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CONSTRUCTION

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Secretariat
Ministerial Review of the State Industrial Relation System
Level 4, 140 William Street
Perth, Western Australia 6000

By email: irreviewsecretariat@dmirs.wa.gov.au

Dear Ms Field,

Ministerial Review of the State Industrial Relations System

We refer to the above matter and Mr Ritter's letter of 6 April 2018.

Please see **enclosed** our further submissions in relation to the Western Australian Industrial Relations System.

If you have any questions, please contact our Political Organiser, Stephen Catania on (08) 9228 6900 or via email at SCatania@cfmeuwa.com.

Yours sincerely,

M. Buchan

Michael (Mick) Buchan
State Secretary

Encl

THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION, CONSTRUCTION AND GENERAL DIVISION, WA DIVISIONAL BRANCH'S FURTHER SUBMISSIONS TO THE MINISTERIAL REVIEW OF THE STATE INDUSTRIAL RELATIONS SYSTEM

Introduction

1. These are the Construction, Forestry, Mining and Energy Union, Construction and General Division, WA Divisional Branch's (**Union**) further submissions in response to the Interim Report published by the Ministerial Review of the State Industrial Relations System (**Interim Report**).

2. We confirm that these submissions are supplementary to our submissions of 8 December 2017 and should be read in conjunction with these submissions.

Term of reference 1

3. We adopt UnionsWA's submission to the Ministerial Review of the State industrial relations system-Interim Report dated 1 May 2018 (**UnionsWA Submission**) in relation to term of reference 1 and the Interim Report's proposed recommendations in relation to this term of reference.

4. As identified in the UnionsWA Submission, some of the proposed recommendations for this term of reference do not streamline the Western Australian Industrial Relations Commission (**Commission**) and fundamentally alter it from a lay tribunal into a court.

5. We do not support the:

   a) abolition of the Full Bench of the Commission which is to be replaced by a Judicial Bench. The current structure of appeals to the Full Bench work effectively and are not in need of reform, save for the President's role;

   b) abolition of the Commission in Court Session which is to be replaced with a Arbitral Bench. The function of the Commission in Court session works effectively and there is no demonstrated need for reform;

   c) denial of contractual benefits jurisdiction to be moved from the Commission. At its core, the Commission is best placed to deal with industrial matters, including the denial of benefits in employment contracts. There is no case for the Commission's jurisdiction in this regard to be altered;

d) exclusion of section 26(1)(a) of the *Industrial Relations Act 1979* (WA) (**IR Act**) when the Commission is deciding a matter of law. Section 26(1)(a) of the IR Act is fundamental to the Commission achieving the objects of the IR Act without being overly technical or pedantic. However, there is existing authority which directs the Commission to follow principles of law. To this extent, this exclusion is unnecessary; and

e) automatic right to legal representation. The Commission at its core must deal with industrial issues not legal issues. Most matters before the Commission do not require legal issues to be traversed. Accordingly, the current rights of representation in the IR Act remain appropriate and are in no need for reform.

Term of reference 6

6. We adopt the UnionsWA Submission in relation to term of reference 6 and the Interim Report's proposed recommendations in relation to this term. We also adopt our previous submissions in relation to this term of reference.

7. As outlined in our previous submissions, awards are arbitral creatures. A simplification of language in those awards would amount to a reduction of their terms. The only way to guarantee existing entitlements through a simplification process is to in effect replicate those entitlements. Such an exercise would be and futile.

8. To the extent there are issues with the scope of awards under the IR Act, we are of the view that those issues can be resolved by the Commission under section 40B of the IR Act. However, if the view were taken that a section 40B review was inappropriate, we note that a legislative instrument could direct and empower the Commission to deal with award coverage.

9. By way of example, coverage clauses such as clause 3 of the *Building Trades (Construction) Award 1987* may be adopted by the Commission to resolve any issues with coverage.

Term of reference 7

Proposed recommendation 67

10. Proposed recommendation 67 of the Interim Report is as follows:

The right of entry provisions in the 2018 IR Act be amended to:

(a) [i]nclude a requirement that a person must be a fit and proper person to obtain, hold or maintain a right of entry permit;

(b) [p]rovide that an application may be made to the WAIRC by the Registrar or an industrial inspector for the suspension or revocation of a right of entry permit on the basis the holder is no longer a fit and proper person to hold the permit; and

(c) [i]n an application made under (b), or in considering an application for a right of entry permit, the WAIRC must take into account, as a relevant consideration, any suspensions, revocation or other sanctions imposed on the holder by or under the FW Act with respect to any corresponding rights of entry.

