

UNIONSWA

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Submission of UnionsWA to the *Ministerial Review of the State industrial relations system*

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Introduction

UnionsWA is the governing peak body of the trade union movement in Western Australia, and the Western Australian Branch of the Australian Council of Trade Unions (ACTU). As a peak body we are dedicated to strengthening WA unions through co-operation and co-ordination on campaigning and common industrial matters. UnionsWA represents around 30 affiliated unions, who in turn represent approximately 140,000 Western Australian workers.

UnionsWA thanks the Minister for the opportunity to make a submission to the Review of the State Industrial Relations system. We are pleased that the WA government is delivering on its election commitment to review the system with the aim of making sure it guarantees rights for all workers, and ensuring those rights keep up with community standards.

It is broadly the position of the Australian union movement that the rules that made Australia fair are broken. We can say this because:

- Inequality is at a 70-year high – and higher in WA than the rest of Australia
- Trickle-down economics has meant the rich have just got richer
- Jobs have been made insecure, offshored and outsourced
- Wage growth is the lowest it's been since records have been kept, but profits have gone up

In order to swing the pendulum back, working people need better and stronger rights at work to keep up with the growing power of employers and to reverse growing inequality.

UnionsWA will support recommendations that ensure working people in Western Australia get better and stronger rights at work, resulting in jobs that are secure and wages that are fair.

UnionsWA will **not** support any recommendations that undermine the fundamental rights of WA workers. The mantra of 'flexibility' must not be used to disguise government or employer initiatives that erode the bargaining power or current entitlements of our members. Any changes that are introduced should ensure that workers under the new regime are no worse off than they have been under the current system.

The problem in WA

Since the last time the state Industrial Relations laws were changed, in 2002, we have seen measures of inequality such as the Gini coefficient of Equivalised Disposable Household Income¹ and the Gender Pay Gap for Average Weekly Ordinary Time Earnings.² This growth in inequality is particularly detrimental for the private sector workforce covered by the WA Industrial Relations system, and the predominantly female workforce of the WA public sector.

The Gini Coefficient is a commonly agreed single statistic that summarises the distribution of income across the population. The ABS uses the Gini Coefficient in its Household Income and Income Distribution survey to indicate the degree of inequality between households across Australia. It lies between 0 and 1 with values closer to 0 representing a lesser degree of inequality, and values closer

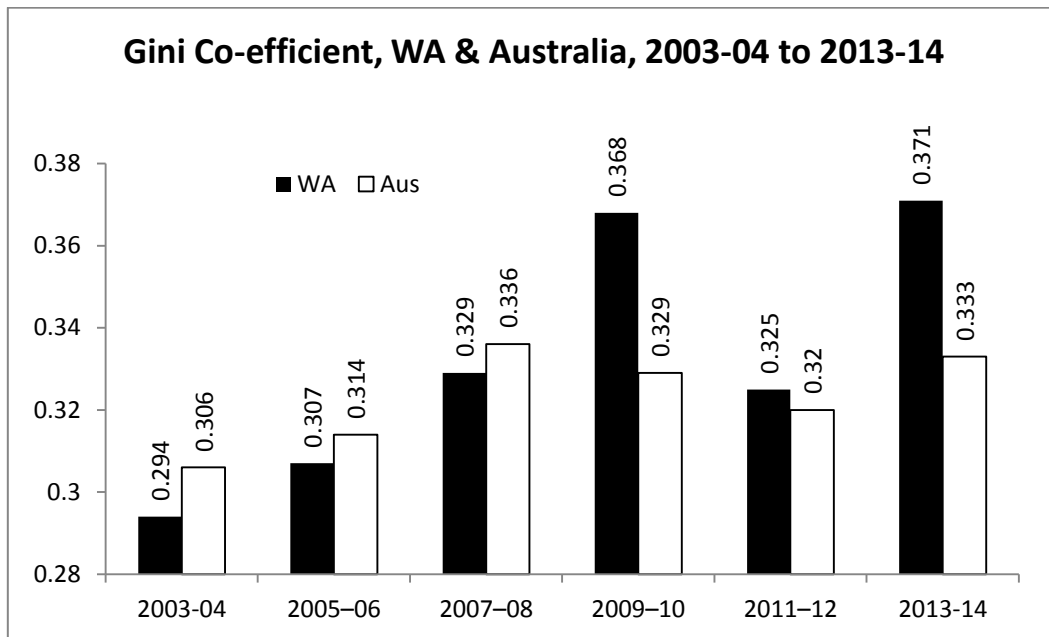
¹; 6523.0 - Household Income and Wealth, Australia, 2013-14

<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6523.02013-14?OpenDocument>

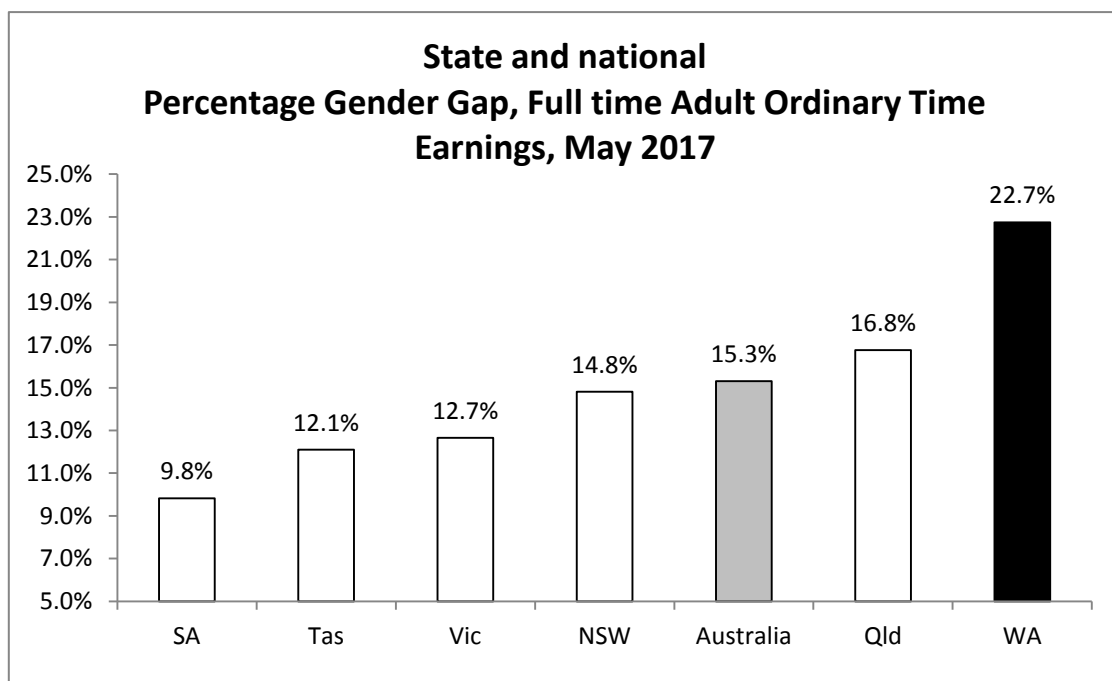
² 6302.0 - Average Weekly Earnings, Australia, Nov 2016,

