

CFMEU

CONSTRUCTION

Ref: 15128

8 December 2017

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.

Please see **enclosed** our 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,



Michael (Mick) Buchan
State Secretary

Encl

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

A. INTRODUCTION

The Construction, Forestry, Mining and Energy Union, Construction and General Division, WA Divisional Branch (**CFMEU**) represents building and construction workers in Western Australia. A majority of our members are national system employees covered by the *Fair Work Act 2009* (Cth) (**FW Act**). However, we welcome a review into the State Industrial Relations System to ensure that the best interests of our members are achieved.

Please see outlined below our submissions to the Ministerial Review established by the Minister of Commerce, the Honourable Bill Johnston MLA. Our submissions are structured to address the Terms of Reference relevant to our members' interests.

B. THE FIRST TERM OF REFERENCE

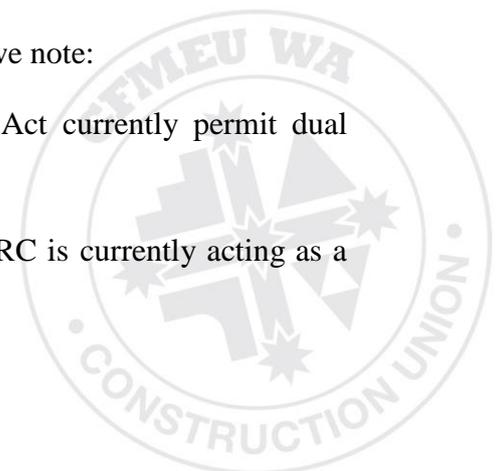
The First Term of Reference is aimed at a review of the structure of the Western Australian Industrial Relations Commission (**WAIRC**). The structure of the WAIRC is established under Part II of the *Industrial Relations Act 1979* (WA) (**IR Act**).

In our view, the WAIRC would be more streamlined and efficient if:

- (a) dual appointments were utilised by the WAIRC and the Fair Work Commission (**FWC**). This streamlining and efficiency gain is largely due to the growing caseload of the FWC. A dual appointee could continue to perform work in both the WAIRC and FWC as agreed to by the Chief Commissioner of the WAIRC and the President of the FWC. A dual appointee would be best placed to deal with industries who are subject to the IR Act and FW Act such as hospitality and retail; and
- (b) if the President's office in the WAIRC be held by a justice of the Supreme Court of Western Australia.

The above submission does not require any legislative change, as we note:

- (a) section 14A of the IR Act and section 631 of the FW Act currently permit dual appointments; and
- (b) that the Honourable Jennifer Smith, President of the WAIRC is currently acting as a justice of the Supreme Court of Western Australia



We therefore commend to this review to recommend:

- (a) dual appointments for future vacancies in the WAIRC; and
- (b) that the office of President in the WAIRC be occupied by a justice of the Supreme Court of Western Australia.

C. THE FIFTH TERM OF REFERENCE

The Fifth Term of Reference is aimed at reviewing the minimum conditions of employment in Western Australia.

We note the minimum conditions of employment contained in the *Construction Industry Portable Paid Long Service Leave Act 1985* (WA) (**CIPPLSL Act**) are not included as a part of this review. It is deeply disappointing and concerning that a review of the minimum conditions which affect our members or over 146,200 employed construction workers in Western Australia,¹ have been excluded from a global review of minimum conditions. This disappointment is compounded given there are significant issues with the CIPPLSL Act in relation to the:

- (a) coverage of the CIPPLSL Act in relation to construction work undertaken on ships;
- (b) payment of long service leave under the CIPPLSL Act, namely the exclusion of allowances and loadings;
- (c) two year period of forfeiture of long service leave under the CIPPLSL Act; and
- (d) the fifteen year service period required by employees under cl.3 of Division 2 of the CIPPLSL Act before the employee can access long service under the CIPPLSL Act.

