Western Australian Municipal, Administrative, Clerical and Services Union of Employees Submission to the Ministerial Review of the State Industrial Relations System – Term of Reference 8

WASU – Local Government Industrial Relations

Term of Reference No. 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.

Overview

In Western Australia, local government is a highly significant industry, and is viewed as an employer of choice for many workers. As at 11 November 2015, the Australian Bureau of Statistics[1] reported that there were approximately 21,600 people employed in local government within WA. Local government in WA plays a vital and ongoing role in providing infrastructure, and delivering a vast number of services, such as health services, building services, facilities including airports, aerodromes, ports, marinas, cemeteries, parking facilities, and providing cultural and recreation facilities to the community. For this reason, it is critical that local government employees are able to access a system of industrial relations that is sound, cost-effective, and able to deliver results that deliver a viable outcome for workers. There are wide-ranging and significant benefits to be derived from local government employees in WA being covered solely by the state system.

The system of industrial relations in WA

Following the introduction in 2009 of the new national workplace relations system in accordance with the *Fair Work Act 2009* (Cth), local government in WA was placed largely within the remit of the federal jurisdiction. Other than Victoria and the Northern Territory, all other states are currently in the state jurisdiction. Accordingly, workplace relations for local government workers in WA are mainly regulated by the Fair Work Commission and the Fair Work Ombudsman. However, significant uncertainty remains for local government employees, given that WA has adopted the somewhat unique position of also retaining a separate industrial relations system that covers state public sector employees, non-trading entities and unincorporated private sector businesses.

Regrettably, the consequence of this has been that the vast majority of local government workers in WA are covered by the far inferior *Local Government Industry Award* 2010 ("the Federal Modern

[1] Australian Bureau of Statistics, 6248.0.55.002, 'Employment and Earnings, Public Sector', Australia, 2014-2015 [1].

Award"), which provides a bare minimum of standards for wages and conditions for employees in local government. All other states are covered by superior state made industrial instruments.

Added to this vexed and nearly untenable position is that competing pressures regarding funding and sources of revenue, as well as the need to deliver quality services to the communities of the 137 local government and 2 ocean municipality areas, often result in councils entering and exiting both the state and federal industrial relations systems, depending on the view of key decision makers at differing points in time.

Industrial disharmony

As a consequence, industrial disharmony has become an ongoing and substantive factor in Enterprise bargaining in the federal system for ASU members in local government, where negotiations can become hostile and combative. Three such examples are the City of Albany Enterprise Agreement negotiations 2010, the City of Wanneroo Enterprise Agreement negotiations 2015 and the Shire of Mundaring Enterprise Agreement negotiations 2011 to 2017:

- City of Albany (Outside Workers) Enterprise Agreement negotiations 2010 (nominal expiry date 30/6/2010) commenced bargaining in March 2010 and was registered at the FWC on 5 January 2011. Negotiations could only be described as hostile against a backdrop of members being offer a 1.6% p.a. (an average of $12.92 pw) pay increase and cuts to conditions, whilst some Directors received 34% pay increases. During the period 23/9/2010 to 18/10/2010 in excess of 40 separate protected industrial actions were notified and actioned. As a counter action, the City 'locked out' ASU members with no pay. The negotiations took 11 months and resulted in a better pay offer but essentially a rollover of the then current conditions which was the initial position of ASU members.
- City of Albany (Inside Workers) Enterprise Agreement negotiations also commenced in March 2010 (nominal expiry 30 June 2010) but continued after the City of Albany (Outside Workers) Enterprise Agreement negotiations had concluded. There were 27 bargaining agents at the table initially. The City had put this Agreement out to a ballot at the same time with substantial reductions in conditions and no in-principle agreement and it was overwhelmingly voted down with a 90% no vote. With a new CEO in placed from February 2011 it was expected that these negotiations would conclude in a timely manner. Unfortunately, that was not the case with another attack on conditions the negotiations became protracted and hostile. The Enterprise Agreement was final lodged on 20 June 2012. The negotiations took 27 months; however, it was to only operate for 12 months and again was a essentially a rollover of the then current conditions. Subsequent negotiations commenced in May 2013 and sought to combine all three Agreements covering employees at the City. These negotiations did not concluded until February 2014.
- City of Wanneroo Enterprise Agreement negotiations 2015 (nominal expiry 24 May 2015) commenced negotiations in mid-October 2014 and did not concluded until May 2016 when the Agreement was approved at the Fair Work Commission. There were 38 bargaining agents at the table initially. The City chose to appoint an external independent Consultant to bargain on their behalf. As a result, these negotiations were both hostile and protracted as the Contractor had only previously negotiated in the mining industry and had no local government experience. The negotiations took 19 months during which resulted in it being put to a ballot four times before it was accepted.