11. For the below reasons, the Union strongly opposes the Interim Report's proposed recommendation.

Submissions to the Interim Report

12. As the Interim Report summarised at:

a) [1392], the Combined Small Business Alliance of WA Inc. (**CSBA**) submitted that contents of the previous Green Bill be adopted with the intention of harmonising the IR Act with the *Fair Work Act 2009* (Cth) (**FW Act**). In the CSBA view this required a "fit and proper test" to be included when issuing authorities under the IR Act. Significantly, the CSBA's submission to the Ministerial Review of the Industrial Relations System (**Review**) in support of a fit and proper person test was based on "*[n]on-employees holding union membership, including phony union officials, such as members of biker gangs be excluded as a "fit and proper person"*". The CSBA's position is biased and lacks any substance. It should be ignored in its entirety;

b) [1397], the Master Builders Association of Western Australia's (**MBA**) supplementary submission to the Review outlined its reasons why a "fit and proper person" test should be included in the IR Act. The apparent basis of this submission is that the current requirements to be issued an authority under the IR Act are "*untenable and must be corrected*". There is no real substance to this submission but merely a claim for further statutory regulation of employee organisation and their officials.

The current system of issuing authority to authorised representatives under the IR Act

13. Section 49J of the IR Act currently prescribes how an authority under Division 2G of the IR Act is issued to a person. Relevantly section 49J of the IR Act provides:

(1) The Registrar, on application by the secretary of an organisation of employees to issue an authority for the purposes of this Division to a person nominated by the secretary in the application, must issue the authority.

(2) The Registrar must not issue an authority for the purposes of this Division to a person who has held an authority under this Division that has been revoked under subsection (5) unless the Commission in Court Session on application by any person has ordered the authority to be so issued.

(3) A person to whom an authority is issued is an authorised representative of the organisation on whose behalf the authority was made.

(4) The authority remains in force unless it is revoked or suspended under this section.

(5) The Commission constituted by a commissioner may, by order, on application by any person, revoke, or suspend for a period determined by the Commission, the authority if satisfied that the person to whom it was issued has-

(a) acted in an improper manner in the exercise of any power conferred on the person by this Division; or

(b) intentionally and unduly hindered an employer or the employees during their working time.

(6) The Registrar may, on application by the secretary of the organisation of employees on whose behalf the application for the authority was made, revoke the authority.

(6a) The Registrar must not revoke an authority issued under subsection (6) if-

(a) proceedings pursuant to an application made under subsection (5) in relation to the authority are pending or in progress; or

(b) appeal proceedings in respect of a decision made under subsection (5) in relation to the authority are pending or in progress, or the time within which such proceedings may be instituted has not elapsed.

(7) An application for the revocation of an authority under subsection (5) is to set out the grounds which the application is made.

(8) Despite section 49-

(a) no appeal lies from a decision of the Commission under subsection (2); and

(b) section 49(2a) does not apply to an appeal from a decision under subsection (5).

(c) A person to who an authority has been issued under this section must, within 14 days after the revocation of the authority, return the authority to the Registrar.

14. Section 49I of the IR Act comprehensively establishes a regime for organisations of employees to authorise representatives of their choice to hold an authority under the IR Act to enter premises.

15. The IR Act does not provide for "permit holders". Instead it provides for "authorised representatives". This distinction is significant, as it recognises that organisations of employees are entitled to authorise representatives of their choice. There is no express limitation on who may be authorised by an organisation of employees. This recognises that workers, through their elected leadership, are able to choose who represents them.

16. Despite the ability of the secretary of an organisation of employees nominating a person to be issued with an authority:

    a) section 49J(2) of the IR Act, prohibits an authority being issued to a person who's authority has been revoked unless the Western Australian Industrial Relations Commission (**Commission**) in Court session orders otherwise; and

    b) section 49J(5) of the IR Act, provides a mechanism for any person to apply to the Commission for an order to revoke or suspend an authority if the Commission is satisfied that the person to whom the authority was issued:

        i. acted in an improper manner in the exercise of power conferred on the person by Division 2G of the IR Act; or

        ii. intentionally and unduly hindered an employer or employees during their working time.

17. These provisions provide the Commission, on application by any person, the ability to stop the abuse of authorities issued under the IR Act.

18. As the Interim Report finds at:

    a) [1409], there has only ever been one instance that an authorised representative has had their authority revoked by the Commission, namely that of Joseph McDonald (**McDonald**);

    b) [1410], that despite an application being made under section 49J(2) of the IR Act, the Commission in Court Session did not issue McDonald an authority; and

c) [1411], that is only limited instances of authorised representatives having their authorities suspended.

19. The Interim Report's own findings lead to a conclusion that the current mechanism under section 49J of the IR Act work effectively and are not in need to review.

20. In the absence of any substance, the bald, vague and embarrassing assertions of the CBSA and MBA should have been treated with little or no weight.