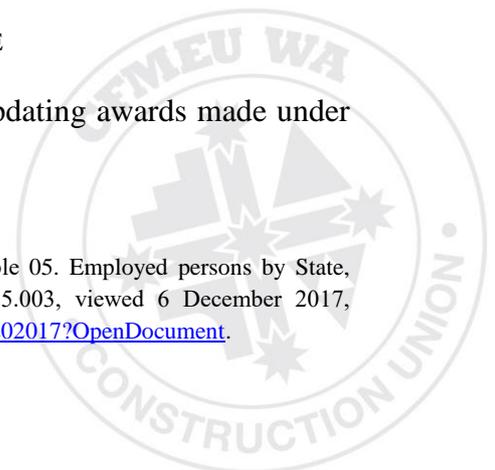
Given the above issues, we implore the Western Australian Government to:

- (a) open a line of communication with relevant stakeholders in relation to the above issues; and
- (b) to initiate a review in to the CIPPLSL Act in order to address the above concerns.

D. THE SIXTH TERM OF REFERENCE

The Sixth Term of Reference is aimed at devising a process of updating awards made under Division 2A of the IR Act.

¹ Australian Bureau of Statistics, 2017, *Labour Force, Australia, Detailed* 'Table 05. Employed persons by State, Territory and Industry division of main job (ANZSIC)', cat. No. 6291.0.55.003, viewed 6 December 2017, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6291.0.55.003Aug%202017?OpenDocument>.



In our view, the IR Act currently provides for effective mechanisms to update awards. In fact we are currently undertaking a review of the *Building Trades (Construction) Award 1987* to update several allowances. For reference, our review is being undertaken through Application 74 of 2017 in the WAIRC.

However, if the view were taken that the above mechanisms were not being utilised effectively, we would caution against any review process being driven by the WAIRC similar to the review process undertaken by the FWC.

In summarising its review process, the Full Bench of the FWC noted in *Re 4 yearly review of modern award-Annual Leave*:²

This review is essentially a regulatory function and the [FWC] must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions. The role of modern awards and the nature of the Review are quite different from the arbitral functions performed by the [FWC] in the past. In the Review context, the [FWC] is *not* creating an arbitral award in settlement of an *inter parties* dispute-it is review a regulatory instrument.

It is trite to observe that awards registered under Division 2A of the IR Act are arbitral instruments and not regulatory instruments like modern awards under the FW Act. Therefore, the WAIRC cannot adopt a review process similar to that of the FWC, unless there were fundamental changes to the current award regime under the IR Act. Such radical change is not justified or required.

Further, our experience with FWC reviews of modern awards has been that they have led to serious detriments for working people. By way of example, in *Re 4 yearly review of modern awards-Annual Leave*,³ three modern awards relevant to our members were varied to the detriment of working people.

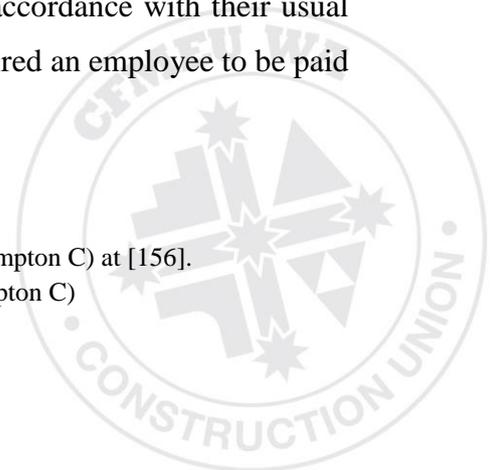
Specifically, the *Building and Construction General On-Site Award 2010 (Award)* was varied to the detriment of working people by:

- (a) inserting a clause 38.2(d) in to the Award.⁴ Clause 38.2(d) of the Award permits an employee paid by electronic funds transfer to be paid in accordance with their usual pay cycle, whereas under clause 38.2 of the Award, it required an employee to be paid before taking their annual leave;

² [2015] FWCFB 3406; (2015) 250 IR 119 (Ross P, Harrison SDP and Hampton C) at [156].

³ [2016] FWCFB 3177; (2016) 257 IR 368 (Ross P, Kovacic DP and Hampton C)

⁴ Ibid at [296].