<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6302.0Nov%202016?OpenDocument>

to 1 representing greater inequality. As can be seen in the following chart, WA had lower levels of inequality than Australia as a whole in 2003-04, but became more unequal relatively quickly by 2013-14.



An important consideration for inequality more broadly is WA's large gender pay gap. The most recent Average Weekly Earnings data released by the Australian Bureau of Statistics for May 2017 shows that, for Full Time Adult Ordinary time earnings, male workers earn 22.7% more than female workers in WA, compared to 15.3% nationally.³



³ 6302.0 - Average Weekly Earnings, Australia, May 2017
<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6302.0Nov%202016?OpenDocument>

The WA gender pay gap has often been attributed to high wages in predominantly male industries such as mining. This was particularly the case during the most recent 'resource boom'.

However only around 7.7% of workers in WA are employed in the mining industry, (82% of whom were male as of November 2016) – far more people work in the services sector.⁴ The loss of more highly paid (presumably male) employment after the end of the construction phase of the resource boom has not resulted in any substantial reduction in WA's gender pay gap.

The most recent Bankwest Curtin Economics Centre (BCEC) report, *The Price is Right? An Examination of the Cost of Living in WA* has found that, while the average West Australian household has benefitted from a lower cost of living in recent years, rising financial inequality is being felt across the State. In particular, the cost of living is rising faster than inflation for low income households.⁵

Findings of the report include:

- Perth has a housing affordability median multiple rating of 6.1 which is in the 'severely unaffordable' category.
- In most WA regions, incomes relative to Perth have failed to keep up with price relative to Perth.

The Report ranks households in each year by their equivalised household disposable income and then divides these households into five equal groups or quintiles. The lowest quintile comprises the 20 per cent of households with the lowest equivalised household disposable incomes. The highest quintile comprises the 20 per cent of households with the highest equivalised household disposable incomes. During 2003-09, low-income households' real income growth lagged behind high-income households, with the *poorest* 20% experiencing only an 11% increase in real income, while the *richest* 20% in WA reaped income gains of nearly 60% (see chart below).

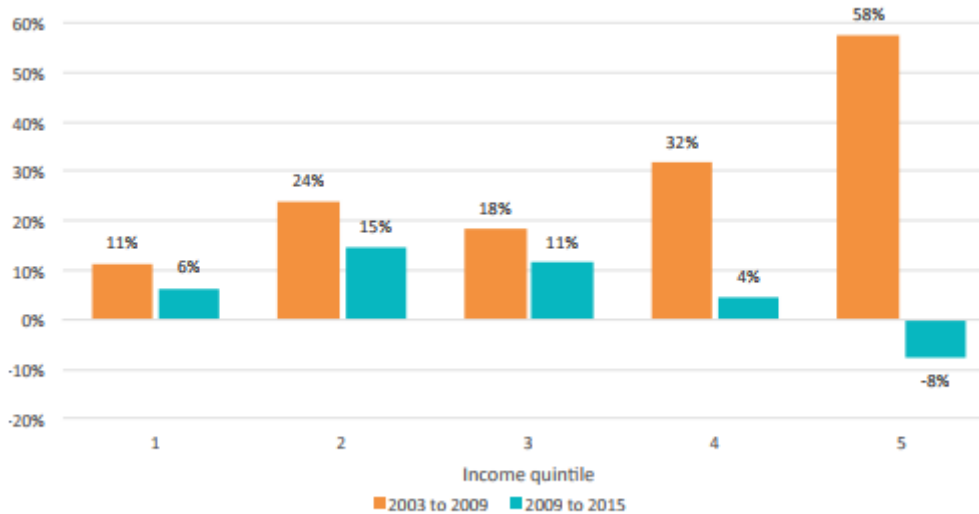
After the Global Financial Crisis, all household types experienced a smaller real income growth in 2009-15 than in 2003-09.

⁴ 6291.0.55.003 - Labour Force, Australia, Detailed, Quarterly, Nov 2016

<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6291.0.55.003Nov%202016?OpenDocument>

⁵ Bankwest Curtin Economics Centre *The price is right? An Examination of the Cost of Living in Western Australia* (December 2017) <http://bcec.edu.au/assets/BCEC-The-Price-is-Right-Report-WEB.pdf>

Figure 17 Percentage change in mean real gross weekly income of WA households, by household income quintile, 2003-04 to 2015-16



Note: The income quintiles are constructed by ranking WA households in the data according to equivalised household disposable income.
Source: BANKWEST CURTIN ECONOMICS CENTRE | Authors' estimates based on ABS Surveys of Income and Housing.

Essentially, low-income groups appear to lag behind high-income groups in WA during periods of strong economic growth. Thus inequality between households is only redressed when the economy experiences a shock or a downturn. This can also be demonstrated by the gender pay gap, which tends to be reduced when employment falls among more highly paid male dominated industries and occupations. Relying on economic downturns to reduce inequality is not a desirable policy position; rather Western Australia should have an industrial relations system that allows working people to recapture the wealth they have generated for the state.

While it is accepted that the state industrial relations system can only fulfil this role within certain parameters – it should nevertheless play its part in providing WA workers with stronger rights at work. Maintaining and improving the spending power of workers across the state and in all household types will underpin WA's future economic performance.

