

Submission to the Ministerial Review of the
State Industrial Relations System

24 November 2017

The Western Australian Council of Social Service Inc. (WACOSS) welcomes the opportunity to make a submission to the Ministerial Review of the State industrial relations system.

WACOSS is the peak body of community service organisations and individuals in Western Australia. WACOSS stands for an inclusive, just and equitable society. We advocate for social change to improve the wellbeing of West Australians and to strengthen the community sector service that supports them. WACOSS is part of a national network consisting of ACOSS and the State and Territory Councils of Social Service, who assist low income and disadvantaged people Australia wide.

In general terms, we suggest that opportunities to simplify the State system and make it easier to navigate for both organisations and workers should be considered, including improved alignment with the Federal industrial relations system (but only where that alignment does not place workers in a position that is in any way worse off).

Jurisdictional Uncertainty

Perhaps the single most significant industrial relations system issue for the community services sector in WA is the lack of certainty for smaller not-for-profit organisations as to whether they fall under the jurisdiction of the state or national industrial relations system.

We note that many small to medium organisations may have sought and received advice when they were first established on jurisdictional issues. However, government funding policy changes overtime (such as from fixed grants to competitive tendering processes) can mean that the nature of their organisational has changed in the eyes of the industrial relations system without them being aware of it.

There has been recent case law that has found that tendering for government funding can constitute 'trading', and hence those receiving such service contracts may now be considered constitutional corporations. The 2009 case of *Aboriginal Legal Service of Western Australia (Inc) v Lawrence* had found that as a public benevolent institution that provided predominantly free of charge services to a strictly defined group, its activities, including its entry into the tendered contract, were removed from ordinary concepts of trade or trading.¹

Steytler P stated in the case, however, that individually the elements of what removed the Legal Service from that definition would not necessarily be enough and that

¹ *Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No 2)* [2008] WASCA 254

A trading corporation can contract with government to provide a charitable or welfare function in fulfilment of government policy. Ordinarily, the provision of large scale legal and allied services, for reward, is trading and the fact that it is not done for profit is not determinative of its character.

The following year in *Bankstown Handicapped Children's Centre Association Inc v Hillman*, the Federal Court held that though the activities of the Association were the "provision of public welfare services" at a cost recovery basis, that did not "detract from the essentially commercial nature of the activities" in part because "its continued existence depended on its success in placing itself in a position in which it would continue to remunerated by continuing to provide those services".²

More recently, we have seen *Re Marie Pasalskyj*, which determined that Outcare met the definition of a trading corporation as a result of the competitive tender process where the Government was seeking specific services at competitive rates, and where payment was made for the actual services provided. The commission contrasted this with the provision of bulk grants, which it characterised as lacking "the character of buying and selling between the organisation and the funding agency, and are often provided gratuitously to the public and are considered to be an end in themselves".³

For organisations, however, the line between competitive tenders and open grants applications processes remains blurry, with a range of variations between different funding agencies, and different processes at State and Federal levels.

That an organisation is now engaging in competitive tendering, rather than receiving bulk grants, is not necessarily because of any decision by the organisation to change its mission, purpose or services, but is the result of government changing its contracting practices. For small organisations, who may have received direction and advice when first being established, but have not retained any legal or human resource expertise, that a decision by government as to how services are to be procured shifts them into a different industrial relations framework may not have occurred to them.

A number of these small to medium organisations may have ongoing state-registered Enterprise Bargaining Agreements (EBAs) from before 2010, but (due to changes in funding and contracting arrangements) arguably should now be considered under the federal system - throwing the enforceability of those EBAs into doubt, and putting both workers and employers into potential jeopardy.

It can be difficult and financially prohibitive for small not-for-profit service providers to correctly determine under which industrial relations system they should function. Provision of access to free or genuinely affordable advice would be to the benefit of the organisations and their workers. Government as a funder, and often the designer, of services has a responsibility to ensure they are being delivered safely and appropriately to its citizens, and with the risk of those services being caught up in complex and arguably unnecessary legal proceedings to establish jurisdiction, would also benefit.

