HSUWA Submission to the Ministerial Review of the State Industrial Relations System

14th December 2017

This submission focuses on matters of particular interest to the HSUWA. Accordingly, we have made general comments rather than specifically address the terms of reference for the review. The submission is not intended to be comprehensive.

Overview

In our opinion, the Industrial Relations system established under the Industrial Relations Act 1979 and related legislation by and large delivers industrial relations regulation, moderation, and disputes resolution (Conciliation and Arbitration) that is relatively well balanced, effective and efficient. The system has the balance of industrial interests about right. It also provides access to dispute resolution, relief and redress, in a timely manner, at the right level and in the main ensures a fair go all round.

In particular the system avoids the excess of regulation, prescriptive legalism and systemic bias against employees and their Unions that has been institutionalised in the Federal system by the perversely named Fair Work Act and associated legislation.

Subject to the specific matters raised below, we have no objection to streamlining the Commission processes provided the changes do not disadvantage our members or workers generally.

For the most part, our submission is focused on modernising the legislation to ensure it is effective and efficient, and as far as practicable closes off opportunities for unscrupulous employers and managers to exploit their workers.

The WA System overall.

We believe it is very important that the system retains its accessibility for lay advocates and persons without excessive legalism. The risk of losing accessibility increases with the increasing intrusion of lawyers at the early stages of dispute resolution. Careful consideration needs to be given to the need to balance the right to representation against the need to maintain an appropriate level of informality, particularly at the conciliation stage of dispute resolution.

<u>WA IR System – Distinctly one of Balance</u>

We believe it is very important to retain the distinct approach to Conciliation and Arbitration that is envisaged by both the objectives of the Act and in particular the direction to Commissioners in the exercise of their jurisdiction set out in s.26 (1) of the Act**, and the exercise of those powers in accordance with s.27, 32, 44, S.80E** and ff. (Public Service Arbitrator) including the power of the Commission to inform itself and to apply its industry knowledge. Clearly the Commission is given broad discretion in both

informing itself and exercising its jurisdiction that goes well beyond the more limited judicial approach exercised by ordinary courts of law.

Alongside this is the object of the Act to provide a system of fair wages and conditions of employment s.6(ca), which in the context of the other objects of the Act and the key role unions have in the WA IR system that means the system is focused on finding a balance between the interests of employees and those of employers.

It is these features that lay at the heart of effective industrial relations dispute resolution that is able to deliver fair and equitable outcomes. It is this difference that gives the dispute resolution processes and decision making its distinct character and delivers outcomes balanced around the employment relationship while taking into account the nuances of work, its purposes and the needs of the employers including the economic imperatives under which they operate.

<u>The increasing impact of lawyers and the need to guard against excessive legalism.</u>

It is a matter of fact and of our times that an increasing number of Industrial Officers and advocates employed by employers and Unions are either legal practitioners, qualified but not practicing lawyers, or holding law degrees but not qualified. (To slightly misquote Former Senior Commissioner, Jack Gregor, “the field is covered by real lawyers, pretend not real lawyers, pretend lawyers, almost lawyers and bush lawyers”. The latter being lay advocates!) This often makes the decision to exclude or not exclude lawyers at any or all stages of dispute resolution, more complex than it once was.

With the increasing intrusion into the system of legal practitioners, whose primary training and orientation is first and foremost in the exercise of and application of the law, rather than first and foremost the assessment of merit, fairness, equity and good conscience in the circumstances and within the framework of the law, there is an increasing risk that the features that distinguish Arbitration from Civil Court proceedings will be lost. That merit, fairness, equity and good conscience in the circumstances will increasingly be subverted by technical black letter law. The risk being that the question of whether or not an employer can lawfully do something will completely overshadow whether what the employer proposes to do is fair, equitable and in good conscience and notwithstanding their relative bargaining power, and not just a fair bare minimum, but a fair deal in all of the circumstances.