Who is in the state system?

The recently released *Final Report* from the State Government's 'Service Priority Review' found that⁶

The WA public sector is the State's largest employer, even without accounting for those engaged by GTEs {Government Trading Enterprises} and non-government organisations in the delivery of public services.

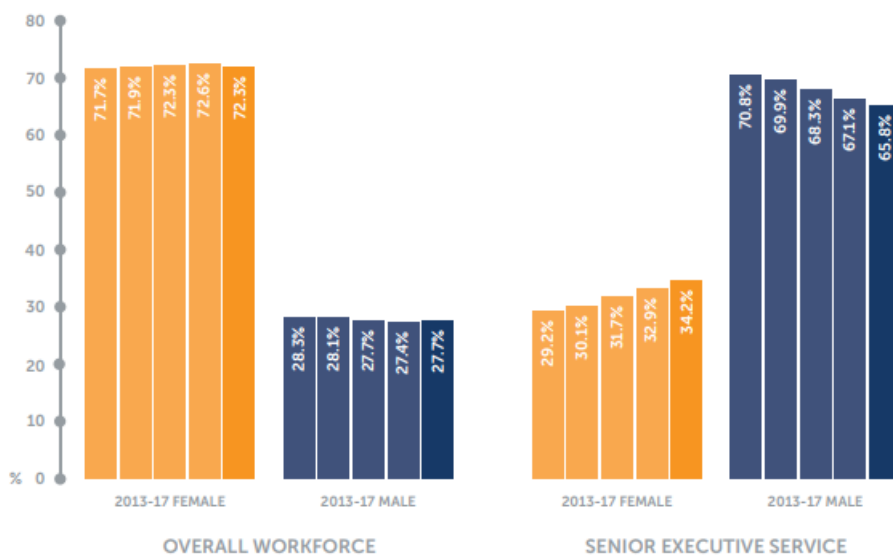
⁶ Service Priority Review *Working together: One Public Sector delivering for WA* (2017) pp. 17, 111
https://www.dpc.wa.gov.au/ProjectsandSpecialEvents/ServicePriorityReview/Documents/SPR_Report_FINAL-5-Dec.pdf

FIGURE 1 – A SNAPSHOT OF THE WA PUBLIC SECTOR WORKFORCE¹



The WA public Sector Workforce is indisputably in the state industrial relations system. However while these workers are more likely to have their terms and conditions determined by collective agreements than State awards; the structure of this workforce also demonstrates the need for the state industrial relations system to robustly address issues such as pay equity. The Final Report found that, within the WA public sector, there is a persistent underrepresentation of women in higher positions within the sector, despite it having a predominantly female workforce compared to the WA labour market as a whole.

FIGURE 13 – GENDER COMPOSITION IN THE PUBLIC SECTOR, 2013-17¹³⁶



UnionsWA argues that, while issues such as unconscious bias in recruitment, and limited take up of flexible work arrangements, may contribute to this disparity, the same issues as those 'at play' in the

wider WA workforce also play a significant role. The magnitude and persistence of the gender pay gap in WA, and the historical undervaluing of work within female dominated industries, demonstrate that 'the free operation of the labour market', and the gradual entry of women into the broader workforce, will not offer redress for women's economic inequality. Concrete action to redress gender inequity is needed, through the state industrial relations system, and through the state government's policies towards its own workforce.

When determining who is in the private sector parts of the state industrial relations system, UnionsWA has utilised, as part of its state wage case submission, the analysis of contained in the Western Australian state government initiated report *Review of the Western Australian Industrial Relations System* (or '*Amendola Report*'). This is alongside ABS labour force data, and information from the Department of Commerce. We appreciate the work of the current Review's secretariat in providing more up-to-date information on the state system, and look forward to seeing the completed report.

The *Amendola Report* argued that the 'type of legal organisation for which an employee works and the industry in which that employee works' could be used to determine the 'breakdown of the prevalence of unincorporated businesses across different industries in Western Australia'. These businesses are judged as more likely to be in the Western Australia state industrial relations system, and thus more likely to have employees who will be more impacted by the state wage case.

The Department of Commerce's analysis of the number of workers in the state industrial relations system included estimates that it could be between 21.7 per cent and 36.2 per cent of Western Australia employees. According to the Department, in May 2010, unincorporated employers were more likely to be in the industries of:

- rental, hiring and real estate services (76.7 per cent unincorporated employers);
- other services⁷ (55.1 per cent);
- accommodation and food services (54.6 per cent);
- administrative and support services (39.9 per cent); and
- retail trade (36.1 per cent)⁸

The 2009 *Australia at Work Report* by the Workplace Research Centre found that employees who were less likely to have the power to negotiate their pay and conditions were likely to be:

- aged less than 24 years;
- female; and
- in precarious employment arrangements.⁹

⁷ According to the Australian Bureau of Statistics, 'The Other Services Division includes a broad range of personal services; religious, civic, professional and other interest group services; selected repair and maintenance activities; and private households employing staff.' 1292.0 - *Australian and New Zealand Standard Industrial Classification (ANZSIC)*
<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/14074305CC4FA750CA25711F00146E4A?opendocument>

⁸ Department of Commerce, Labour Relations,
http://www.commerce.wa.gov.au/LabourRelations/Content/Employers/About_IR_in_WA/Western_Australian_industrial_.html

⁹ van Wanrooy, B, Wright, S, Buchanan, J, Baldwin, S, Wilson, S, *Australia at Work in a Changing World*, Workplace Research Centre (2009), pp.69-72, <http://www.australiaatwork.org.au/temp-1913374402.php>

In Western Australia at the end of the February Quarter of 2017, those industries (as identified by the Department of Commerce) with unincorporated private sector businesses most likely to be in the state system had employees who were:

- 51.3 per cent female;
- 28.1 per cent aged 15-24 years; and
- 46.2 per cent working part time.

By contrast, for Western Australia employees as a whole:

- 44.4 per cent are women;
- 15 per cent are aged 15-24 years; and
- 31 per cent are part time.¹⁰

UnionsWA contends that the state industrial relations system includes vulnerable groups of employees who are less likely to negotiate decent increases for themselves. The Review's recommendations should reflect this situation, and take steps to improve it.