Where organisations are found to be mistaken as to which system they operate under, the opportunity to establish a transition scheme to help them re-register agreements in the appropriate system should be explored.

Procedures at a program level could also be explored to provide advice as to whether participation in a grant-making or tendering process would of itself constitute trading.

² *Bankstown Handicapped Children's Centre Association Inc v Hillman* (2010) 182 FCR 483

³ *Re Marie Pasalskyj* [2015] FWC 7309

Equal Remuneration Provision

WACOSS strongly supports the inclusion of an equal remuneration provision in the Industrial Relations Act with the objective of facilitating the conduct of equal remuneration cases and other initiatives.

The community services sector was proud to advocate alongside its workers and their unions to achieve the 2012 Equal Remuneration Order by the Fair Work Commission for social and community service workers, crisis accommodation workers and disability home care workers under the *Social, Community, Home Care and Disability Services Award*.

The ERO provides for 'above Award' pay increases for social and community service workers of between 23% and 45% over an eight-year period from December 2012 to December 2020.

In 2012, the Fair Work Commission issued an Equal Remuneration Order (ERO) requiring human services agencies to pay annual increases of between 23% and 45% over 8 years (to 2020).

In Western Australia, this was followed by a 2013 decision of the Industrial Relations Commission to amend the *Crisis Assistance, Supported Housing Industry – Western Australia Interim Award 2011* and the *Social and Community Services (Western Australia) Interim Award 2011* in line with the national system to increase rates of pay.⁴

WA has seen, however, the advances achieved by through the ERO and WAIRC decisions undermined by successive State Governments' refusal to accept their continued role in fully funding historically undervalued sectors.

The implementation of the Delivering Community Services in Partnership (DCSP) was intended to shift commissioning processes to outcome-based contracts, based on either tendering on the cost and quality of a fixed level of service delivery (where outcomes are specified), or tendering the level and quality of service delivered for a fixed cost. However, the extent to which we are actually seeing community service providers tendering the 'true cost' of service delivery remains debatable, particularly where existing services are being re-tendered with fixed costs and departmental expectations about ongoing service models and levels are strongly implied.

Problems have arisen where small to medium service providers in particular have lacked the knowledge and tools to be able to sustainably price longer term contracts in a changing funding environment.

This is particularly true of the ability of services to cost in increasing award wage obligations during a period in which the State Non-Government Human Services Sector (NGHSS) indexation formula has changed, and rates of indexation have dramatically diverged from award wage increases.

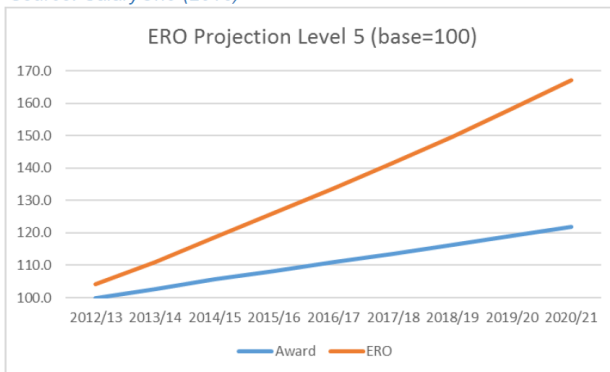
Over the last few years, wage growth has dropped dramatically and the gap between the Wage Price Index and the implementation path for the ERO award increases have diverged significantly. Consequently, annual pay rises are between 5% and 6%, whereas indexation had dropped below 2%. With over 400 organisations providing contract services to WA Government agencies, this presents a significant impact on the sustainability of organisations, services or programs.