We believe that in order to ensure that the focus of the WA IR system is on delivering a fair equitable and balanced outcome, the Act needs to direct the Commission in exercise of its jurisdiction to ensure that it does not under weigh its role in actively “legislating” outcomes on the basis of s.26 and the objects of the Act and that it not simply fall into the trap of saying it is lawful therefore it is sufficient, or it meets the bare minimum therefore it is fair, equitable and balanced. ***While the resolution of a dispute must be lawful it must first and foremost be fair, equitable and conscionable in the circumstances and to the extent permitted by the law.***

Lawyers Add Cost

The increasing resort to lawyers at the early stages of dispute resolution in our view and experience, adds little if anything to dispute resolution, but does increase costs and complexity. ***The role of lawyers needs to be minimal at the early stages of dispute resolution.***

Some specific Issues.

In the remainder of this submission we focus on particular aspects of the system, which in our view not only includes the Industrial Relations Act 1979, but, without attempting to be comprehensive, also the Public Sector Management Act, the Minimum Conditions of Employment Act, Occupational Health and Safety legislation (particularly where it intersects with the role of the Commission), the Long Service Leave Act, and, in the case of Health Service Employees, the Health Act 2016, particularly Part 11. We will not be commenting on all of these.

Public Service Arbitrator

Retain the separate jurisdiction

Retain the separate jurisdiction of the Public Service Arbitrator for Government Officers.

The HSUWA prefers that Government Officers remain under the s.80E jurisdiction of the Public Service Arbitrator rather than under the general jurisdiction of the Commission.

The jurisdiction is specifically designed taking into account the nature of the employer employee relationship for Government Officers, the type of issues they encounter and the time frames involved in dispute resolution in the Public Sector. In regard to dispute resolution we refer to the period of direct discussion / negotiation / dispute resolution prior to referring a matter to the Arbitrator as well as following referral.

The jurisdiction of the PS Arbitrator is primarily one of review. It has the power to review and overturn decisions of Management. This means that the Arbitrator has the power to overturn a decision or modify a decision of management with retrospective effect from the date management make a decision which can be from well before an application is made to the Arbitrator and much earlier than the date of the decision of the Arbitrator. (This has been confirmed in appeal decisions.) On the other hand, decisions of the Commission can only have effect from the date of the decision of the Commission or in special circumstances the date of the application unless otherwise agreed. (See s.39 noting that orders are awards for the purposes of the Act. See also s.44(13) that also references s.39).

The review nature of the jurisdiction of the PS Arbitrator, not only reflects the way that public sector administration operates, it protects the need for timely activity and implementation from undue delays due to administrative processes, while the possibility of a decision being overturned causes administrators to give due consideration to the impact of their decisions on their employees. On the other hand, by allowing direct consultation

and negotiation to occur, without serious consequences in regard to the effective date of the Arbitrators decision, it allows matters to be resolved without unnecessary referral of matters to the Arbitrator. Without that protection, Unions would have to lodge a claim first and commence proceedings immediately or lose effective date.

Remove restriction re Public Sector Standards

Remove restriction on the PS Arbitrator reviewing matters related to Public Sector Standards contained in s.80E (7), or at least narrow down the exclusion. We note that the Commission has a narrow interpretation of the restriction, but to the best of our recollection their interpretation has not been tested in the Industrial Appeal Court.

The lack of Judicial Oversight of the administration of integrity laws, which the PS Standards are, was heavily scrutinised and criticised by Chief Justice Wayne Martin in the 2013 Whitmore Lecture (1 August 2013) titled "Forewarned and Four Armed - Administrative Law Values and the Fourth Arm of Government." In the paper he specifically singled out the Public Sector Commission (PSC) and the Crime and Corruption Commission (CCC), for the lack of judicial scrutiny of their activities. (Copy attached)

We say ***the PS Arbitrator and potentially by way of appeal, the Full Bench/Commission in Court Session and Industrial Appeal Court should have jurisdiction to oversight the administration of the PSM Act 2014 and in particular the Standards and Policies and Instructions made pursuant to that Act and their administration.***

The current situation sees no formal actual oversight and minimal enforcement. Unions do not have a formal role in regard to matters raised pursuant to the PSM Act that impact on our members. Members who attempt to pursue a grievance under the PSM Act in regard to a breach of standards, or code of conduct, or a breach of administrative procedures are more often than not left feeling it is a waste of time and to their detriment. There seems to be much investigation and very little outcome. It appears to be only on rare occasions and in more extreme circumstances that the PSC criticises the actions of an employer. Even then it takes the form of a critical report and recommendations and minimal if any consequences. There is no real enforcement that we are aware of. In our experience in regard to industrial matters, Equal Opportunity matters and OS&H matters generally, the possibility of oversight and being held to account by an external agency improves the administration of such matters.