21. The Review should be extremely cautious of merely transposing the provisions of the FW Act into the IR Act.

Utility of a "fit and proper person" test and contradictors to applications

22. The FW Act permits our officials to enter premises to

a) investigate suspected contraventions of the FW Act or a term of a fair work instrument under section 481 of the FW Act; and

b) hold discussions with members or people eligible to be members under section 484 of the FW Act.

23. However, under section 494(1) of the FW Act our officials cannot exercise a "*State or Territory OHS right*" unless the hold an entry permit under the FW Act.

24. Relevantly:

a) section 494(2) of the FW Act defines "*State of Territory OHS right*" as a right if that right is conferred by a "*State or Territory OHS law*" in relation to certain premises or employers;

b) section 494(3) of the FW Act provides that a "*State or Territory OHS law*" is a law of a State or Territory prescribed by the regulations; and

c) regulation 3.25, item 4 of the *Fair Work Regulation 2009* (Cth) prescribes:

> Sections 49G and 49I to 49O of the [IR Act] of Western Australia, but only to the extent to which those provisions provide for, or relate to, a right of entry to investigate a suspected contravention of:
>
> (a) the *Occupational Health and Safety Act 1984* of Western Australia; or
>
> (b) the *Mines Safety and Inspection Act 1994* of Western Australia.

25. The above interaction between the FW Act and IR Act makes it necessary for our officials to hold both an authority under the IR Act and an entry permit under the FW Act.

26. Currently, section 513 of the FW Act outlines "*permit qualification matters*" that the Fair Work Commission must take into account before issuing an entry permit under the FW Act. These permit qualification matters detrimentally impede on the democratic right of working people to elect officials to represent in their workplaces.

27. To further exacerbate matters, contradictors may seek to intervene in applications made by registered organisation to have an entry permit issued under section 512 of the FW Act.

28. The Australian Building and Construction Commissioner (**ABC Commissioner**) frequently intervenes or make submissions in application we make under section 512 of the FW Act. Having the ABC Commissioner as a contradictor delays the determination of these matter and significantly increases the costs associated.

29. Introducing a "fit and proper person" test has no utility as officials will in any event have to hold both an authority under the IR Act and an entry permit under the FW Act. Where an official has met the permit qualification matters set out in the FW Act, replication in the IR Act is unnecessary.

30. We note that there are currently over 400 authorised representatives who have been issued authorities under the IR Act. The introduction of a "fit and proper person" test will necessitate the Commission having to determine over 400 authorised representatives. Such an exercise is contrary to the public interest given the massive financial impact it will have on the resources of the Commission and the parties, namely employee organisation, subject to these determinations.

31. Further, the introduction of a "fit and proper person" test in the IR Act will give contradictors a second opportunity to act as contradictors. Such an outcome would be oppressive to registered organisations.

Proposed recommendation 68

32. Proposed recommendation 68 of the Interim Report provides:

> The 2018 IR Act include a provision that amends what is presently s 49I of the IR Act to include:

(a) An entitlement under what is presently s 49I(2)(b) of the IR Act to make copies of entries in records and documents (that is relevant to the suspected breach) by way of a photograph, video or other electronic means.

(b) An entitlement to photograph, or record by video, tape or other electronic means the work, material, machinery or appliance that is inspected under what is presently s49I(2)(c) of the IR Act, that is relevant to the suspected breach.

(c) A civil penalty provision to apply in circumstances comparable to s 504 of the FW Act, for any misuse of any documents or other materials obtained in exercise of the rights contained in s 49I(2) of the 2018 IR Act.

33. We commend proposed recommendation 68 save for proposed recommendation 68(c).

34. We oppose recommendation 68(c) because:

a) there is no evidence of any misuse of any documents or other materials obtained in the exercise of rights under section 49I(2) of the IR Act. This recommendation is made on the presumption of authorised representatives misusing their rights. To this extent, this recommendation is offensive and biased; and

b) section 504 of the FW Act only applies to the disclosure of information or a document obtained under section 482, 483, 483B, 483C, 483D or 483E of the FW Act. It does not apply to section 494 of the FW Act. To this extent, recommendation 68(c) inexplicably goes further than section 504 of the FW Act.

Conclusion

35. Given the above, we commend the UnionsWA Submission. In relation to proposed recommendation:

a) 67 of the Interim Report seeks to remedy a mischief that does not exist, namely to impose a "fit and proper person" test under the IR Act for authorised representatives; and

b) 68(c) of the Interim Report seeks to remedy the alleged misuse of information or material obtained under section 49I(2) of the IR Act, in light of absolutely no evidence.

36. It is clear that the current authority regime under section 49J of the IR Act works effectively. Further there is no evidence that there has been any abuse of this regime.

37. Given the above, Recommendation 67 and 68(c) of the Interim Report lack substance and constitute poor policy. Accordingly, these recommendations should be rejected.

Dated: 1 May 2018

Michael (Mick) Buchan

State Secretary