UnionsWA's recommendations to this Review, and those of its affiliates, aim to create a state industrial relations system that will protect the rights of all workers, and ensure those rights keep up with community standards. We also aim to combat wage theft, and other forms of non-compliance with industrial law.

Addressing 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.

UnionsWA advocates for a strong and independent umpire for the WA Industrial relations system. Therefore the WAIRC should have the power to resolve workplace disputes, and arbitrate on merits, without restrictions. Arbitration should also be available to create new workplace and industry standards. There should also be broad discretion for the WAIRC to be guided by what is fair and reasonable in workplace and industrial disputes.

The Labour Relations Reform Act 2002 streamlined and clarified grounds of appeal to the Industrial Appeals Court. This review should now be extended to streamline the office and administrative processes of the WAIRC.

In order to reduce overlap and bureaucracy, functions of the President as well as the Commission in Court Session (CCS) should be reviewed. There is no reason why the functions of the CCS could not simply be exercised by the WAIRC sitting as a Full Bench.

The Act seeks to achieve the object by encouraging the settlement of industrial disputes by communication, negotiation, conciliation and if necessary arbitration. It provides for a structure of the WAIRC that is two tiered.

¹⁰ ABS 6291.0.55.003 - *Labour Force, Australia, Detailed, Quarterly, Feb 2017*, <http://www.abs.gov.au/ausstats/abs@.nsf/PrimaryMainFeatures/6291.0.55.003?OpenDocument>

UnionsWA agrees there is an argument to eliminate the two tiered structure of the Western Australian industrial relations legislation. Any amended Act should have similar legal representation rights for registered organisations as that provided for by the *Fair Work Act 2009*. UnionsWA is not opposed to streamlining the WAIRC and its constituent authorities; however we do not support any undermining of its role consistent with s6 – Objects of the *Industrial Relations Act 1979*.

As provided by s.71 of the Industrial Relations Act 1979, the majority of Western Australian unions have dual registration under both federal and State jurisdiction.

Possible difficulties have arisen where unions have not sufficiently differentiated the legal entities of the State and federal bodies. These significant legal problems would be overcome if the reformed Western Australian legislation contained 'invalidities' provisions. Such provisions are already found in the Fair Work Act 2009 and in the industrial legislation of other States.

The operation of 'invalidities' provisions allow organisations to make an application to the Federal Court (for a federally-registered union) or the State industrial commission (for a State-registered union) for orders that 'cure' any invalidity in the administration of a registered union. UnionsWA supports the inclusion of similar 'invalidities' provisions in Western Australian legislation.

UnionsWA also supports the WA Commission having the power to automatically update Allowances in the state IR system.

We join with our affiliate, United Voice, in recommending that the Western Australian Industrial Relations Commission remains a laypersons tribunal to ensure that all workers in Western Australia have access to justice on matters of an industrial nature. To this end, there should be timely resolution of matters, website upgrades and application processes suitable for a modern industrial relations system.

UnionsWA has no objection to the office of the WAIRC President being occupied by a Supreme Court justice, provided the position is properly funded for the timely resolution of industrial matters.

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.

UnionsWA supports its affiliate, the CPSU/CSA in seeking amendments and reforms of the Industrial Relations Act (and consequently the Public Sector Management Act regarding the

- 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;

Public Sector unions should be able to bring matters relating to Public Sector Standards to the WAIRC, and access the Conciliation powers. This is because the current role of the Public Sector Commission (PSC) acts to undermine rights at work for Public Sector workers.

The problems of the current Act were highlighted in 2013 by the Chief Justice of WA Wayne Martin. In his Whitmore lecture 'Forewarned and Four-Armed – Administrative Law Values and the Fourth Arm of Government',¹¹ the Chief Justice expressed a deep concern about the '*proliferation of the various agencies which perform functions grouped under the heading of "integrity"*'. He argued that, while these agencies are ostensibly 'watchdogs' '*there appear to be few mechanisms which operate effectively to keep these metaphorical watchdogs on a leash*'. He singled out in particular the Public Service Commissioner which the WA Parliament has effectively provided '*with the power to override laws of the Parliament*'.

Pursuant to s 21 of the PSM Act the Commissioner is given the functions of establishing public sector standards, and issuing codes of ethics setting out minimum standards of conduct and integrity to be complied with by public sector bodies and employees. By s 22A of the Act, the Commissioner is empowered to issue written instructions on a wide variety of matters including the management and administration of public sector bodies, official conduct, suspected breaches of discipline, and the taking of disciplinary action and "any other matter in respect of which Commissioner's instructions are required or permitted under" the Act.

WA public sector workers should have their rights at work restored through full access to the WA industrial relations commission.

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.

UnionsWA joins with our affiliate, United Voice, in arguing for strong action on equal remuneration in the WA industrial relations system. As they point out, equal pay has been recognised as an industrial relations imperative by Australian states for decades. However gendered pay inequity persists.

Conceptually, there are differences between equal remuneration and the 'gender pay gap'. While the promotion of 'equal remuneration for men and women for work of equal value' is an object of the current Act, and a consideration for the state wage case, it is weakly worded, and 'balanced' against other considerations. It should at least read, as stated by United Voice as '*ensur[ing] equal remuneration for men and women for work of equal or comparable value*'.

More broadly it should be a priority objective of the WA industrial relations system to *close* the gender pay gap by addressing the gender-based undervaluation of certain industries. The WAIRC should therefore be empowered, as is the FWC, to make Equal Remuneration Orders (ERO).

However the WA state system has the opportunity to learn from the problems of Fair Work Act's ERO processes, particularly the tendency of applications to be lengthy, costly and protracted. The FWC's insistence on 'comparators' in equal remuneration cases has proven to be a way of preventing action on gender pay equity, rather than promoting it.

