Chamber of Commerce and Industry WA

Ministerial Review into the State Industrial Relations System

Submission by the Chamber of Commerce & Industry of WA

12 December 2017

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Table of Abbreviations

ACCI	Australian Chamber of Commerce and Industry
CCI	Chamber of Commerce and Industry WA
DMIRS	Department of Mines, Industry Regulation and Safety
FWC	Fair Work Commission
FW Act	*Fair Work Act 2009*
GFB	Good Faith Bargaining
IMC	Industrial Magistrates Court
IR	Industrial Relations
IR Act	*Industrial Relations Act 1979 (WA)*
MCE Act	*Minimum Conditions of Employment Act 1993 (WA)*
NES	National Employment Standards
PSA	Public Service Arbitrator
PSAB	Public Service Appeal Board
PSMA	*Public Sector Management Act 1994 (WA)*
SME	Small to Medium Enterprises
WA	Western Australia
WAIRC	Western Australian Industrial Relations Commission
WGEA	Workplace Gender Equity Agency

1. About CCI

1.1 The Chamber of Commerce and Industry of Western Australia (CCI) is a not-for-profit, member based organisation, providing quality, cost-effective information, services and support for business. Our commitment to helping Australian businesses is summed up in our vision: To make WA a world leading place to live and do business.

1.2 With extensive commercial and government linkages across Australia, CCI is the peak business body for WA. With a reach of over 9,000 members across the state, CCI services the business community by working cooperatively with local chambers of commerce, business associations, economic development councils and government at all levels. CCI has strong engagement with local businesses, particularly small and medium enterprises (SMEs) across diverse industries including manufacturing, retail, construction, health care and social assistance, among others.

2. Executive Summary and Key Recommendations

2.1 CCI welcomes the opportunity to make a submission regarding the review of Western Australia's State IR system.

2.2 WA maintains a separate IR system for the private sector, notwithstanding that most WA businesses are clearly covered by the national system through the Fair Work Act 2009(Cth). This contrasts with Victoria and the Territories in which there is a single set of workplace regulation under the Federal legislation. This has several implications, including:

a) increased government recurrent costs from funding the duplication of services, and an increasing disconnect between the costs of maintaining a state IR jurisdiction and the declining work it does in support of employees, employers and doing business in WA;

b) increased inefficiencies due to jurisdictional confusion and uncertainty as to which IR system applies to employers and employees. Given the various means of structuring an employing entity, employers often need to seek costly legal advice in an attempt to provide clarity as to which IR system applies. Clear advice is not however always possible. In addition, not-for-profit organisations can move between state to national and back again at any time depending on their funding arrangements which creates further uncertainty.;

c) increased time and money spent by employers, and other entities on compliance, legal services and advice. For example, around 50% of the calls taken and time spent by consultants from CCI's Employer Relations Advice Centre (ERAC) is on determining which award applies and which IR system employers are in. This equates to around 15,000 – 16,500 calls per annum and around 135,000 – 148,500 minutes spent addressing these queries per year (where an average call length is nine minutes). This is not making things fairer or adding to compliance, it is an increasingly unnecessary cost of doing business and employing people in our state.

d) lower productivity and competitiveness for small business because of often high wages compared to the National IR system, and increased time and costs associated with IR compliance.

It should be noted that the profile of businesses that the remaining WA state IR system applies to are those least able to afford high employment costs or navigate complication, being overwhelmingly the smaller to micro sized businesses that cannot or do not incorporate.

2.3 The current IR system is outdated and fails to address the needs of the modern workplace, and in particular the subset of WA businesses it actually applies to. CCI therefore supports a comprehensive review to make the system more effective and relevant.

2.4 This review should seek to:

a) ensure there is a fair, efficient, universally acceptable, easily understood, and consistently applied regulatory framework;

b) create a level playing field across WA to promote business efficiency and competition;

c) remove unnecessary costs to government, business and taxpayers, noting that additional transactional and compliance employment costs harm the unemployed and employees as well as those who employ them;

d) promote higher levels of understanding, awareness and compliance through the simplification of IR and related legislation; and,

e) consider the implications of the Future of Work on workplace needs and regulation;

f) anticipate and consider the future needs of contemporary small business in WA.

2.5 According to data provided by the Government of Western Australia[1], CCI understands that the State IR system potentially applies to one-third of the WA workforce. Of this:

a) State system employers account for 38.4% of total private sector employers in WA, comprising mostly of trusts (20.6%), unincorporated sole traders (10.4%), and partnerships (7.5%);

b) State system employees account for 36.2% of total employees in WA according to type of legal organisation, of which 23.8% are in the private sector and 12.4% are in the public sector.

c) the top six industries that employees under the State system work in, according to recent Wageline click-rate data, are (1) food and hospitality, (2) retail and wholesale, (3) construction, (4) commercial, social and professional clerical services, (5) hairdressing, and (6) metal trades.

