to hear a claim for denied contractual benefits where the respondent, the employer's business, was principally based in Queensland.[3] There is now doubt as to whether the WAIRC acted validly in those matters.

4. It is certainly undesirable to have legislation creating a process for resolution of disputes concerning denied contractual benefits, for that process to be available only when the parties are resident in Western Australia. This would create disparity between the rights of workers employed by employers resident in WA and workers whose employers are resident elsewhere. It may impact on the ability of parties to continue proceedings commenced in the WAIRC, if they later become resident elsewhere. And it may be exploited by parties who wish to avoid the WAIRC's jurisdiction, by moving out of WA.

5. Currently the only alternative avenue to resolve such matters is by a breach of contract claim in a civil Court with the associated significant costs. There is no denied contractual benefits provisions in the *Fair Work Act 2009* (Cth) (although there may be scope in some matters to utilise section 323 of the *Fair Work Act 2009* (Cth) to seek remedies in some matters where the denied benefit relates to pay).

6. The impact of the exclusion of jurisdiction in relation to section 46 matters is more difficult to forecast, and is outside our experience. Given the scheme of the *Fair Work Act 2009*, we would not anticipate there is much scope for interstate residents to be parties to Awards, let alone section 46 Award interpretation matters.

7. The following options could be considered to deal with this "gap" in the WAIRC's jurisdiction:

    a. Insert an express provision in the IRA excluding power to determine matters involving the exercise of federal diversity jurisdiction. This could be supported by other provisions permitting the Registry to refuse to accept applications which involve interstate residents. This option would not alter the WAIRC's powers, create any new rights or remedies nor would it diminish any existing rights or remedies. It may however reduce the instance of applications being made where the WAIRC lacks jurisdiction, and avoid delays and costs involved in disputes about jurisdiction. However it does nothing to address the anomaly and disparity created by the gap in jurisdiction and for that reason is not the optimal option.

    b. Restructure the WAIRC so that it is and operates as a State Court, for matters in which it acts judicially. Consideration would then have to be given to excluding the operation of s 26(1)(a) of the IRA. Such a restructure would alter fundamentally the nature of the WAIRC and may detract from some or many advantages of a tribunal structure.

    c. Give an authorised State Court the power to grant leave to an applicant to bring a claim of denied contractual benefits to that Court, where the applicant satisfies the Court that the WAIRC lacks jurisdiction. Consideration should then be given to whether the no costs nature of the WAIRC follows the denied contractual benefits application to the civil court, similar to the operation of matters that proceed to the federal courts under the *Fair Work Act 2009* (Cth). Alternatively, a model could be

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[2] See, for example, *Ovidiu Puscas v Caimes Pty Ltd* (ACN 102 573 928) 2013 WAIRC 01063; [2013] WAIRComm 1063 (13 December 2013) at [26] citing the Industrial Appeal Court decision in *Parker v Tranfield* [2001] WASCA 233; (2001) 81 WAIG 2505.

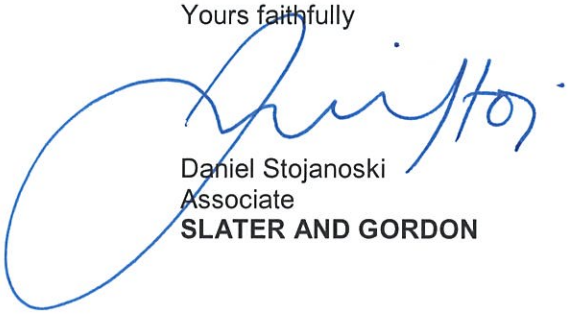
[3] *Ovidiu Puscas v Caimes Pty Ltd* (ACN 102 573 928) 2013 WAIRC 01063; [2013] WAIRComm 1063 (13 December 2013).

adopted by the WAIRC similar to that of the Fair Work Commission whereby the WAIRC could perform the conciliatory functions for denied contractual benefits claims and if the matter does not resolve at the WAIRC level, then the claimant is issued with a certificate to proceed with the matter to the civil court. This option would mean that the WAIRC's jurisdiction to deal with claims can continue uninterrupted. While there will be an additional hurdle for applicants bringing a denied contractual benefits claim, a process and remedies for such claims are nevertheless expressly provided for in the IRA, closing the "gap" in jurisdiction. From a policy point of view, such provisions would reinforce a commitment to ensuring there remains an avenue for resolving claims of denied contractual benefits.

Please contact us if you require further submissions on these views on the High Court Decision.

Finally, we have no objections to these submissions being published.