¹¹ The Honourable Wayne Martin AC, 'Forewarned and Four-Armed – Administrative Law Values and the Fourth Arm of Government' (August 2013) pp.9, 24-5
<http://www.supremecourt.wa.gov.au/files/Whitmore%20Lecture%202013%20Chief%20Justice%20Martin%201%20Aug%202013.pdf>

The WA system should look to the Queensland Industrial Relations Act's provisions for 'equal remuneration for work of equal or comparable value'. A comprehensive Equal Remuneration Principle (ERP) was established in 2002 in that state. This ERP has advantages for running Equal Remuneration Cases such as:

- not requiring a comparator to proceed with a case
- a broad definition of what comprises undervaluation
- recognition that proper work value assessment may not have taken place in the past.

The WAIRC should adopt an ERP the same as Queensland. This would also be of benefit because:

- New State awards would be subject to an equal remuneration test
- Determinations or orders on existing awards could include directions to the parties to obtain and provide wage related information.
- Applications for the certification of new agreements could require steps to be taken by the parties to ensure that their agreement provides for equal remunerations

Both our affiliates, CPSU/CSA and United Voice, refer to Dental Clinic Assistants as an example of an occupation historically undervalued because women make up the majority of the workforce. In Queensland in 2003, United Voice made an ERO application to increase remuneration, provide an extended career path, and grant additional allowances for dental assistants employed under the *Dental Assistants (Private Practice) Award*. The union was able to demonstrate to the Full Bench of the Queensland Industrial Relations Commission that the dental assistants' classification structure provided lower wages despite comparable qualifications. More information on this case can be found in the United Voice submission to this Review.

In addition to addressing matters in the *Industrial Relations Act*, the WA government should also legislate directly for principles to guide organisations towards closing their gender pay gaps. A key principle will be transparency of information, plans, and outcomes. The state government will also actively support pay equity cases taken to the WA industrial relations system. This support will include a commitment to fully fund the wage outcomes from such cases.

The state government will require its agencies to

- Audit their organisations for compliance with pay equity principles
- Formulate pay equity plans (PEPs) to address areas where their organisations fails to comply with those principles
- Set targets for pay equity outcomes that are reportable to parliament

The state government should also require PEPs from companies and NGOs with which the state government has procurement and tender arrangements, and service delivery contracts. The state government should also increase staffing and funding for the Pay Equity Unit within the Department of Commerce. The unit will be fully resourced to proactively audit government agencies for their performance on pay equity, and assist in formulating their PEPs.

The unit will also assist private sector organisations and NGOs with their pay equity plans as required by government procurement, tendering and contract arrangements.

Effective measures for pay equity should be at the heart of any modern industrial relations system. Adopting an equal remuneration principle, making equal remuneration orders, and closing the gender pay gap, should all be explicit priorities of the WA state industrial relations system.

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.

While Australia does have strong legislative frameworks governing worker protections, rights for all workers need to move with community standards. Issues have been emerging in Australia that leave workers vulnerable to exploitative pay and working conditions and with little access to recourse. Accordingly, WA legislation needs to include far broader definitions of ‘employee’ and ‘worker’.

UnionsWA supports the Salvation Army’s submission that, given the increase in the migrant domestic workers globally, and the patterns of exploitation and abuse that are perpetrated against them, the WA Industrial Relations Act’s definition of ‘employee’ should no longer exclude domestic workers. The effect of this exclusion is that workers who are *directly* engaged by an individual to provide support in a private home are not employees for the purposes of either the state or the national systems.

The Salvation Army reports that, since 2007, they have assisted nearly 30 domestic workers nationally who have been subjected to degrading and humiliating conditions, including deprivation of food, withholding of identity documents, abuse, threats, and intimidation. Individuals seeking our assistance have withstood verbal humiliation and psychological and physical abuse, sexual harassment and assault, denial of medical care, control of their movement and communications with other people, invasion of privacy, excessive work, and little no pay at all. Sadly, this is consistent with migrant domestic workers in countries around the world.

As our affiliate United Voice points out, the implications of the exclusion of domestic workers in the Industrial Relations Act is not just a matter for WA. The International Labour Organization Protocol of 2014 to the Forced Labour Convention, 1930 requires that relevant labour laws apply to all workers in all sectors of the economy. Australia’s ratification of the ILO’s Domestic Workers Convention (No. 189) and Recommendation (No. 201) is prevented by the domestic worker exclusion in the IR Act.

UnionsWA supports the point made in the ACTU’s submission, that the growth of non-standard forms of employment in Australia has given rise to an unprecedented growth of insecure work and has removed a whole range of securities and entitlements from certain workers. Addressing this effectively this effectively requires an expanded definition of ‘employee’ that better captures indirect employment arrangements like labour hire and dependent contracting. A broad definition of ‘work’ and ‘worker’ is needed that is not limited to those workers engaged under an employment contract so that it can include ‘so called’ platform or gig economy workers.

While these types of working arrangements have been justified as entrepreneurial, in practice it has become a relabelling of employment as sharing. By becoming ‘sharers’ of an asset (labour), rather than sellers (employees), workers are excluded from the protections of industrial law. This has had far reaching industrial relations consequences around the world

- In the United States services have started which force workers to compete in a classic ‘race to the bottom’ against each other to bid for the right to work.
- In Australia Uber has been lobbying regulators claiming that workers want the ‘flexibility’ of becoming ‘entrepreneurs’ and driving for Uber.

The reality of sharing is that workers are on zero hour contracts with zero entitlements and are forced to carry risk on behalf of a large multinational. Because workers are also competing against each other for work – they will be tempted to cut costs on their ‘businesses’ by forgoing vital

insurance measures such as public liability and income protection. It is also far from clear how 'sharing economy' workers will be covered by workers compensation and health and safety laws. These social protections are not just a matter for the benefit of individual employees. Society as a whole benefits these laws and obligations minimising social costs in the event of catastrophic events and injuries.

For example, in June this year a Perth Uber Eats who was driver left unable to work after he was injured in a hit-and-run in Northbridge. An online fundraiser was set up raised more than \$5000 in less than 24 hours.¹² While this is a 'good news' story, it points to the lack of Occupational Health and Safety, and Workers Compensation protections for such workers.

Workplace regulators need to more forcefully apply existing labour laws to gig businesses, using test cases and other efforts to clarify that workers in gig businesses should indeed be protected by minimum standards. Therefore legislation also needs to clarify and strengthening the definition of 'employee' in existing labour law so that gig workers are more clearly covered by those laws. Otherwise the gig economy will continue to undermine the protections and safeguards that are at the heart of the Australian industrial relations system.