In our view, the policy making role of the PSC needs to be separated from the review and enforcement role by enabling the PS Arbitrator to review the application of PSC Standards and policies to employees in the context of their employment. Unions need to be able to have a role in this.

The recently published Service Priority Review Final Report to the Western Australian Government October 2017 – “Working Together – One Public Sector Delivering For WA” at recommendations 10, 11 and 12 recommends that the PSC take a greater role in the public sector wide employment matters including the Industrial Relations role currently performed by the Department of Mines, Industry Regulation and Safety (DMIRs). This shift in emphasis and broadening role further heightens the need for independent oversight by the Public Service Arbitrator.

Please note, when it comes to the recruitment and selection of employees we do not want to go back to the bad old days of merit based appeals. This would impose too high a cost in delay, damage in relations between employees and is not justified as only a small percentage of decisions were ever overturned.

Remove referral of Disciplinary and Substandard Performance Matters from the Public Service Appeal Board and refer them to the Public Service Arbitrator.

Referral of disciplinary and substandard performance matters for Government Officers covered by the HSUWA should be removed from the jurisdiction of the Public Service Appeal Board (PSAB) and referred to the Public Service Arbitrator. In our view the PSAB provisions of the Act should be abolished.

Prior to the introduction of Part 11 of the Health Services Act 2016, the HSUWA was able to refer most disciplinary and substandard performance matters to the PS Arbitrator via s.44 applications, and WA Health was happy to take that path. Individual employees only had access to the PSAB. The s.44 approach provided access to compulsory conciliation and saw almost all matters reach a satisfactory outcome via the conciliation process without need for a formal hearing. In addition, there are more options for relief and redress via the general jurisdiction of the PS Arbitrator.

WA Health and HSUWA have reached Agreement on, and recommended to the Government that the referral to the PSB be removed from the Health Act and that the referral be to the PS Arbitrator. This approach would be consistent with the arrangement for Support Workers (UV) and Nurses (ANMF WA) under part 11 of the Health Act where such matters for employees under their coverage are referred to the Commission. While noting the difference in our proposal (PS Arbitrator rather than Commission), it makes for a more continuous and simpler jurisdiction if all matters relating to Government Officers (public sector employees covered by HSUWA) are referred to the Arbitrator rather than some to the Commission and some to the Arbitrator. The latter approach creates artificial divisions in regard to jurisdiction.

In our view the PSAB is a product of a bygone age. Notwithstanding there are three people on the Board, where the employer and employee appointed representative members disagree it, in effect, results in the PS Arbitrator deciding the matter. Referral to the PSAB denies access to the conciliation process where most matters are able to be resolved, it is unwieldy, requires additional resources for no gain and causes additional delays in reaching a resolution. The PSAB also has quite limited remedies available to it. In addition, the narrow jurisdiction of the PSAB creates an artificial barrier to dealing with complex matters that give rise to aspects that fall under the jurisdiction of the PSAB and aspects that fall under the jurisdiction of the PS Arbitrator. Bullying giving rise to allegations of poor performance, illness giving rise to allegations of poor performance or poor behaviour are two such examples. Another is family responsibilities creating conflicting demands with work requirements and duties.

In terms of the theory that employer and employee appointed board members can provide additional context to the arbitration of such matters, there can be no doubt that the advocates for the employee and the employer are well able to provide such information.

The possible solutions available to the Arbitrator also need to be broadened to enable a better range of potential outcomes / remedies, which may include unique and innovative solutions tailored to a particular person, organisation, or circumstance.

If the PSAB is to be retained then the jurisdiction needs to be amended to include access to compulsory conciliation via s.32 and for the PS Arbitrator alone to preside over the conciliation. It also requires the jurisdiction to offer a broader range of outcomes / remedies.

Conciliation has the effect of drawing in the employer's more senior managers and their Industrial Relations expertise and bringing it to bear in finding a resolution. It speeds up settlement and results in less adverse impact on both the employee concerned and the employer. Very often aggrieved employees feel they have had their day in court, been listened to and advised by an independent person and an acceptable outcome achieved.

