

## Ministerial Review of the State Industrial Relations System (Western Australia)

Submission of the Australian Council of Trade Unions, 8 December 2017

### Executive summary

1. The Australian Council of Trade Unions (**ACTU**) welcomes the opportunity to make this submission to the Ministerial Review of the State Industrial Relations System (Western Australia) (**Review**).
2. We note that the Review is part of the Western Australian Government's commitment to a contemporary, fair and accessible State industrial relations system for employers and employees and a strong independent umpire in the form of the Western Australian Industrial Relations Commission (**WAIRC**).
3. We note further that the State industrial relations system in Western Australia has not been comprehensively reviewed and updated since 2002, in which time the industrial relations and employment environment has changed significantly.
4. Against this background, the ACTU's submissions in respect of each of the terms of reference (**TOR**) are set out below, following an introduction to the ACTU.
5. We also take this opportunity to note our support for the submission of UnionsWA, and to commend to the Review the recent amendments to the *Industrial Relations Act 2016* (Qld). The ACTU is supportive of the changes made to the Queensland industrial relations system.

### About the ACTU

6. Since its formation in 1927, the ACTU has been the peak trade union body in Australia. There is no other national confederation representing unions. For 90 years the ACTU has played the leading role in advocating in the industrial courts and tribunals for the improvement of employment conditions of workers. It has consulted with governments in the development of almost every legislative measure concerning employment relations over that period.
7. The ACTU consists of affiliated unions and State and regional trades and labour councils. There are currently 43 ACTU affiliates. They have approximately 2 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

## 1. Structure of the WAIRC

8. The ACTU supports a structure of the WAIRC that ensures its independence and provides fair and efficient access to justice. Court processes can be complex, costly and slow. The ACTU suggests consideration be given to dual appointments to the WAIRC and the Industrial Magistrates Court to achieve streamlined enforcement and compliance procedures.

## 2. Jurisdiction and powers of the WAIRC with respect to public sector employees

9. The ACTU supports the submissions of UnionsWA and of those unions who represent public sector employees in Western Australia in respect of this TOR.

## 3. Inclusion of an equal remuneration provision to facilitate equal remuneration cases and other initiatives

10. The ACTU supports the inclusion of an equal remuneration provision in the *Industrial Relations Act 1979 (WA) (IR Act)*, with the objective of facilitating the conduct of equal remuneration cases and other initiatives in the WAIRC.
11. The ACTU submits that effective equal remuneration provisions must include the following:
  - a) an expert and properly resourced pay equity panel empowered to determine claims for equal remuneration orders, with:
    - i) strong own-motion inquisitorial powers;
    - ii) a mandate to determine claims for equal remuneration orders in an inquisitorial rather than adversarial manner; and
    - iii) the ability to conduct properly-funded research;
  - b) a mandatory requirement for the panel to make an equal remuneration order when the legislative conditions are met;
  - c) an explicit statement that no 'male comparator' is required to bring a claim for an equal remuneration order; and
  - d) standing for workers, unions and other interested parties such as the Equal Opportunity Commission to bring a claim for an equal remuneration order on behalf of individuals or groups.

12. The ACTU urges the Review to consider the successful Queensland model for equal remuneration matters. The Queensland jurisdiction provides an explicit statement of equal remuneration principles and detailed direction on how equal remuneration matters are to be handled.
13. While the ACTU supports the inclusion of an equal remuneration provision in the IR Act, we note that the achievement of pay equity requires a range of measures. In order to more fully address pay equity concerns, the ACTU urges the Review to also recommend measures that:
  - a) ensure that awards provide more than a safety net and reflect contemporary community standards;
  - b) convert the state minimum wage into a true living wage;
  - c) expand statutory universal rights to include:
    - i) paid parental leave;
    - ii) paid family and domestic violence leave; and
    - iii) a right to reduced or flexible hours of work to accommodate parenting and other caring responsibilities and to revert to former hours at the conclusion of those responsibilities;
  - d) ensure that workers in casual, fixed-term and other forms of insecure work are not excluded from statutory universal rights (including by revising the definition of 'employee', as discussed against TOR 4 below);
  - e) ensure that any update or variation to awards consider cash and non-cash benefits, rostering arrangements and working hours, and skills, training and education in light of historical gender-based undervaluation of work in female-dominated occupations and industries; and
  - f) place an obligation on parties to bargain for equal remuneration and on the WAIRC to consider pay equity before registering an industrial agreement.

#### 4. Definition of “employee” to ensure comprehensive coverage for all employees

14. The ACTU submits that, in light of the significant changes in the industrial relations and employment environment since the Western Australian industrial relations system was last updated, a revision of the definition of ‘employee’ is critical if the Government’s commitment to a contemporary, fair and accessible industrial relations system is to be realised.
15. 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.<sup>1</sup> To address this effectively requires an expanded definition of ‘employee’ that better captures indirect employment arrangements like labour hire and dependent contracting.
16. The ACTU submits that the definition of ‘employee’ in the IR Act and the *Minimum Conditions of Employment Act 1993 (WA) (MCE Act)* should be revised so that the coverage of the Acts is based on a broad definition of ‘work’ and ‘worker’, and not be limited to those workers engaged under an employment contract.
17. However the challenges posed by the growth of non-standard employment and insecure work to a ‘contemporary, fair and accessible industrial relations system’ require a range of measures. In order to more fully address these issues, the ACTU urges the Review to also recommend measures that:
  - a) restore casual work to its originally intended purpose, including:
    - i) a definition of ‘casual employee’ that clearly delineates the circumstances in which an employee can be engaged on a casual basis;
    - ii) a statutory universal right to convert to permanent employment if certain legislative criteria are met; and
    - iii) an increase to the casual employees’ loading to a minimum of 25% (s 11 of the MCE Act).
  - b) introduce a labour hire licensing system;
  - c) prohibit sham contracting or sham partnership arrangements.