The Salvation Army submission also refers to another aspect of migrant domestic worker issues that also have a broader application – namely those workers who are working in breach of their visa conditions. The situation for these workers is particularly tenuous, as they do not have a legal means of redress if they are exploited in the workplace. Unscrupulous employers benefit from exploiting migrant labour, while retaining no liability to pay unpaid wages. Given this precarious situation, an illegally employed migrant worker is unlikely to seek help from the authorities if this would mean they are risking detention and deportation under the *Migration Act*.

The need for this change is demonstrated by recent Fair Work Ombudsman prosecution of the Commercial and Residential Cleaning Group:

A former petrol tycoon, his wife and their cleaning company have been hit with a record fine of more than \$500,000 after being slammed for exploiting vulnerable foreign workers.

...

Judge Lucev said both cases "demonstrate similar circumstances and a similar mode of operation". He said they had a deliberate strategy to hire vulnerable workers, refuse to pay them for weeks, deny them their full entitlements and then refuse to pay them when the employment ended.

Judge Lucev said the pair had shown "no contrition" and displayed "no evidence of corrective action" and "no co-operation with the court or the regulator". One worker was paid about one-third of her entitlements over two months and was owed more than \$5000. She gave evidence that she borrowed money from a friend and ate only one meal a day to allow her to pay rent.¹³

The point of this example is that the directors of this company are repeat offenders, employing a deliberate business strategy that directly exploits the visa status of vulnerable workers. While it is

¹² 'Community spirit helps Uber Eats driver Fabio Silva injured in hit-and-run'

<https://thewest.com.au/news/northbridge/community-spirit-helps-uber-eats-driver-fabio-silva-injured-in-hit-and-run-ng-b88505611z>

¹³ 'Povey cops big penalty for rip-off of workers' <https://www.pressreader.com/australia/the-west-australian/20171206/281779924456625>

pleasing to see this particular prosecution, they are also rare, and hampered by the reluctance of the 'chief witness' i.e. the worker, to approach authorities. While there are many aspect to addressing this issue (including those addressed in the Review's Term of Reference 7), in order to ensure that their rights are enforceable, the definition of 'employee' should cover all workers regardless of visa status.

Finally, the situation of piece workers, who are currently excluded from the definition of an employee for the purposes of the *Minimum Conditions of Employment Regulations*, should also be remedied. They should no longer be excluded from exercising their full rights and entitlements as workers in WA.

As the Review considers broader definitions of 'employee' or 'worker', UnionsWA points out that there are already examples within the WA jurisdiction that include far more expansive characterisations of 'worker'. For example, WorkCover WA's definition of a 'worker' covers:

- full-time workers on a wage or salary
- part-time, casual and seasonal workers
- workers on commission
- piece workers
- working directors (optional)
- contractors and sub-contractors (in some circumstances)
- family members.

As the world of work evolves, the laws relating to work must evolve with them to ensure that worker rights move with community standards.

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.

In addition to having legislation with coverage based on broad definition of work, UnionsWA supports joins with the ACTU in supporting a strong set of universal standards in working life. We are supportive of minimum conditions being consolidated into the state Industrial Relations Act, providing those conditions reflect, and go beyond, the National Employment Standards.

UnionsWA also supports our affiliate, the CFMEU in asking for consideration of the *Construction Industry Portable Paid Long Service Leave Act 1985 (WA)* when considering the minimum conditions of employment.

WA's state minimum employment standards should include:

- requests for flexible working arrangements.
- an upper limit on the number of ordinary hours which may be specified in an industrial agreement.
- a clear entitlement to paid public holidays during leave

- parental leave
- compassionate leave

Access to ten days paid domestic violence leave should be secured in legislation and the minimum conditions in WA. Paid leave is essential for any worker experiencing domestic violence so they are able to maintain employment and financial security to escape an abusive or violent situation. Ten days are necessary because Domestic Violence Leave must provide financial and employment security for time off, including for attending court hearings or looking for a safe home to relocate children. Research by the ACTU has shown that escaping an abusive relationship costs \$18,000 and takes 141 hours, almost all during business hours.¹⁴

There should also be an increase the 'prescribed percentage' for all casuals from 20% to 25% in the WA state industrial relations system, to match the casual rates of the National system.

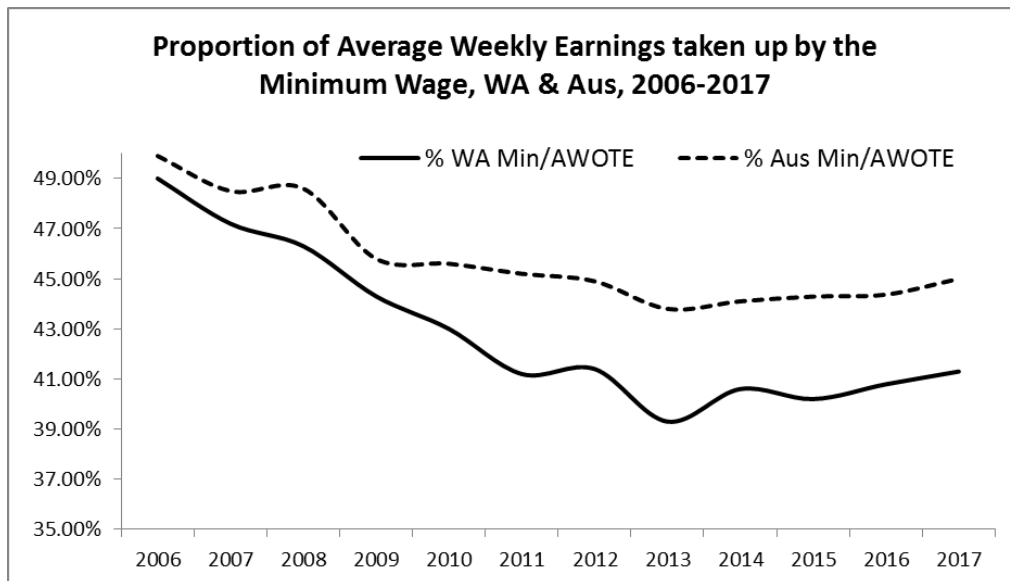
Currently there is a higher state minimum wage in WA than the national minimum wage rate. UnionsWA argues that the considerations permitting that higher wage should be retained within the state system. The reason for retaining a higher minimum wage rate in WA is consistent with the union movement's general concern at a national level that the continuing disparity between the minimum wage and Average Weekly Ordinary Time Earnings (AWOTE) is a serious source of inequality in both WA and Australia as a whole. The higher rate in WA masks the problem that WA has a greater wage disparity between its minimum wage and average weekly earnings than does Australia as a whole.