- Shire of Mundaring Municipal Employees Enterprise Agreement negotiations 2011 (nominal expiry 30 June 2011) and 2015 (nominal expiry 30 June 2014). Bargaining commenced in March 2011 with issues from the outset around the process the Shire utilised to call for bargaining representatives. Negotiations quickly became hostile with an application for protected industrial action being filed by ASU on 30 June 2011. The CEO immediately suspended negotiations. Members engaged in protected industrial action from July 2011 through to September 2011. ASU members also exercised their democratic right by speaking to their community at local markets in their own time and they were subject to disciplinary action by the Shire. This resulted in ASU seeking an injunction in Federal Court as the Shire alleged ASU members had breached the Local Government Act. This Adverse Action order remained outstanding until 2017 when, due to the passage of time and no decision forthcoming, both parties resolved the matter outside of court. The 2011 Enterprise Agreement was finally approved by the Fair Work Commission on 28 November 2011. The negotiations took 9 months.
- Unfortunately, the subsequent negotiations in 2015 and 2017 were as hostile with a protected action application being filed by ASU and granted by the FWC in July 2014. The 2015 Agreement was finally registered at the FWC on 3 July 2015 and the 2017 Agreement is yet to be finalised after a substantive no vote.

Transmission of Business

The Federal system of industrial relations has provided uncertainty regarding Transmission of Business principles when changes occur to a local government entity in particular during an amalgamation of boundary change, with one observation being that the Fair Work Act may override the WA Local Government Act. Only a definitive proclamation that all WA Local Government entities exist solely in the WA state jurisdiction removes this conflict. This would allow control by the WA State Government and the associated WA Local Government Act during any future amalgamations. State Government control should ensure fairness for employees, job security as per the WA Local Government Act and benefits for the WA communities.

Conclusion

In the absence of any certainty being delivered, a seemingly perpetual state of jurisdictional ambiguity pervades industrial relations within WA, and has encouraged calls for reform from various parties within the industrial relations field. To this end however, any suggestion that the state government refer its residual industrial relations powers to the federal government must be soundly rejected.

Currently, there are two Awards in the Western Australian Industrial Relations Commission (WAIRC) relevant to local government, *Local Government Officers' (Western Australia) Interim Award 2011* and *Municipal Employees (Western Australia) Interim Award 2011*.

Recommendation: urgent steps are taken to 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.

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

Benefits of access to the state industrial relations system and tribunal for local government employees in WA

The value of local government being solely captured within the state industrial relations system cannot be underestimated. In fact, by way of an example drawn from NSW, which utilises the NSWIRC, the NSWIRC is one of the most historic industrial relations tribunals within Australia, as well as globally. This tribunal, which is invested with the ability to conduct judicial and quasi-judicial proceedings, has a lengthy, strong tradition of delivering sound and harmonious outcomes to parties involved within New South Wales industrial relations. In contrast, in WA local government, the federal system creates a hostile industrial relations environment, built on industrial conflict, including stoppages and lockouts. However, in WA state jurisdiction it is more harmonious, similar to the industrial arena as experienced in NSW.

The WA State Government's own *Local Government Act 1995 Review Phase 1 Consultation Paper* states, 'The degree of autonomy is an ongoing challenge. On one hand, many local governments believe that they do not have enough autonomy. On the other hand, some industry groups and members of the community are concerned that local government decision making is inconsistent, and that greater oversight and accountability is required. This tension between autonomy and oversight is a constant and is not unique to Western Australia.'[2]

The Review Paper goes further by proposing a *'Remedial Action Process'* to introduce 'more sophisticated ways to work with local governments to improve financial management, governance and performance has the potential to prevent large-scale issues and to strengthen local government capacity.'[3]

In addition, the Review Paper seeks ways in which to remove barriers that have the 'potential to greatly increase the skills and capacity of both State and local government workforces. Both can be viewed as 'closed shops', and increasing the cross-pollination between these two major employers could result in exchange of skills, experience and capability that will benefit both tiers of government and the community.'[4]

Whilst it needs to be recognised that local government employees as 'public officers' have a unique status that should not be changed in terms of the tiers of government, these proposals have direct relevance to the premise that it would be more beneficial for local government to be solely captured within the state industrial relations system in two capacities.