2.6 CCI believes the statistics representing businesses that fall within the State IR system may be an overrepresentation. We believe that a much lower proportion of WA businesses and employees are likely to be covered by the State IR system. CCI estimates that approximately 11 – 16% of the WA workforce are covered by the State IR system. These would consist of incorporated entities which are not carrying out trading and financial activities and unincorporated businesses, i.e. sole traders.

[1] Government of Western Australia (2017), *Who is covered by the state industrial relations system? An information guide,* p.2

It is important to note that the inconsistent data regarding who remains in the State IR system, as Stated on the information guide provided by the State Government, is a testament to the difficult and confusing nature of having two overlapping IR systems.

2.7 As stated above, most private sector employers regulated by the State IR system are small unincorporated businesses, typically employing 0-6 staff, operating as either sole traders or partnerships. These employers do not have the advantage of being able to employ specialized HR staff to monitor compliance with their IR obligations. Rather it is often the owner of the business who is required to ensure compliance, not only with IR requirements but also the myriad of other laws and regulations that are relevant to the running of a business in WA. It is for this reason that achieving a system which is accessible, simple to understand and easy to comply with is critical.

2.8 CCI's key position is to refer the State's residual IR powers with respect to the private sector and local government to the Commonwealth. This would of course need to be supported by transitional arrangements that were navigable for small or 'micro' businesses impacted by the change and ensure that businesses were not landed with higher employment costs in the transition process.

A single IR system, applying to all employment in all WA private sector workplaces would provide several benefits to employers, employees and legal bodies/ government, and the entire WA community including:

a) removal of duplication and inconsistency as to which system, rights and obligations apply to employers and employees, and more certainty and clarity across the WA community on employment standards and obligations;

b) reduction of costs that come with having overlapping IR regulation, which according to the Explanatory Memorandum of the Fair Work Amendment Bill 2009[2], was to be upwards of $60 million per year for all states of taxpayers' money for providing legal services and advice alone;

d) reduction of regulation and red tape to nurture business growth and innovation in WA;

e) closing the financial differential between State and National system wages to allow smaller businesses to remain competitive;

2.9 In the absence of referral of its IR powers, CCI recommends harmonisation with Commonwealth laws to the extent possible / appropriate with an emphasis on recognising the needs of small business.

2.10 The hallmarks of an efficient and effective IR system tailored to the WA economy would be:

a) a single system covering all employment in WA;

b) a simple set of minimum employment standards;

[2] House of Representatives (2009), *Fair Work Amendment (State Referrals and Other Measures) Bill 2009 Explanatory Memorandum,* p.vii

c) a consolidated and significantly simplified award system that focuses on those industries that remain state award reliant and that endeavours to meet the needs of small business and their employees;

d) a simple and clear unfair dismissal system that is appropriate to small business.

e) a system that appropriately balances fairness and minimum standards with employment, business viability growth and investment to empower employers and employees.

2.11 In the absence of referral of its IR powers, CCI recommends the following:

a) Recognise who is still under the State IR system and gain a better understanding of their needs in context.

b) A comprehensive review of the current award system with the view to significantly condensing the number of awards to a discrete few for those key industry sectors that are most state award reliant. Ensuring content is reflective of modern work practices, removing obsolete and/or historical provisions that are no longer relevant and closing the gap between National and State with respect to costs to ensure WA small businesses can remain competitive.

The creation of a miscellaneous award that produces a safeguard for any historically award covered employees who fall outside the coverage of the new simplified body of State awards.

c) Minimum employment standards that are both simple to understand and easy to implement. We recommend the creation of a State-based set of legislative minima that reflects the core entitlements of the National Employment Standards (NES), drafted in a simpler fashion with a less prescriptive approach to the application of the entitlements. In addition, these provisions should be specifically tailored to smaller business. This should not result in a scaling up or duplication of entitlements but will instead require rationalisation of award content that is consistent with those standards (e.g. with regard to notice of termination and redundancy entitlements). The annual and personal leave provisions are one example of this. CCI continues to receive queries from members who are unsure how to apply the accrual and payment of annual and personal leave to non-standard working arrangements, such as fly-in fly-out (FIFO) arrangements. CCI has made submissions to various Federal inquiries expressing its concerns.