The disparity can be demonstrated by looking at how minimum wages have fallen as a proportion (or 'bite') of average full-time earnings, as demonstrated by the table below. The WA fall has been sharper, and faster, than the national fall despite the WA minimum wage now being larger in dollar terms.

	WA Min Wage \$	WA full-time AWOTE (May each year) \$	% WA Min/AWOTE	Aus Min Wage \$	Aus full-time AWOTE (May each year) \$	% Aus Min/AWOTE
2006	504.4	1028.4	49.00%	511.86	1025.8	49.90%
2017	708.9	1714.7	41.3%	694.9	1543.2	45%

The increases awarded by the WA Commission since 2006, despite recording improvements in 2012, 2014, and 2016, have not been sufficient to reverse the decline in relative living standards.

¹⁴ 'ACTU demands Turnbull back 10 days paid domestic violence leave' <https://www.actu.org.au/actu-media/media-releases/2017/actu-demands-turnbull-back-10-days-paid-domestic-violence-leave>



The gap between low paid workers’ living standards and those of other workers is larger than it was ten years ago, and in WA it would have been larger still if the state minimum wage had merely matched the national minimum wage. The minimum wage bite demonstrates that the living standards of low paid workers are too low relative to other workers – especially in WA. Therefore maintaining a higher state than national minimum wage is important to ensure disparities are not increased any further.

UnionsWA joins with the ACTU to supports process for statutory minimum conditions to be periodically updated by the WAIRC without the need for legislative change. UnionsWA also agrees that the WAIRC should be empowered to arbitrate and make orders that create new universal standards or specific occupation or industry standards, on its own motion and on application, provided there are protections to ensure changes will not result in any diminution of employee entitlements.

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.***

UnionsWA acknowledges that many WA workers are likely effectively Award free, as private sector State Awards have not been maintained by anyone other than the WA IRC.

Nevertheless UnionsWA does not support any adoption of ‘award modernisation’ as a process for updating State awards, nor do we support the wholesale replacement of comprehensive awards

with Federal awards. The four yearly review processes for award making has also proven to be a bad idea at the Federal level.

As the ACTU submitted to the Productivity Commission's Workplace Relations Framework Inquiry:

The creation of modern awards involved consolidation and simplification of award entitlements on a massive scale. In the process, terms and conditions of employment that had been well entrenched in particular states, sectors or parts of the economy were eliminated. Examples include additional public holidays, jury service make up pay, and more beneficial leave entitlements. In addition, detailed provisions were redrafted in order to clarify and/or simply the safety net. In some cases, critical information regarding the operation of specific entitlements was removed, creating a degree of uncertainty or ambiguity in relation to the safety net.

Any updating of awards should be preceded by a number of steps to ensure the rights of WA workers are protected, along with their pay and conditions. Specifically

- Unions and employers should remain the *principal* parties to awards. This is to ensure that vexatious interference with award and agreement making by organisations and individuals who are not representative of the relevant industries. For similar reasons there should be restricted standing on who can *make* an award.
- Accordingly there must be safeguards against employer groups making vexatious applications to cancel awards.
- There should be no concept of 'allowable matters' - as this is a restriction that has facilitated the stripping of award conditions at the Federal level
- Principles for award updated must be comprehensive and ensure no workers are worse off. This should include making conditions such as penalty rates must be protected
- The scope and responsiveness of all State awards should be reviewed and made comprehensive *before* any process of updating begins, as this will make any future processes more efficient and effective.
- Any new State awards should be enforceable from the day they are made.
- WAIRC should be able to make State awards and orders or register industrial agreements containing entry and inspection provisions that are additional to those described in the Act. Parties should be able to include any mutually acceptable provisions for union entry to a workplace, in enterprise agreements.

UnionsWA joins with the ACTU in cautioning against a 'plain English' approach that does not account for common usage language used in workplaces in that occupation and industry and familiar to employers and workers in those workplaces. The WAIRC and the parties should retain control of any 'plain english' drafting process and there should be 'user testing' with employers and workers in the relevant occupation or industry.

While any State award updating process can be driven by the WAIRC, it remains the case that, even if the WAIRC is fully funded to undertake the work, unions will nevertheless need to review that work. It is proposed that funding be provided to UnionsWA for at least two years in order to employ a qualified person to undertake this task

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.

UnionsWA agrees with the ACTU that ensuring that employees are paid their correct entitlements and deterring non-compliance with State industrial laws and instruments require both

a) Streamlined enforcement and compliance procedures (as discussed against TOR 1 above); and

b) Measures that ensure that unions can effectively enforce workers' rights, including simple and expanded right of entry and access to worker information.

As the Salvation Army points out that, over the past couple of years, many taskforces, inquiries, and reviews have revealed previously hidden a previously hidden epidemic of wage theft and underpayment. One recent example from Western Australia, as reported by the Fair Work Ombudsman, is a former Perth restaurant operator facing Court for allegedly requiring a Bangladeshi worker to repay thousands of dollars of his wages - then dismissing him because he lodged a workers' compensation claim after injuring his back at work. The worker was in Australia on a 457 skilled worker visa.¹⁵ While it is encouraging to see such cases prosecuted, there is every indication that they are only the 'tip of the iceberg'.