Firstly, if all WA local government industrial instruments were subject to the state industrial relations system this would further assist in facilitating the outcomes being sought in the proposed remedial action process by allowing more uniformity of pay and conditions across the sector. Secondly, this would assist with the idea of cross-pollination between the tiers of government and between local government entities, particularly in relation to recognition of length of service for the portability of leave.

[2] Department of Local Government, Sport and Cultural Industries, Local Government Act 1995 Review Phase 1 Consultation Paper 2017
[3] ibid
[4] ibid

Finally, the uniformity that would be achieved by solely capturing local government within the state industrial relations system could more easily facilitate any proposed future voluntary amalgamations of councils.

Within New South Wales, the key industrial legislation is the *Industrial Relations Act 1996* (NSW), and confers upon the NSWIRC the power to review and determine a wide range of industrial issues, while ensuring that there is 'an effective and practical dispute resolution system'.[5]

The New South Wales industrial relations system has been described as being advantageous for four key reasons; it is simple, accessible, timely and practical[6]. It is a system which is geared towards ensuring an equitable playing field, where workers can be easily and effectively represented by their industrial organisation, in a system whereby the emphasis is upon resolving disputes and delivering outcomes, in a quick and cost-effective way. For these reasons, local government employees within WA should be covered by the state system.

Recommendation: urgent steps are taken to develop a strategy to ensure local government employers and employees in WA are entirely covered by the state industrial relations system.

Proposed change to the WA IR system and options to achieve it

The current system in WA pertaining to industrial relations, particularly for those employed within local government, lacks flexibility and the opportunity to deliver a viable means of resolving workplace issues and industrial disputation, in a timely and cost-effective way. Simply put, it is suggested that WA follow the path implemented by NSW, in declaring all councils and county councils to be non-national system employers.

[5] Walton, Michael, "The New South Wales Industrial Relations System: 1998 to the Workplace Relations Amendment (Workchoices) Act 2005" [2006] UNSWLawJl 5; (2006) 29 (1) University of New South Wales Law Journal 47 [2].
[6] Walton, Michael, "The New South Wales Industrial Relations System: 1998 to the Workplace Relations Amendment (Workchoices) Act 2005" [2006] UNSWLawJl 5; (2006) 29 (1) University of New South Wales Law Journal 47 [6].

Case studies: the NSW and QLD approach

In NSW, throughout 2008, decisive action was taken to lobby the government regarding the benefits of retaining coverage within the state system for local government workers. The action by key figures in Queensland, in the form of "de-corporatisation" of councils, and removing their status as constitutional corporations, and reinforcing state industrial rights, proved a similar outcome could be achieved in NSW.

The landmark decision in the ***Etheridge*** **case[7], where Justice Spender determined that Etheridge Shire Council in Queensland was not a constitutional corporation and could not be covered by a federal agreement**, also provided further motivation and belief that NSW could achieve a similar change.

This occurred on 22 December 2009, when the [former] NSW Minister for Industrial Relations, the Honourable John Robertson issued a declaration pursuant to section 9A of the *Industrial Relations Act 1996* (NSW), that all NSW councils and county councils were non-national system employers. The Honourable Julia Gillard endorsed the Order on 17 December 2009, pursuant to section 14 (4) (a) of the *Fair Work Act 2009* (Cth). This action was highly significant and roundly welcomed by those who had tirelessly lobbied for this result. The outcome of this action was that all NSW councils and county councils became non-national system employers, and therefore all of their employees are thus covered by the state industrial relations system.