2.12 In responding to the terms of reference, CCI seeks to address the larger, more fundamental issues raised by this review. To quote the Australian Chamber of Commerce and Industry (ACCI) (2005)[3], "the regulation of how we work is of vital national importance and is an area where good policy must prevail over political pragmatism." This submission will primarily examine the key issues for the small employers and institutions (i.e. awards, minimum conditions, agreements and termination claims), and will raise considerations for the remaining terms of reference.

Leverage for Policy Change

[3] ACCI, '*ACCI Welcomes Historic Workplace Relations Reforms'* Media Release, 26 May 2005

2.13 Employers recognise that the Government was elected with IR policies, and that the concerns that inform IR debate throughout Australia and globally are expressed equally strongly in WA and from unions and some segments of the WA community in particular. Some of these are reflected in the Terms of Reference (TOR) for the review, and in particular references to concerns in areas such as pay equity and enforcement. Many of these are areas where employers would share a measure of the concerns expressed, albeit we often draw different inferences and would advance different "solutions" to the matters raised.

Regardless, a critical threshold point must be made upfront, and we say should inform any conclusions and recommendations of this inquiry.

A residual system that applies only to a small proportion of employees, in WA's smallest and least resourced businesses, fundamentally and inherently lacks the leverage to make a difference on macro level impacts of the system. A residual system that covers 11-16% of WA employees cannot make a difference, for example, on pay equity across the WA economy. This is an important challenge, however a residual system which remains in WA cannot make a difference to macro outcomes.

3. State Awards [TOR 6]

3.1 We wish to stress upfront the importance of the award system to the particular cohort of private sector employers and employees in WA that are not covered by the national system. As small and micro enterprises (for the most part) they do not bargain, and are directly reliant on the award safety net.

This safety net must be concise, navigable and targeted, and its scope and upkeep must be proportionate to the work it has to do in the WA labour market. This is not to leave anyone behind or with any gaps in the safety net – we recommend precisely the opposite, but it is to recognise that a system with only residual coverage in a concentrated set of areas:

- Does not warrant hundreds of state awards in future.
- Warrants a tight and simple safety net, focussed on where the unincorporated employers and employees are concentrated.
- Should be able to be put together relatively simply and if not non-controversially, at least confining and directing areas of disagreement to areas where modernised state awards have work to do.

CCI supports a modernisation of WA State awards by the WA Industrial Relations Commission (WAIRC), to ensure they are comprehensive, contemporary and user-friendly (noting that the use of the word modernisation should not be read as validating the federal approach that lead to the creation of Modern Awards under the Fair Work Act, which has proved problematic in a number of regards, addressed a different challenge and did not have to deal with whole swathes of legacy awards which had very little or no application – which is the challenge in WA).

Regular updates should also be driven by the WAIRC. It is important to note that consolidation (numerically if not in award content) would be a necessary part of the State award modernisation process due to the significantly reduced coverage, with many awards becoming obsolete and having little-to-no application to the small and "micro" businesses covered by the State system.

3.2 CCI suggests the following:

a) Gaining a deeper understanding of who the unincorporated employers are that remain under the State IR system, which industries they work in, which occupations they employ, and which of these employers are award reliant. CCI understands that DMIRS Wageline calls concerning the State IR system are largely from employers with award-free employees (20%), construction workers (14%), and wait staff (11%). Further, the Private Sector Directorate, Labour Relations Division receives the most complaints regarding award breaches from workers employed in hospitality, fruit growing and packing, construction, contract cleaning, wholesale, and hairdressing.

b) Thoroughly examining the causation of these issues and endeavouring to address these as part of the award modernisation process, which:

   i. should be directly focussed on those areas of existing/legacy state award coverage which continue to do work and have active application to employment in sufficient numbers such as to justify maintaining a modernised state award; and

   ii. Consolidates or cancels all other legacy state awards, subject to the safety net of a catch all / miscellaneous state award.

   In examining the causation of these issues, CCI asks whether an issues register exists which could identify common themes in order to inform areas for action.

c) Considering both the current and future needs of employers and employees in the State IR system when creating modern awards.

d) Condensing WA State awards to approximately ten key industry awards plus one miscellaneous award for employers and employees who have previously had award coverage.

e) Ensuring modern award content is drafted in plain English and is easy to implement, using terms and expressions from modern awards in the federal system where possible to avoid confusion and reflect what should be best practice in expressing minimum terms and conditions of employment.

f) Considering financial differentials in any National modern awards covering the same/ similar industry sector and closing the gap.