In the WA system, the current maximum penalty for an employer (organisation, or association) breaching an agreement is \$2,000, with individuals are only liable for a \$500 penalty. UnionsWA agrees with our affiliate, United Voice, that such minimal penalties are an insufficient deterrent for unscrupulous employers from taking advantage of vulnerable workers. The current laws make wage theft too easy and the punishment too light. Wage theft is now so common that in some places it's the business model, and the 'savings' for employers generated by robbing employees of their wages are far greater than the fines that can be incurred. It is 'profitable' for employers to steal wages and pay the fine should a claim be brought for underpayment and back-pay.

Penalties for employers who have breached awards or agreements in the state system should be set as such a level as to 'cost' them more than they have made from their abuses.

However, industrial inspection is not enough; unions should be able to actively prosecute for breaches of compliance. In order to do that there should be far stronger union rights to investigate workplace breaches, and far stronger union delegate rights.

The right of unions to investigate possible breaches should not be restricted to only those impacting union members. Access to non-member records should also be permitted because:

- a) It is often only possible to determine an underpayment comparing multiple records, including both members and non-members
- b) Non-members also have the right to know if they are being underpaid

There should also be a reverse onus of proof on employers for lost records relating to possible breaches. Such a reverse onus has precedence in laws such as the national *Work Health and Safety*

¹⁵ 'Perth curry house operator faces Court over alleged unlawful cash-back exploitation' (6 September 2017) <https://www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/september-2017/bikaner-india-litigation>

Act 2011 – which prohibits a person from being subjected to discriminatory treatment. The defendant bears the legal burden of proving that a prohibited reason was *not* the dominant reason for engaging in discriminatory conduct. The reverse burden of proof on this issue is required because it will often be difficult for a prosecution to prove that a person engaged in discriminatory conduct for a prohibited reason. Similarly, for compliance matters, it would be too easy for employers to ‘lose’ pertinent records unless otherwise required to produce them.

Freedom of association provisions should provide positive legislative recognition of the rights of union delegates. These would be consistent with Australia’s international obligations on Civil and Political Rights.

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.

UnionsWA supports the submission made by our affiliate the Australian Services Union in relation to the term of reference regarding local government employees.

The WA government should remove any ambiguity associated with the unique ‘dual’ industrial relations system within Western Australia, and issue a clear, definitive determination proclaiming that all local government employers and employees are solely regulated by the state industrial relations system.

Legislation should be passed that clarifies explicitly that Local government is regulated by the state industrial relations system.

The Constitution of Western Australia states quite clearly in its section 52:

Elected local governing bodies

(1) The Legislature shall maintain a system of local governing bodies elected and constituted in such manner as the Legislature may from time to time provide.

(2) Each elected local governing body shall have such powers as the Legislature may from time to time provide being such powers as the Legislature considers necessary for the better government of the area in respect of which the body is constituted.¹⁶

UnionsWA agrees that any suggestions that the state government refer its residual powers regarding industrial relations to the Commonwealth, be rejected in their entirety.

Conclusion and Recommendations

Addressing each of the terms of reference (TOR) – UnionsWA recommends

TOR 1

¹⁶ Constitution Act of WA

[https://www.slp.wa.gov.au/pco/prod/filestore.nsf/FileURL/mrdoc_37172.pdf/\\$FILE/Constitution%20Act%201889%20-%20%5B06-f0-00%5D.pdf?OpenElement](https://www.slp.wa.gov.au/pco/prod/filestore.nsf/FileURL/mrdoc_37172.pdf/$FILE/Constitution%20Act%201889%20-%20%5B06-f0-00%5D.pdf?OpenElement)

- *UnionsWA is not opposed to streamlining the WAIRC and its constituent authorities; however we do not support any undermining of its role in protecting workers in the WA industrial relations system.*

TOR 2

- *WA public sector workers should have their rights at work restored through full access to the WA industrial relations commission.*

TOR 3

- *The WAIRC should adopt a comprehensive Equal Remuneration Principle (ERP) the same as the Queensland IRC.*
- *The WAIRC should be empowered to make Equal Remuneration Orders.*

TOR 4

- *The WA IR Act's definition of 'employee' should be reviewed so as not to exclude domestic workers*
- *Piece workers, who are currently excluded from the definition of an employee for the purposes of the Minimum Conditions of Employment Regulations, should also be included in any new definition*
- *The definition of employee should be broad enough to capture so called platform or gig economy workers.*
- *The definition of 'employee' should also cover all workers regardless of visa status, order to ensure that their rights are enforceable*
- *Consideration should be given to WorkCover WA's broader definitions of what constitutes a 'worker'*

TOR 5

- *UnionsWA supports our affiliate, the CFMEU in asking for consideration of the Construction Industry Portable Paid Long Service Leave Act 1985 (WA) (CIPPLSL Act)*
- *We are supportive of minimum conditions being consolidated into the state IR Act, providing those conditions reflect, and go beyond, the NES*
- *Minimum conditions should include requests for flexible working arrangements.*
- *Access to 10 days paid domestic violence leave is a right that should be secured in legislation and the SES.*
- *Increase the 'prescribed percentage' for all casuals from 20% to 25% in the WA state industrial relations system*
- *Arrangements that permit a higher minimum wage in WA than nationally should be retained*

TOR 6

- *UnionsWA does not support any adoption of 'award modernisation' for Western Australian awards, nor do we support the wholesale replacement of comprehensive awards with federal awards. The four yearly review processes for award making has also proven to be a bad idea at the Federal level.*
- *Any updating of awards should be preceded by a number of steps to ensure the rights of WA workers are protected, along with their pay and conditions*
- *Government should commit to providing funding to the parties for full time staff to undertake award modernisation.*

TOR 7

- *Penalties for employers who have breached awards or agreements in the state system should be set as such a level as to 'cost' them more than they have made from their abuses of vulnerable workers.*
- *Unions should be able to actively prosecute for breach of compliance*
- *Freedom of association provisions should provide legislative recognition of the rights of union delegates.*
- *The right to investigate possible breaches should not be restricted to only those impacting union members.*
- *Access to non-member records should be permitted.*

TOR 8

- *Legislation should be passed that clarifies explicitly that Local government is regulated by the state industrial relations system*
- *Any suggestions that the state government refer its residual powers regarding industrial relations to the Commonwealth, be rejected in their entirety*

Thank you for the opportunity to comment to this Review. If you would to discuss this submission further, please contact:

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Or

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