⁴ *Western Australian Municipal, Administrative, Clerical and Services Union of Employees v Aboriginal Alcohol and Drug Service (AADS) (Inc) & Others* [2013] WAIRC 00795; (2013) 93 WAIG 1380

Figure 1 ERO Impact by SCHDS Award Level

Level	Total Increase	Annual ERO Increase
2	23%	2.6%
3	26%	2.9%
4	32%	3.6%
5	37%	4.1%
6	40%	4.4%
7	42%	4.7%
8	45%	5.0%

Figure 2 Projected Pay Increases Level 5
Source: SalaryOne (2016)



Research by the *Curtin Not-for-profit Initiative* in 2016/17 on 19 major WA not-for-profit agencies commissioned by WACOSS and Lotterywest found a negative financial impact on all organisations covered by the relevant awards, with the scale of the impact varying depending on whether agencies were already paying over award rates. Six of the 19 agencies reported reduced profitability or were no longer profitable in the short term and five expected a high impact, with that number rising to seven and eight respectively in the long term. Four agencies expected to become unprofitable directly as a result of the ERO. Eight organisations that were either unprofitable before the ERO or became unprofitable as a result of the ERO, deploy 182 programs which were impacted negatively by 10 per cent or more as a consequence.⁵

WACOSS remains concerned that the growing gap between reduced indexation rates for service funding and scheduled award wage increases under the ERO will inevitably lead to reductions in service delivery levels and/or service quality, and is likely to threaten the ongoing financial viability of some small to medium community organisations delivering essential community services. This problem is particularly acute for wage-intensive 24/7 and after-hours services, such as women’s refuges and homeless services. While contract renewal processes will provide services with the opportunity to re-price their services to meet the true cost of service delivery over time, there is a need for an interim strategy to allow services with legitimate sustainability challenges to seek transitional top-up support and/or renegotiate service levels.

Providing for the advancement of gender equity through the facilitation of state equal remuneration orders is crucial, but government must recognise it has a continued role in this space after such orders are made. As mission-driven not-for-profit organisations, our members are faced with difficult choices in balancing their commitment to deliver the best possible services and support to vulnerable and disadvantaged members of our community, and their commitment to treat their workers fairly and provide a safe and fulfilling working environment.

Where organisations are forced to cut services and staff because they are unable to afford to pay them a fair and just wage as a result of government contracting and funding decisions, the Western Australian community is left significantly poorer.

Definition of Employee and Minimum Conditions

⁵ David Gilchrist and Penny Knight (2017) [The 2012 Equal Remuneration Order: Sustainability Impacts on Human Services Delivery in Western Australia.](#)

WACOSS is of the position that this review needs to address the exemption of 'person engaged in domestic service in a private home' from the definition of employee.

Domestic workers, employed by homeowners and occupiers, deserve to be able to access the same minimum conditions as those who meet the current definition.

The roll-out of NDIS and individualised service payment models, while seeing an increase in consumer choice and control, may have implications for the minimum conditions of workers. Where they may have previously been employed by an agency, they may now find that they are employed directly by the person they are providing services for, which could push them outside of the current definition of employee.

It is imperative that our industrial relations system is able to adequately protect workers as they transition into a service model that changes the nature of the relationship between them and the people they are paid to support. It also needs to protect vulnerable and disadvantaged service users, who may not appreciate their responsibilities as 'an employer' under these circumstances, and may be put at both physical and financial risk.

It is also of significant concern to the Council that, as a result of this feature in WA's industrial relations legislation, Australia has been unable to ratify or fully comply with international conventions relating to domestic workers and forced labour. It is incumbent on our State Government to take whatever steps are necessary to enable the ratification of the relevant conventions.

WACOSS further believes that it is critical that Western Australia takes a strong stance to eliminate the use of zero-hour contracts and sham contracting arrangements under the state industrial relations system, as well as advocating for their elimination on a national level. The rise of the 'gig-economy' places in jeopardy the conditions and welfare of the workforce. Proactive steps to protect their entitlements and conditions in our industrial relations system is necessary.

If you would like to discuss this submission further, please feel free to contact the WACOSS Research and Policy Development Leader Chris Twomey at chris@wacoss.org.au or 9420 7222.

Yours sincerely,



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