3.3 This encapsulates the considerations and endpoint for the WA award system. We would be pleased to discuss further with the review and government mechanisms for transitioning from the existing system of state awards to a far more concentrated system of 10 or so more modern

awards, better geared to their contemporary purpose and audience. If this significant effort is to be embarked upon, lessons from the federal award modernisation process should be drawn.

3.4 In particular, the Australian Industrial Relations Commission conducted an award modernisation process which resulted in fewer awards but saw many employers required to pay more employees for doing the same work when the modern awards came into effect from 1 January 2010. The rationalisation process stretched the resources of all parties involved and did not afford time for the testing of merits based on evidence. This saw many historical provisions carry over into the modern awards despite many employers expressing concern about the relevance or appropriateness of the provisions in contemporary society. Indeed, many of the provisions in awards are a creature of arbitrated disputes from a bygone era. Award rationalisation should not reduce flexibility and increase costs for employers or reduce benefits for award reliant employees.

3.5 A state based review of modern awards presents an opportunity for award content to be reviewed with a greater level of efficiency and on a much more targeted basis if a clearer profile of the small and micro businesses that pay under these instruments is established. The content of the awards should appropriately balance the needs and realties confronted by those businesses as well as the people that they employ.

4. State Agreement Making

4.1 State agreements were not mentioned in the terms of reference, however CCI would like to include commentary on this as this option provides greater flexibility to employers and employees and research suggests the WA State IR system in this regard is currently not being utilised.

Reality for future use of State agreements

4.2 Research shows that employers in the private sector under the WA State IR system consist largely of very small businesses with very few employees and no internal HR expertise. As such, the scope and capacity to engage in a complex and lengthy bargaining process is somewhat limited.

4.3 While it is not anticipated that the State will return to pre-FW Act agreement approval levels, it still remains that there is limited scope for agreement making and consequently achieving flexibility around industrial awards for State system employers.

4.4 If the State is to retain a State enterprise bargaining system CCI recommends that the system:

a. Be kept very simple with the ability of the Commission to use its judgement in the approval process, and whether agreements should be approved in the public interest;

b. Have a simple public interest test / NDT test;

c. Include an assessment by the Commission based on information provided by the relevant parties;

d. Apply a universal approach to the NDT rather than adopting a line-by-line approach.

5. Unfair Dismissal and Other WAIRC Powers

5.1 It is important for the State system to provide a clear set of guidelines for small business as to what constitutes a fair termination of employment. The National system has incorporated the Small Business Fair Dismissal Code (Code) and 12 month qualifying period for small business employers (employing fewer than 15 employees) before employees can claim unfair dismissal. These were established in recognition of the issues faced by small business in this regard. These aspects of the National system should also be reflected in the State system. Whilst the Code is designed to make the process simpler for small business, the Code itself has been subject to complex legal debate. While imperfect it does represent an incremental improvement given no such Code applies in Western Australia. Adoption of it will ensure harmony with the National system and may assist some small business in navigating a defensible approach to termination.

5.2 CCI also believes that the definition of small business should be based on Full Time Equivalents (FTE) rather than headcount. Many of the industries which predominantly fall under the State system (such as rental, hiring and real estate, other services, retail trade and accommodation and food services) employ a significant proportion of part time employees. If a business size is calculated on headcount, a number of genuinely small businesses would not fall into the small business category due to their large number of part time staff. They would be accurately categorized if staffing is reflected on an FTE basis. There is also a gendered dimension to this – a headcount system encourages employers to employ on a full-time basis (providing the hours they need done to fewest heads), whilst an FTE approach doesn't dis-incentivise providing part time work to parents are carers, most often women seeking work in their local communities.

5.3 A significant problem for WA employers has been the number of applications, especially related to unfair dismissal, which are made in the wrong jurisdiction. Jurisdictional hearings can often be a costly and unnecessary process for both parties. Thus, CCI recommends that a matter can be dealt with without a hearing where it is deemed appropriate by the WAIRC, either by the request of the party or of its own motion. In addition, we also recommend that where there is a question as to jurisdiction, these matters are dealt with prior to any conciliation conference unless the Respondent otherwise agrees.

Unfair Dismissal Test - Band of Reasonable Responses

5.4 The legislation should explicitly outline that a 'range of reasonable responses' test be applied to unfair dismissal claims. The test that ought to be applied is whether, in the circumstances, the employer acted reasonably in treating the reason for dismissal as a sufficient reason for dismissal. A dismissal will only be unfair if the employers decision fell outside the band of reasonable responses. This will avoid a situation where individual Commission members substitute their own views as to whether a dismissal was unfair or not. This will create further certainty for employers and employees alike, and therefore, achieve a more efficient process.