Remove the disciplinary and substandard performance provisions of Part 11 of the Health Act 2016.

To the extent that the terms of reference of the review go to employment matters generally, the employees of Public Sector Health Service Providers have been subject to the disciplinary and substandard performance provisions of Part 11 of the Health Act 2016, with effect from 1 July 2016. The provisions of the Health Act apply with full exclusion of all other Acts, industrial instruments, terms of employment contracts, and employer policies.

The disciplinary and substandard performance provisions in the Health Act have essentially been imported from Part 5 of the PSM Act. Up until the creation of the Health Act, HSUWA Members and those of the ANF and UV were not covered by Part 5 of the PSM Act which applies to Public Servants only. There was no discussion with the relevant Unions. We have no idea why they made such a major change. There was no seminal event that we are aware of that caused the Government to make the change.

By way of a side note: The Health Act 2016 at s.295 amends the Industrial Relations Act 1979. The amendments in regard to 80I, which have been implemented in the Industrial Relations Act contains errors. We understand processes are underway to address this by reversing out the amendments and removing the referral to the PSAB from the Health Act and replacing it with referral to the PS Arbitrator.

Bullying

The HSUWA is of the view that the capacity of the parties to stop employees from being bullied at work and to address bullying issues would be significantly improved if the bullying provisions of Part 6-B of the Fair Work Act, s.789FB to s. 789FH inclusive, were included in the WA Industrial Relations Act, with relevant modifications, including in regards to the WA OSH Act and the jurisdiction of the PS Arbitrator.

While bulling is an industrial matter under the Industrial Relations Act, an OSH issue under the Occupational Safety and Health Act 1984, and can potentially find its way before the Commission in the form of the Occupational Safety and Health Tribunal, pursuant to Part

VIB of the OSH Act and potentially be dealt with in combination with other related matters in the Commission under s.51K of the OSH Act, it continues to be a slippery and difficult issue to address head on. It would be far easier to come to grips with if it were specifically recognised in the WA Industrial Relations Act, together with practical forms of relief, without limiting the general jurisdiction of the Commission in dispute settlement.

In the case of the Public Sector, the challenge of dealing with bullying, which in it most rudimentary form is a series of inappropriate behaviours toward another, is made more difficult, as bullying issues are also issues that are in breach of the Standards and of the Codes of Conduct and Codes of Ethics under the PSM Act. Thus, except for disciplinary and substandard performance issues that are related to bullying, they are potentially outside the jurisdiction of the PS Arbitrator pursuant to s.80E(7) of the Industrial Relations Act. (See also our submission in regard to the jurisdiction of the PS Arbitrator and Part VIB of the OSH Act.)

Bullying by its very nature is insidious. Tools that assist in addressing such behaviour, such as the threat of Orders to stop the bullying, in our experience, have, by their very presence, a significant moderating influence upon would be bullies, and empowers the efforts of both Unions and managers in stamping out the behaviour and the harm it causes. We see this effect with Equal Opportunity laws on a daily basis and while we have not had to bring the bullying provisions of the FW Act to bear formally in our areas of coverage, having the provisions in the FW Act assists greatly in having such matters addressed. We are also aware, anecdotally, that other Unions have found the FW Commission bullying jurisdiction of considerable assistance in having bullying issues addressed and that it works well.

Commission's Power to vary Agreement in limited Circumstances

There is an inconsistency between the powers of the Commission (including the Arbitrator) pursuant to s.44 (6a) (b) in regard to interim orders that may have the effect of varying an Agreement, and s.43(1) which, in effect, prohibits the Commission from varying an Agreement. We agree that an Agreement between a Union and an Employer should not be varied lightly. However, it is difficult to reconcile a situation where such a variation is justified under s.44 (admittedly on the basis of summary proceedings) but cannot be implemented by order of the Commission except by the agreement of both parties and in any circumstances, following a full hearing.

There are many unforeseeable factors in a dynamic work and industrial environment. The potential impact of every provision of an agreement in every possible circumstance is rarely canvassed and often not foreseeable. In addition, the lack of a right to dispute an unintended or unforeseen outcome can lead to an excess of caution in agreement making.