- (b) inserting clause 38.5 into the Award.⁵ Clause 38.5 of the Award allows up to two weeks of annual leave to be cashed out by agreement between an employer and employee. Previously no cashing out of annual leave was permitted under the Award; and
- (c) inserting clauses 38.6 and 38.7 into the Award.⁶ These clauses now permit an employer to direct employees to take annual leave where their annual leave accrual is deemed excessive. Such direction was never permitted under the Award historically.

We would also caution against the WAIRC reviewing State awards with a view to ensure they are written in plain english.⁷ As noted above, State awards are creatures of arbitral findings. To simplify or streamline awards would have unintended consequences and would likely undermine decades of settled industrial practice.

Our above submissions barely demonstrate the detriment suffered by working people through the review process undertaken by the FWC. We submit that such detriment is to be expected given the FWC has been charged with a regulatory function and is able to take submissions and evidence from anyone it considers would assist in its function. This style of review is incompatible with the award regime under the IR Act, given that each award has parties attached to the award. Therefore, we commend to this review not to make any recommendations to follow the FW Act's model of reviewing awards.

Finally, if the view were taken that a major review of all State awards was required, we submit that all parties to the awards (including industrial organisations) need to be funded to meaningfully assist the WAIRC in a review process. It is well known the last major State award review in the early 2000s through section 40B of the IR Act was unsuccessful due to the under resourcing and underfunding of parties to the State awards. If a serious review was sought to be undertaken, this review must recognise that it is vital that parties be resourced and funded to meaningfully assist the WAIRC in any State award review process.

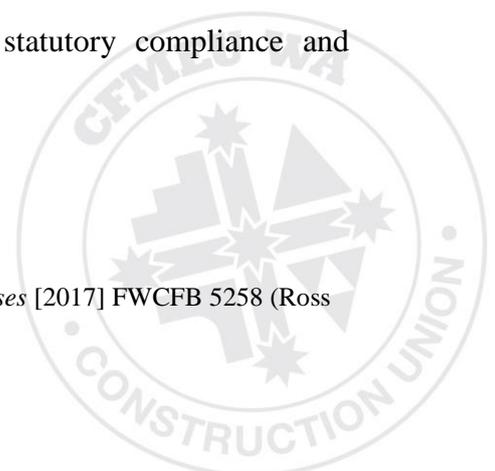
E. THE SEVENTH TERM OF REFERENCE

The Seventh Term of Reference is aimed at reviewing the statutory compliance and enforcement mechanisms.

⁵ Ibid at [293].

⁶ Ibid at [302].

⁷ See *Re 4 yearly review of modern awards-Plain language-standard clauses* [2017] FWCFB 5258 (Ross P, Hatcher VP and Hunt C).



Division 2G of the IR Act establishes a regime for the right of entry and inspection by authorised representatives of industrial associations. In particular, section 49I of the IR Act provides an authorised representative with a right to enter to investigate suspected contraventions of several pieces of legislation. It is clear that Division 2G of the IR Act provides an essential statutory compliance regime. Save for the minor amendments submitted below, the right of entry regime established under the IR Act works efficiently and is not in need of major reform.

1. *Omission of the CIPPLSL Act from section 49I of the IR Act*

Section 49I(1) of the IR Act relevantly provides:

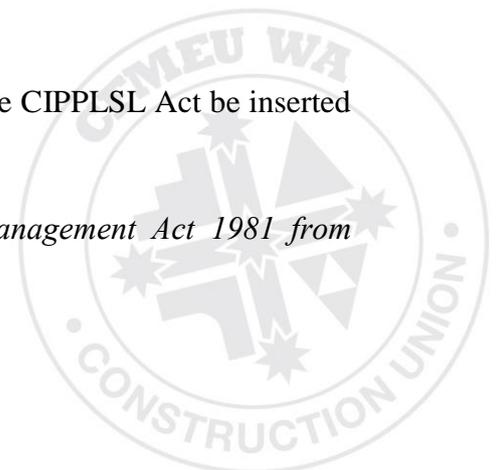
An authorised representative of an organisation may enter, during working hours, any premises where relevant employees work, for the purpose of investigating any suspected breach of this Act, the *Long Service Leave Act 1958*, the MCE Act, the *Occupational Safety and Health Act 1984*, the *Mines Safety and Inspection Act 1994* or an award, order, industrial agreement or employer-employee agreement that applies to any such employee.