A code of conduct guideline which identifies misconduct and serious misconduct is commonly used by business and may be an option to consider in this instance.

5.5 Of note, in 2015 the Productivity Commission undertook a review into Australia's workplace relations system and made a number of observations about the federal system that can be echoed with regard to the state system. In particular it found that:

> *The most problematic aspect of the current legislation is that an employee who has clearly breached the normal expectations of appropriate work behaviour may nevertheless be deemed to have been unfairly dismissed because of procedural lapses by the employer. For example, in one case a business dismissed two employees after they assaulted their supervisor. The FWC concluded that their physical assault was a valid reason for dismissal, but that the employer's failure to follow certain administrative procedures meant that the dismissals were unjust, unreasonable and therefore unfair.*[4]

5.6 It went on to recommend a range of incremental reforms including, but not limited to, amendments so that procedural errors alone are not sufficient to award compensation or restore employment in what would otherwise be a valid dismissal and an upfront assessment as to whether there is a valid reason for dismissal.[5] This is in a similar vein to the approach recommended above.

5.7 Unmeritorious applications are also a significant concern for employers. There is very little risk associated with an applicant making an unfair dismissal or other claim under the IR Act. This encourages "give it a go" claims. CCI encourages the review to consider options to reduce the number of "give it a go" claims whilst allowing for valid application to proceed.

[4] Productivity Commission (2015), *Workplace Relations Framework*, p.30
[5] Productivity Commission (2015), *Workplace Relations Framework*, p.31

5.8 Employers also want to avoid a system that encourages and rewards speculative claims and encourages applicant lawyers. WA has an opportunity to consider a system that is genuinely appropriate to the small enterprises that come before it, and that focusses on a proper balance of relief between what will generally be two lower income earners (an SME proprietor and their award covered employee).

5.9 In this regard a number of the Productivity Commission recommendations arising from its review of the National system are also noteworthy and in particular non-refundable filing fees[6] and a capacity to deal with matters on the papers (e.g. in the case of unmeritorious claims).[7]

6. WAIRC Jurisdiction and Powers [TOR 2]

Appeals from the Full Bench to the Court of Appeal

6.1 CCI respectfully recommends that the Industrial Appeal Court be abolished. Instead, there should be a direct right of appeal from the Full Bench to the WA Court of Appeal. Matters at the Court of Appeal level should be a costs jurisdiction.

6.2 The ability to appeal a decision of the Full Bench ought to be broadened. The grounds of appeal currently contained in S90 of the Industrial Relations Act 1979 (WA) are too narrow (for example, there is no ability to appeal an error of law).

6.3 In our respectful submission, this proposed change will result in a more streamlined, robust and efficient structure.

Appeals from the Commission to the Full Bench

6.4 In the interests of efficiency and to address uncertainty, the legislation should expressly outline what the appeal rights are from a single Commission decision to the Full Bench. Appeals should be by way of rehearing, requiring an error of law (i.e. there needs to be an appealable error). This will address uncertainty and inconsistency.

7. WAIRC Structure [TOR 1]

7.1 CCI understands that the WAIRC has not been streamlined for decades. WAIRC would need to base the restructuring around what it is asked to do – and not do. The structure of the WAIRC

[6] Productivity Commission (2015), *Workplace Relations Framework*, p.591
[7] Productivity Commission (2015), *Workplace Relations Framework*, p.594

must take into consideration the outcomes of the second term of reference of the review, i.e. what the WAIRC is asked to do.