> ***Local councils are not constitutional corporations (****AIAL FORUM No. 59)*
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> *In a recent decision* ***AWU v Etheridge Shire Council*** *[2008] FCA 1268 (20 August 2008) (Spender J) the Federal Court determined that local councils are not constitutional corporations and therefore not 'employers' for the purposes of the Workplace Relations Act 41 1996 (Cth). The Federal Court considered whether the Etheridge Shire Council in Queensland could enter into a workplace agreement with its employees under the Federal industrial relations system.*
>
> *Under the Workplace Relations Act 1996 (Cth), the agreement could only be made if the Council was a constitutional corporation, that is, a trading or financial corporation formed within the limits of the Commonwealth.*
>
> *Justice Spender held that, in determining whether the Council was a trading or a financial corporation, the primary focus was on the activities of the Council. There was evidence that while the Council's activities included providing a tourism centre, road works for the Department of Works, private works (services to residents and organisations), hostel accommodation, childcare centres, office space rental, residential property rental, sale of land, hire of halls, sale of water and services to the Federal Government, the Council was*

[7] *AWU (Qld) v Etheridge Shire Council* [2008] FCA 1268 (20 August 2008).

not a trading corporation,

Justice Spender held that:

• all of the above activities 'entirely lack the essential quality of trade;

• almost all activities ran at a loss ;

• all activities were directed to public benefit objectives;

• in monetary terms they were 'so inconsequential and incidental to the primary activity and function of the Council as to deny the Council the characterisation of a 'trading corporation or a financial corporation'.

The decision means that local councils cannot enter into workplace agreements under the Federal industrial relations system and are not employers for the purposes of the Federal unfair dismissal provisions.

An appeal is unlikely against the decision, due in part to legislative amendments made to the Local Government Act 1993 (Qld) in March 2008 which expressly provided that councils are not corporations. However, for councils that have implemented Federal workplace agreements, such as in Western Australia, the Federal Court's decision is likely to cause significant uncertainty. In NSW, the government legislated to shield some public sector employees from Federal industrial relations law, but not council employees. Etheridge turned on the nature of local councils and their functions and provides little guidance as to the status of incorporated not-for-profit organisations.

A similar method could be utilised in WA, which would involve declaring all WA councils and county councils to be non-national system employers, and would therefore ensure that all local government workers are solely covered by state specific industrial relations system.

***Shire of Ravensthorpe v John Patrick Galea* 2009 WAIRC 01149**

Also relevant to the excise of local government from the federal system, is in regard to considerations about the status of local government councils as a 'trading corporation', which was reviewed at length within the Full Bench decision of the Western Australian Industrial Relations Commission, in the decision of *Shire of Ravensthorpe v John Patrick Galea*.[8] The hearing at first instance considered whether the council was a trading corporation.

[8] *Shire of Ravensthorpe v John Patrick Galea* 2009 WAIRC 01149.

Part 3 of *the LGA*, comprised by ss3.1-3.68, sets out the functions of local government. The general function of a local government is set out in s3.1 as follows:

> *"**3.1. General function***
>
> *(1) The general function of a local government is to provide for the good government of persons in its district.*
>
> *(2) The scope of the general function of a local government is to be construed in the context of its other functions under this Act or any other written law and any constraints imposed by this Act or any other written law on the performance of its functions.*
>
> *(3) A liberal approach is to be taken to the construction of the scope of the general function of a local government."*

"In my opinion this section is very important. It sets out the reason for existence of a local government and its overriding function. Section 3.2 of the LGA provides that the "scope of the general function of a local government in relation to its district is not limited by reason only that the Government of the State performs or may perform functions of a like nature".

Ultimately it was held that the activities undertaken by the Shire, to generate income, were insufficiently significant to satisfy the threshold requirements of a trading corporation. The subsequent appeal by the Shire of Ravensthorpe was unsuccessful, and it was found that *"even if these activities are trading activities, a conclusion would not necessarily be able to be drawn as to whether the appellant is a trading corporation as the extent of these activities together with other activities would have to be examined in a qualitative assessment. Even if all of the activities claimed by the appellant to be trading activities it does not mean that at law the appellant is a trading corporation"*.[9]

Accordingly, it is our view that the precedent set within this decision, adds further weight to the case for excising local government in Western Australia, from the federal system. On the basis that councils are not trading corporations, it is both cumbersome and problematic, for local government to remain dually within the state and federal systems, in such a manner as it currently is, within Western Australia. The ideal course is for local government to be decisively placed within the state system.