The legislative and industrial instruments which give rise to a right for an authorised representative to enter and inspect suspected contraventions are exhaustively defined in section 49I(1) of the IR Act. However, two relevant legislative instruments have not been included, potentially due to an oversight of Parliament at the time.

The first legislative instrument which has been omitted from section 49(1) of the IR Act is the CIPPLSL Act. Section 49(1) of the IR Act clearly envisages authorised representatives being able to enter and inspect suspected contraventions of the *Long Service Leave Act 1958 (WA) (LSL Act)*. Given the intention of the Parliament to include the LSL Act, the CIPPLSL Act cannot be excluded for any justifiable reason. In this regard we repeat our submission above that 146,200 employed Western Australian Construction Workers are covered by the CIPPLSL Act. If the CIPPLSL Act was not included in section 49I(1) of the IR Act, it would continue to exclude these workers. This would seem counterintuitive to the objects of this review.

We therefore commend this review to recommend that the CIPPLSL Act be inserted in to section 49I(1) of the IR Act.

2. *Omission of the Workers' Compensation and Injury Management Act 1981 from section 49I of the IR Act*



Similarly to the submissions above, the *Workers' Compensation and Injury Management Act 1981 (WA) (WCIMA)* has been omitted from section 49(1) of the IR Act.

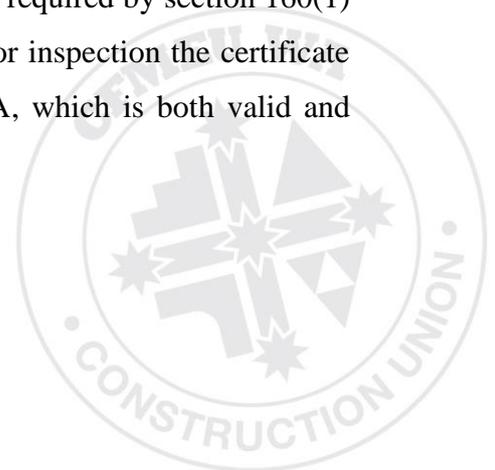
The majority of our members, and working people in Western Australia, are covered under the WCIMA. Our experience has been that there is an undercurrent of underinsurance by building industry participants in Western Australia. This underinsurance includes:

- (a) obtaining insurance for less than the number of construction workers employed; and
- (b) intentionally underestimating the wages of employees to reduce premiums.

This undercurrent seems to be tied to the rising casualisation and insecurity of employment in the construction industry. Where historically, a principal contractor would employ the majority of construction workers on a project with limited subcontractors and labour hire arrangements in place, the contemporary construction industry sees a principal contractor employ limited direct construction workers (largely supervisory staff) with construction workers engaged through subcontractors and predominately labour hire arrangements. In addition we regularly see practices such as:

- (a) phoenixing where an indebted entity transfers assets to a related entity in order to avoid paying employee entitlements, such as workers' compensation; and
- (b) sham contracting arrangements to avoid paying construction workers employee entitlements, such as workers' compensation.

Given these circumstances and numerous employers of construction workers on a given project, it is essential that authorised representatives have the ability to enter and investigate suspected contraventions of the WCIMA to ensure all construction workers on a project are covered by approved insurance as required by section 160(1) of the WCIMA and that an employer is able to produce for inspection the certificate of currency as required by section 160(7) of the WCIMA, which is both valid and accurately reflects the workforce on a given project.



To guarantee approved insurance in accordance with the provisions of the WCIMA, the compliance regime under Division 2G of the IR Act needs to be extended to include compliance of the WCIMA.

Accordingly, we commend this review to recommend that the WCIMA be inserted in to section 49(1) of the IR Act.