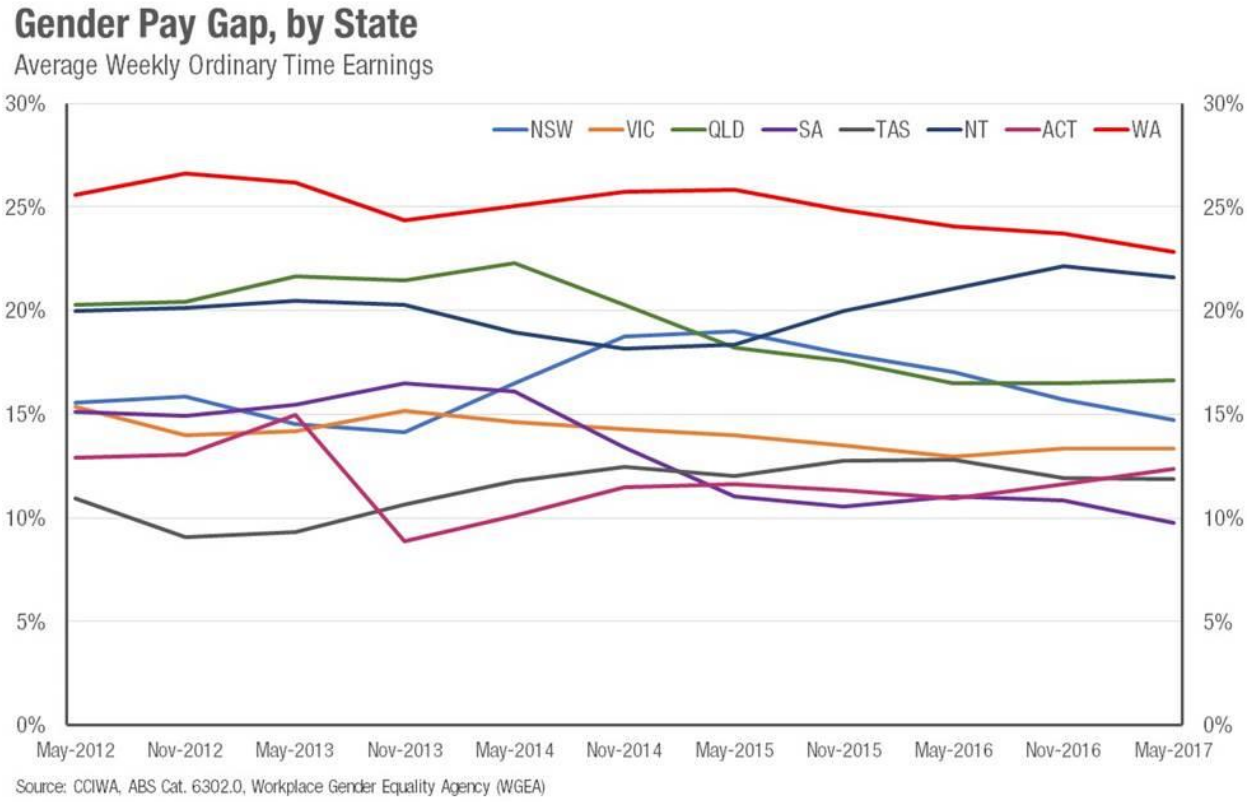
7.2 Under the current structure there is a public sector arbitrator and appeals board which gets paid more. But if the public sector is increasingly where their work lies – then WAIRC need a clearer focus on the private sector, and dedicated approaches and objectives.

7.3 CCI recommends focussing on time and cost efficiency regardless of outcome for this TOR**.** State Government should consider:

a) Decoupling the WAIRC from the Court;
b) Abolishing overlapping roles in order to reduce recurrent spending; and,
c) Retaining the public sector arbitrator and appeals board, but State Government should consider extending this to Local Government – see section 11 / TOR 8.

8. Equal Remuneration [TOR 3]

8.1 CCI shares the desire and commitment of the WA Government to improve pay equity in our State. CCI supports gender equity and efforts to promote equal pay. According to the recent Workplace Gender Equity Agency (WGEA) report based on ABS data, WA has the highest gender pay gap (22.8%)[8] in the country.



[8] WGEA (2017), *Australia's gender pay gap statistics*, p.4

8.2 WA is seeing progress in closing this gap, but it is not good enough, and we note that substantial challenges remain.

8.3 It is important to promote WA champions of change and pay equity networks and CCI supports the efforts of CCI member, CEOs for Gender Equity, in this regard. As the largest employer in the state, CCI encourages the WA State Government to benchmark public sector employment against the practices identified by WGEA.

8.4 CCI also believes State Government can support more bargaining in female dominated industries. Through cooperation with CCI, we can provide resources and assistance to help enterprises and employees bargain in SACS, retail and hospitality.

8.5 CCI does not believe that equal remuneration will be effectively realised through the facilitation of equal remuneration cases and other activities in the WAIRC. Such cases could impose additional costs on business and across the system yet would be unlikely to achieve pay equality. CCI believes that business can achieve more effective pay equity outcomes through company- driven changes rather than imposed outcomes.

8.6 It would also be difficult to run a pay equity case when the State system only oversees 11 – 16% of the private sector. The best run and determined pay equity case, cannot make a difference in a small jurisdiction that lacks leverage or bite on the overall labour market. Even the highest female employment industries – retail, hospitality and perhaps some SACS areas do not have enough State coverage to effect macro level change.