Yours faithfully



Daniel Stojanoski
Associate
SLATER AND GORDON

Schedule

Proposed recommendation/ request for addition information - Interim Report	Submission
Item 20- Should the IRA contain a single procedure for compulsory conferences?	Given the range of matters which the WAIRC deals with and the fact that each case involves different circumstances, it is difficult to say how any change to the procedure for compulsory conference might enhance outcomes. However a uniform procedure does have the advantage of simplicity and consistency. Logical, user friendly drafting might involve a single section setting out the requirements for, procedures involved in and powers exercisable during a conciliation conference. Sections 32 and 44 could both cross reference to that single section.
Item 21- Should a party for whose benefit an order is made have the ability to enforce the order under section 84A(1)?	Yes. We have not had particular experience with enforcement under section 84A(1) and understand it is not commonly utilised. We would expect that if it was necessary to commence enforcement under section 84A(1), the party seeking enforcement would write to the Registrar requesting that the Registrar commence enforcement action. That act alone, perhaps with some further correspondence from the Registrar, might elicit compliance with the order. If so, the advantage of the current provisions is that the process might be effective without involving any great cost to the parties. However ultimately the preference is that the parties themselves be able to "drive" enforcement.
Item 22 - Whether the 2018 IR Act should include, in any industrial matter before the WAIRC, and subject to the overall discretion of the WAIRC, a right for any party to obtain discovery and inspection of relevant documents held in the possession, power or custody of any other party.	It is well established that if the Court does not have all the relevant information, it cannot achieve the object of achieving real justice between the parties.[4] In the leading authority as to discovery in the WAIRC, Sharkey P[5] says in general terms that *"[t]he purpose of documentary discovery is to provide each party to an action with access before trial to the relevant documents in the hands of his opponent, so avoiding trial by ambush, saving costs and encouraging settlement in proper cases."* Whilst pursuant to s 27(1)(o) together with r 20(2) of the *Industrial Commission Regulations 2005* (WA) the WAIRC can order discovery, production and inspection of documents, it is not a matter of right and the WAIRC retains discretion to make such an order when it is considered "just" - an operative term in s 27(1)(o). In the same decision, Sharkey P went on to say with respect to the term "just" that[6] *"[t]he expression "just" means "right and fair, having reasonable and adequate grounds to support it, well founded and comfortable to a standard of what is proper and right."* We say parties should not be encumbered with showing their request for discovery is "just" and we therefore submit that yes, the 2018 IR Act should include, in any industrial matter before the WAIRC, and subject to the overall discretion of the WAIRC, a right for any party to obtain discovery and inspection of relevant documents held in the possession, power or custody of any other party and that party.
Item 28 – The extent to which a breach of a public sector standard by an agency under the PSM Act may be referred, challenged or appealed by a public sector employee or an organisation on their behalf, to the WAIRC, and the remedies that may be awarded by the WAIRC.	Our submissions to this review made on 29 November 2017 submitted that the WAIRC should have jurisdiction to enquire into or deal with employees attempting to obtain relief in respect of the breaching of public sector standards. Save for abolishing the Public Sector Commission ("PSC"), a public sector employee or an organisation on their behalf should be able to bring such a matter to the WAIRC only after the matter has been dealt with by the PSC at first instance. The remedies that may be awarded by the WAIRC should include all the powers of relief the PSC could otherwise have awarded and further, must go above the limited remedies the PSC can award which should include the appointment of a claimant or another person - something the PSC cannot award.[7]

[4] *Davies v Eli Lilly & Co* [1987] 1 All ER 801 per Sir John Donaldson MR at 804.
[5] The unanimous Full Bench decision of ALHMWU v The Western Australian Hotels and Hospitality Incorporated and Burswood Resort Hotel (1995) 75 WAIG 1801 At 1805
[6] Citing *Loxton v Ryan* [1921] State Reports (Qld) 79 at 84 and 88 per Lukin J.
[7] See determinations and relief of the PSC at regs 20 and 21 of the Public Sector Management (Breaches of Public Sector Standards) Regulations 2005 (WA), noting in particular reg 21(2) and (3).

	This would require amendments to section 23(2a) of the IRA and section 97(1)(a) of the *Public Sector Management Act 1994* (WA) to give the WAIRC jurisdiction. Our experience has been that public sector employees have been denied access to justice and legal recourse because of the operation of these sections, which oust the jurisdiction of the WAIRC in the types of matters.
Item 30 - Whether the 2018 IR Act should include, for the benefit of both public and private sector employees, an entitlement to bring an application to the WAIRC to seek orders to stop bullying at work based on the model contained in the FW Act Part 6-4B "Workers bullied at work" and, if so, whether there ought to be any variations from that model.	Yes. Our submissions to this review on 29 November 2017 made on behalf of the Western Australian Prison Officers' Union contained a list of 16 recommendations. Those submissions also contained recommendations to vary the FW Act model so as to fill gaps discovered: after the litigation of bullying claims in the Fair Work Commission; and through our experience in dealing with bullying claims in the Fair Work Commission in general.
Item 54 - The nature and extent of the Family Domestic Violence leave to be included in the State Employment Standards, including the length of the leave and the extent to which the leave should be paid or unpaid.	Family Domestic Violence ("FDV") leave is a benefit that our society now recognises the value and importance of, but society's expectations are not yet reflected in the legislation. Notwithstanding that most domestic violence occurs at home, the effects of FDV is a workplace issue and therefore requires a workplace solution. Whilst some employers have developed their own policies to allow for FDV leave, a policy can generally be changed or revoked at any time by an employer. This is why it is important to have FDV leave legislated. Therefore the proposed SES should have a provision for FDV leave. We make no submission as to the length of leave however it should be paid leave so as not to further unnecessarily burden the person being subjected to the FDV. If the aggressor controls the financials of the victim, then it is very unlikely he victim will take unpaid domestic violence leave, for obvious reasons. Finally, in our view it is inevitable that FDV leave will become legislated in the national employment system, and to that end we submit that the IR Act 2018 should provide for FDV in its proposed SES before the state system employees are in a position where they are disadvantaged compared with natural system employees.