3. *Powers of authorised representatives when investigating under section 49I of the IR Act*

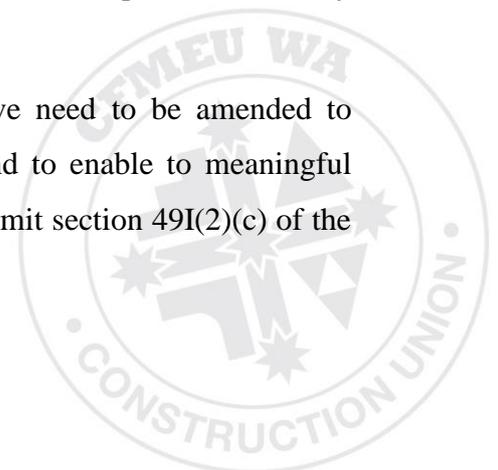
Section 49I(2) of the IR Act, in a non-exhaustive fashion, outlines some of the powers an authorised representative may exercise when investigating a suspected contravention under section 49I(1) of the IR Act.

Whilst the powers outlined are helpful, a more fulsome definition of an authorised representatives powers is required. This is because, on numerous occasions, authorised representatives of ours have been hindered and obstructed from carrying out proper investigations.

The major dispute between an occupier of a premises or relevant employer is the ability of an authorised representative to document their investigation with photographs, audio and visual recordings. By way of example, our authorised representatives were escorted off site after taking photographs and on another occasion one our authorised representative's had to revert to taking sketches of suspected safety contravention. On any objective view, a contemporary understanding of what is deemed to be an investigation would include documenting photographs, audio and video recordings. This is particularly the case given the ease with which photographs, audio and video recordings can be captured with mobile devices.

Further, in order to properly assess whether a suspected contravention can be prosecuted, photographs, audio and video recordings of suspected contraventions must be captured *in situ* to ensure quality of that evidence is preserved in any subsequent legal proceedings.

In this regard, the powers of an authorised representative need to be amended to ensure they are in line with contemporary understand and to enable to meaningful investigation suspected contraventions. To this end we submit section 49I(2)(c) of the IR Act be amended to as follows:



...

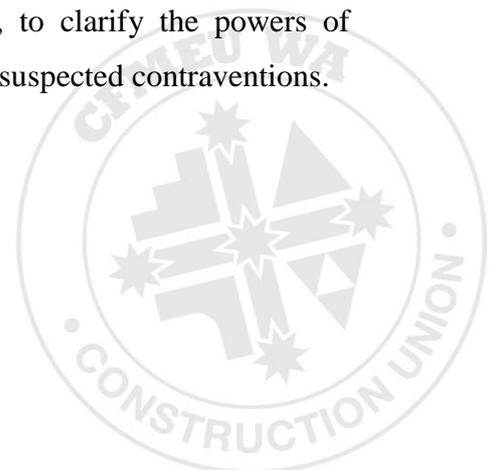
- (c) During working hours:
 - (i) inspect;
 - (ii) take photographs;
 - (iii) make video recordings;
 - (iv) audio recordings; or
 - (v) view,
 - any work, material, machinery, or appliance, that is relevant to the suspected breach.

We commend this review to recommend the above amendment to the powers outlined in section 49I(2) of the IR Act.

F. CONCLUSION

Given the above submissions, we commend this review to make recommendations to:

- (a) utilise dual appointees when filling future vacancies in the WAIRC;
- (b) appoint a justice of the Supreme Court of Western Australia to hold the office of President in the WAIRC;
- (c) have the Western Australian Government open a line of communication to review the minimum conditions in the CIPPLSL Act, or initiate a review of the minimum conditions of the CIPPLSL Act, or both;
- (d) maintain the current mechanisms of reviewing awards. However if a more comprehensive review of awards is required, that funding is allocated to the parties to the award to ensure meaningful contribution from parties to the awards;
- (e) amend section 49I(1) of the IR Act to include the CIPPLSL Act;
- (f) amend section 49I(1) of the IR Act to include the WCIMA; and
- (g) amend section 49I(2) of the IR Act, as outlined above, to clarify the powers of authorised representatives when entering and investigating suspected contraventions.



Dated: 8 December 2017



Michael (Mick) Buchan

State Secretary

CFMEU