8.7 It is unhelpful to have a difference between state and federal rates in an industry as you cannot hold people and it creates confusion. Examples of this include SACS in NSW. Thus, CCI recommends that the review should:

a) overall recommend a referral of the remaining WA system to the Commonwealth, and that more WA enterprises have access to federal pay equity mechanisms.

b) address pay equity / equal remuneration through other initiatives, including administrative and promotional activities and partnerships with the private sector;

c) there should be no moves towards including equal remuneration provisions into the Industrial Relations Act 1979, or for the facilitation of equal remuneration cases at the State level; and,

d) the WA Government should explore options to partner with WGEA and CEOs for Gender Equity to close the gender pay gaps in more WA enterprises, particularly those medium sized enterprises with employee numbers between 50 to 100 employees.

9. Definition of Employee [TOR 4]

Future of Work

9.1 WA has a small but vibrant new economy ecosystem. If the State were to impose onerous regulation on this group of companies, it is likely they would seek to operate interstate and WA would lose the opportunity for business and communities to benefit from the growth and opportunities that the gig economy presents.

9.2 As the nature of the Future of Work is very fluid, it is not clear how an old economy employment model could be effectively imposed onto new forms of work.

9.3 Many of the new economy enterprises are incorporated and the coverage of their employed workforce is clear. If they were to receive a second set of state regulation this would introduce added levels of complexity for these businesses.

9.4 If the State Government is considering this type of regulation, CCI recommends the Government undertake detailed consultation with businesses, in particular, the new economy organisations that may be impacted.

9.5 We would also note that many new economy enterprises may as they scale up be drawn into the national system, which needs to be understood before seeking to change the system for the future of work. If new economy enterprises are incorporated (for example) the state IR system may have little scope to do anything in this area.

Domestic Workers

9.6 CCI notes that domestic employees working in homes as cleaners or nannies may not be considered as employees if they are paid as a direct contractor. If they were to be considered employees as the term of reference suggests, everyday households would then be considered employers and be required to complete all the necessary paperwork associated with employment legislation. This would add a serious burden to households, many of which would not have training or advice on how to do this.

It would also be time consuming and costly for the states to police whether households are following the appropriate regulations. We would add to this a considerable caution on the notion that inspectors or unions could enter private homes that were also places of work. This has the prospect of galvanising community opposition (with for example the prospect of union right of entry or labour inspectors being able to enter homes in situations in which police would need a warrant, being likely to provoke criticism).

9.7 CCI notes that an alternative already exists for domestic workers: They have the option to choose employment through a registered domestic agency such as a cleaning or nanny agency. This provides them with comprehensive coverage as an employee. Thus, CCI recommends that the State does not seek to include domestic workers as employees, as they currently have the option

to do this through a specialised employment agency if they choose, and making all households employers, by default, would create unnecessary additional regulations for households.

CCI recommends that there should be no change to the definition of "employee" in the Industrial Relations Act 1979 and the Minimum Conditions of Employment Act 1993.

10. Compliance and Enforcement [TOR 7]

10.1 CCI recommends that the State Government reviews 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 can effectively perform their statutory functions.

10.2 Employers agree the system needs to be enforced. CCI does not support undercutting or underpayment of staff. CCI considers that there are generally three groups of employers in terms of compliance. We define these as:

a. compliant: those who strive to be compliant.

b. ignorant: those who are under-informed or misinformed.

c. chancers: conscious non-compliers and the wilfully ignorant.

10.3 CCI suggests that the state should:

a) reward group a;
b) inform and assist group b; and
c) focus sanctions and prosecution energies for group c, with specific consideration for repeat breaches.

10.4 CCI members tend to be a mix of groups a and b. Many businesses join CCI, or other industry associations, in order to access employment advice to ensure they appropriately comply with the necessary laws and regulations. Some members are also underinformed, or misinformed, especially those in the smaller businesses which cannot afford in house HR advisors. When CCI identifies problems for members, our members generally seek to resolve the issues without legislation. CCI works cooperatively with enforcement bodies – Federal and State.

10.5 CCI believes that any enforcement measures should aim for comity and consistency with the National system. The more consistent the standards, compliances and obligations are between state and federal systems, the more compliance is likely.

10.6 CCI supports enforcement measures which focus on putting mistakes right. For instance, the encouragement of voluntary rectification and small claims approaches, which is similar to how the FWO approaches its role now.

10.7 CCI considers that money spent on information and knowledge is more effective in making changes to work practices than prosecution. Both employers and employees need to be better informed, especially to ensure problems do not go on too long.

10.8 There have recently been significant increases in the powers of inspectors, and fines at the national level (the package of amendments for "vulnerable workers"). Employers did not support these changes, but on balance the case for harmonised enforcement seems strong, and the review should recommend consideration of the harmonisation of compliance obligations and enforcement as much as possible.