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<sup>1</sup> *Lives on Hold: Unlocking the Potential of Australia’s Workforce*, Report of the Independent Inquiry into Insecure Work: [https://www.actu.org.au/media/349417/lives\\_on\\_hold.pdf](https://www.actu.org.au/media/349417/lives_on_hold.pdf). See, also: *Non-Standard Employment around the World: Understanding Challenges, Shaping Prospects*, International Labour Organization, pp 267-272: [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_534326.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_534326.pdf).

## 5. Minimum conditions of employment

### 5a) Updating the minimum conditions of employment

18. The ACTU submits that the minimum conditions should be updated to provide for at least the following:
- a) universal rights for all workers, by revising the definition of 'employee' (as discussed against TOR 4 above);
  - b) paid parental leave;
  - c) paid family and domestic violence leave; and
  - d) a right to reduced or flexible hours of work to accommodate parenting and other caring responsibilities and to revert to former hours at the conclusion of those responsibilities;
  - e) a right for a casual employee to convert to permanent employment if certain legislative criteria are met;
  - f) a casual employee loading of at least 25% (s 11 of the MCE Act);
  - g) positive workplace rights and protections for union activity; and
  - h) meaningful consultation provisions in respect of the introduction of workplace change.

### 5b) Empowering the WAIRC to update the minimum conditions

19. The ACTU supports a process for statutory minimum conditions to be periodically updated by the WAIRC without the need for legislative change.
20. The ACTU submits 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.

## 6. Updating of State awards for private sector employers and employees

### 6a) Ensuring the scope of awards provide comprehensive coverage to employees

21. The ACTU submits that the revision of the definition of 'employee' as discussed against TOR 4 is critical to ensuring that the scope of awards can provide comprehensive coverage to employees.

## **6b) Ensuring awards reflect contemporary workplaces and industry, without reducing existing employee entitlements**

22. The ACTU submits that, in order to ensure that awards reflect contemporary community standards, they must:
- a) provide for a true living wage; and
  - b) address the historical undervaluation of work in female-dominated occupations and industries.
23. Further, any process to update State awards must mandate that resulting award variations cannot reduce any existing worker entitlements.
24. The ACTU would caution against any move to limit the matters that can be dealt with in awards, as has occurred in the federal system. Worker entitlements need to be able to progress as economic development, standards of living and community expectations progress.

## **6c) Ensuring awards are written in plain English and are user friendly**

25. The ACTU cautions against an approach that adopts 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.
26. In some cases the 'industrial expression' used in awards is outdated or imprecise and that should be addressed. However such expression cannot be updated or clarified in a vacuum and translated into 'plain language' without due regard to the industrial context.
27. The ACTU suggests that, if the WAIRC is minded to involve an external 'plain English' expert in the process, the expert's role ought to be clearly defined and appropriately limited. Such an expert may add value in assisting the parties to better express meaning and 'road test' different approaches, but the WAIRC and the parties should retain control of the drafting process and there should be 'user testing' with employers and workers in the relevant occupation or industry.

## **6d) Ensuring that any award updating process is driven by the WAIRC, with appropriate input from the award parties and other relevant stakeholders**

28. Recent experience has demonstrated that an unconfined review of awards can be a substantial undertaking. Since 2012 the federal award system has been in a perpetual state of review and this has led to all industrial parties reaching a consensus position that the mandatory requirement in the federal system to review awards every four years must be abolished (a move that also has bipartisan support in the Parliament). Notwithstanding that the updating process contemplated by this Review is presumably narrower in scope than that which the courts have held is required in the

federal ‘four yearly review of modern awards’, the ACTU strongly suggests that realistic boundaries and expectations be set from the outset.

29. This boundary-setting could be achieved by the industrial parties and the WAIRC cooperating at the commencement of the process to identify issues that they believe ought to be explored in the updating process. The issues should then be assessed and prioritised against agreed criteria for the need to address the particular issue in a practical sense, keeping in mind that award updating can be exceedingly resource intensive. The criteria could include, for example, where there is ambiguity, a regulatory gap, a merit case to be heard, or historical anomalies such as where an award refers to things that no longer exist.
30. Through this process, the industrial parties with the WAIRC should attempt to agree on the list or program of issues to be addressed (be they award-specific or systemic), with the WAIRC as the final arbiter. The list may need to be revised throughout the process where consequential matters that may not have been apparent at the initial stages require determination.
31. The ACTU is concerned that employers and unions retain control and ownership of the award updating process as parties to award creation, not just organisations to be consulted, but with necessary resourcing and assistance from the WAIRC.
32. In particular, the ACTU strongly urges an award updating process in which union parties are fully resourced to represent the interests of those workers within their coverage in the process. This work is resource-intensive, and unions have limited resources and multiple competing priorities. Proper resourcing is the only way to ensure that unions are able to fully engage in the process.

## **7. Statutory compliance and enforcement mechanisms**

33. The ACTU submits that the following measures would support the Review’s objectives of ensuring that employees are paid their correct entitlements and deterring non-compliance with State industrial laws and instruments:
  - 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.

## **8. Regulation local government employers and employees in Western Australia**

34. The ACTU supports the submissions of UnionsWA and of those unions who represent local government employees in Western Australia in respect of this TOR.