Excision from the Federal Jurisdiction

It is possible for WA to take steps towards reform, and to exclude local government from the federal industrial relations system. This can be achieved without the need for costly High Court challenges regarding the reach of constitutional corporations.

This was ultimately achieved in NSW by the *Local Government (Legal Status) Act 2008* NSW which provided clarification that local government employers and employers in NSW are covered by the NSW Industrial Relations system, and are covered by the *Industrial Relations Act 1996* (NSW).

<u>*Recommendation*</u>: that legislation, similar in nature to that developed in NSW, circa 2008 and 2009, is developed and enacted to ensure that local government employees within WA are captured exclusively by the state system of industrial relations, with unfettered access to the state industrial relations system and tribunal.

Transition to the state jurisdiction

[9] *Shire of Ravensthorpe v John Patrick Galea* 2009 WAIRC 01149 at [245].

The QLD government provided legislation that allowed any existing federal instrument to be converted to state based instruments.[10] In our view, a notable aspect of this legislation is found within Part 7, which specifically addresses issues relating to transitional provisions, and how such circumstances should be properly addressed.[11] History shows that this was achieved in a seamless manner that provided no interruption to business or local government objectives.

Recommendation: that legislation, similar in nature to that developed in QLD in 2008, is developed and enacted to ensure that local government employees within WA are conferred with commensurate protection of entitlements.

A summary of benefits of state based coverage for local government employees

There are a wide range of benefits for all employees, including those workers within local government, being captured by the state industrial relations system. This is largely because the state based industrial relations system delivers a cost effective, practical and timely method of resolving workplace issues and industrial matters, as well as ensures employee relations are generally harmonious.

WA should take urgent action, and adopt the course taken by NSW and QLD, to ensure that legislation is enacted which confirms that the local government industry is wholly excised from the federal jurisdiction.

[10] https://www.legislation.qld.gov.au/LEGISLTN/ACTS/2008/08AC005.pdf

[11] https://www.legislation.qld.gov.au/LEGISLTN/ACTS/2008/08AC005.pdf [Part 7 Division 1,, ss 744 – 755].

Transitional Arrangements for Local Government to WA Industrial Relations.

It is understood that various Councils and Local Government entities in WA have remained in the state IR system. The majority of current WA IRC covered councils are using State Awards in place since 1999. These awards were last reviewed in 2011, which was the day before the review to the current Federal Local Government Industry Award. For these councils the transition for WA to be declared and regulated state entities will be seamless.

Councils currently that are operating under state awards operate their payroll function very effectively when applying the state award terms of employment. In fact; the conditions applied are very similar for the payroll function under state awards compared to a federal EA. Our members advise that there is very little change to payroll functions required during the transition.

Where councils have chosen to independently operate in a Federal jurisdiction the WASU branch is committed to wide consultation and cooperation to make the transition to the WA state IR system a unifying experience that strengthens the role of Local Government in WA.

Western Australian Services Union recommends the following:

- The Queensland approach should be adopted that transitions existing federal local government industrial instruments. That is, the current federal industrial instruments are granted WA industrial act registration from the date of ascent of the legislative amendment.

- That WASU commit to working with WA Councils to review subsequent transitioned registered industrial instruments within 18 months of the transition or upon 3 months expiry of the industrial instrument whichever occurs first.

- That WALGA and WASU enter into a review of the current *Local Government Officers' (Western Australia) Interim Award 2011* and *Municipal Employees (Western Australia) Interim Award 2011* with a commitment to finalise this review within 6 months and with the aim to have the WA IRC to register these documents as consent awards within 2 months of this review. These consent awards will have a three-year duration cycle.

- The above-mentioned consent awards are reviewed by the parties to the awards 2 years after registration with the aim to have new consent awards registered by the WA IRC during the third year to establish a 3-yearly award review cycle. Parties to the Awards will have access to the WA IRC to seek assistance during these reviews.

- That a Local Government IR Implementation Project Control Group is established that includes WASU, WALGA, WA Industrial Relations Commission and Local Government departmental representatives. This Project Control Group would report to the WA Industrial Relations Commission and the Local Government Minister's department to ensure this long overdue transition delivers certainty and efficiencies for the WA community.