Information and Assistance

10.9 CCI believes that the crux of the problem is that employers and employees are not informed. Some businesses seek to inform themselves and comply, but many act on poor or partial information. This is far more likely in smaller enterprises – and they dominate the remaining coverage of the WA system / the scope of this review.

10.10 CCI recommends that the State government should spend money on informing employers and employees – to complement and support money spent on inspection.

10.11 An effective way to spend it would be to partner with CCI – we are trusted and have the lines of communication – already have ERAC to inform employers, but could additionally work with government on awareness, guidance, and compliance. There is scope for real innovations in compliance and enforcement were government to look to partner with the WA business community through CCI and we invite dialogue on these options.

Right of Entry

10.12 To eradicate the inconsistencies between the Fair Work Act and the state IR legislation, CCI believes that the right of entry aspects of the State IR system should be abolished or not applicable when a business is operating under the federal system.

10.13 CCI believes there is misuse of State right of entry provisions, particularly in relation to investigations for suspected occupational health and safety breaches. Currently right of entry for OSH investigation are not subject to minimum notice requirements and there is no obligation on the union official to particularise the nature of the suspected breach. The speed by which right of

entry can be accessed and the lack of accountability in having to justify why entry is sought has resulted in a number of union officials misusing this right as a means to deal with IR issues.

10.14 If the right of entry provisions were not abolished or made inapplicable to organisations operating under the federal system, CCI recommends that the State establish minimum particulars that must be identified, such as details of the alleged breach, what equipment or processes are involved, where on the premises the breach is occurring, what employees are affected etc. In the case of a legitimate concern about OSH matters, it is reasonable to assume that the matter has been raised by an affected employee on site and as such the additional required information should be easy for the permit holder to provide.

10.15 Entry notices should be required to be provided in advance of the request for entry. In addition, entry notices should include an extract from the relevant rules that demonstrate coverage of the relevant workers, including any exceptions to coverage. This will provide greater clarity to both the employer and the permit holder as to which employees right of entry can be exercised for. The entry notice should also make it clear which group of employees will be subject to the right of entry notice. This would remove confusion as to which employees the permit holder is seeking to hold discussions with.

10.16 In summary, CCI recommends:

a) WA adopt the compliance and enforcement provisions of the FW Act.

b) Research be undertaken and legal advice sought on referring to the FWO all enforcement and compliance powers and responsibilities for State awards and agreements and minimum conditions.

c) The FWO or Employment Law Centre be resourced to better and more effectively promote employment obligations to WA employers and employees, with particular attention paid to informing migrant employees and their employers, younger employees and their employers and any other identified groups of employees and employers where particular concerns or incidence of non-compliance exist.

d) A consultation group be set up on enforcement with representation from CCI on behalf of employers.

11. Local Government Regulation [TOR 8]

Employment Regulation in Local Government in WA

11.1 The coverage of employment in local government in all States is already a hybrid of federal award regulation, through the Local Government Industry Award 2010 (a federal modern award) and State awards/jurisdiction.

11.2 At issue is whether each local government is a trading corporation – some are and some are not. Thus, it's not possible for the State IR system to capture blanket coverage of local government in WA.

11.3 CCI recommends that there be a very clear delineation between the for profit and non-government organisations.

Whistleblowing and Anti-Corruption

11.4 Our members are harmed by petty corruption that can arise in local government, for instance on the planning and letting of contacts/ tenders. Any changes to local government provisions should ensure that there are sanctions for unacceptable conduct in local government, and effective protection against corruption. Any whistle-blower protections need to be appropriate to local government.

Local Government Arbitrator / Public Sector Arbitrator

11.5 CCI notes that industrial matters concerning Government officers are dealt with either by the Public Service Arbitrator or the Public Service Appeal Board.

11.6 CCI believes there are two options:

a. Create a comparable Local Government Arbitrator and Appeals Board; or
b. Empower the existing Arbitrator and Appeals Board to also deal with local government.

11.7 The Review should recommend as follows:

a) as far as possible, any regulation of local government employment under a modernised WA State system, awards and regulation by the WAIRC should be harmonized with regulation under modern awards under the National system. Objects and directions to the WAIRC (or its successor) in this area should prioritise harmonization and consistency to the extent possible, and only allow departures from National standards where specifically merited.

b) amended/new legislation should contain specific objects and parameters (or entire divisions) for the setting of local government and public-sector terms and conditions which are clearly delineated and operate separately to the regulation of employment in the private sector.

c) the transfer of business provisions of the Fair Work Act 2009 (Cth) regulate any transfers of functions or responsibilities from local governments to the private sector as an exclusive code, without any additional WA State regulation.