There needs to be the possibility of orders of the Commission made in resolving a dispute having the collateral or incidental effect of varying an agreement, provided it does not amount to revisiting the act of making the Agreement. Using a real example: If there is a dispute that wearing a uniform creates an occupational health and safety risk for an employee or group of employees and the case is proven, the Commission should not be prevented from making a decision that the specific employee/group of employees not be required to wear a uniform, notwithstanding that there is a provision in the Agreement stating

that the employer can direct an employee/group of employees to wear a uniform provided it meets certain requirements in regard to provisioning and laundering. (The case has been resolved on the ground.) Such variations should be limited to the employer and employees immediately impacted by the dispute. It should not facilitate the "wholesale" renegotiation of the agreement via a dispute.

The work value change requirement and reclassification - discrimination against women.

In the context of this Review of the State Industrial Relations System, in regard to HSUWA coverage, this issue largely applies to the Union's public-sector coverage.

There are two aspects to this issue. A general aspect and a potential for gender biased aspect. Both issues have their genesis in the "Statement of Principles" (the Principles) issued by the Commission in the State Wage Case and their application to assessing the classification of a position or class of position within the classification structures established in an Award or Agreement. This comes about as a consequence of two things:

1. The Principles issued pursuant to s.50A(1)(d) are applied to any position reclassification claim within an established award or agreement. A claimant is required to demonstrate that there has been an increase in work value as well as being established by comparison with other positions of similar work value.
2. The requirement at 1. applies to both setting the classification levels within an Award / Agreement, including the realignment of the award/ agreement classifications, and the assessment of individual positions and classes of positions for the purposes of allocating them to a classification level under the award / Agreement.

Applying the Principals in the creation and review of Award / Agreement Classification structures is in our view correct and operates as an effective tool to guard against wholesale classification creep. However, applying the Principles to the classification of positions (whether individual positions or classes of positions for the purpose of allocating/reallocating to classification levels already established under an Award or Agreement can lead to undesirable outcomes. It can create an injustice where on a like to like comparison basis alone a position is clearly under classified, because, unless an increase in work value can be demonstrated the Commission cannot reclassify a position under a strict application of the Principles notwithstanding the unfairness. This can occur at the time of establishment/creation of a position where there is no possibility of a work value increase.

The flow on effect is evident in areas of work that have historically been adversely classified due to a bias against the classification given to work primarily performed by women. If there has not been an increase in work value since the original determination, then there is no way to have the biased classification of the work corrected by making direct comparisons to other work of the same or similar work value.

In the general examples described above, the current application of the Principles biases towards the maintenance of the status quo and prevents the work from being properly and fairly reassessed. Both these biases are contrary to the objects of the Act and to s.50A (3).

In our submission, the Principles should only apply in regard to the creation and variation of classification structures or for claims to increase the rates of pay generally under Awards / Agreements (other than enterprise bargaining increases settled by agreement) and not to the classification of positions in the sense of allocating them to the existing classification levels under an established Award / Agreement. (The usual mechanism to vary the classification structure under an existing Award / Agreement is to claim a variation to classifications in the Award and then for the outcome of that process to be applied administratively or to the Agreement and at the time of making a replacement Agreement – under this scenario the wage fixing principles apply.)

There are two possible solutions. One would be for the Unions to intervene in a State Wage Case and make submissions seeking a variation to the principles (or appealing a classification decision on the basis of the Law), and hope for the best in regard to the outcome.

The more direct solution would be to **vary the Act to make it clear that the Principles do not apply in regard to the classification of positions for the purpose of allocating them to a classification level set out in an established Award or Agreement**.

Such an amendment becomes even more necessary if the Act is varied to ***include an equal pay review provision to enable a proper and effective review of work to ensure equal pay for work of equal value without gender bias***. (A proposal that the HSUWA supports.) Such a provision needs to facilitate the effective review of pockets of such work and to be aware of unconscious bias as well as conscious bias. For such cases to succeed, they must be based on direct comparisons to work of the same or similar work value. There must be no defence based on a lack of an increase in work value as such a defence would amount to perpetuating the bias and inequity.

Definition of Employee and Employer

The issue of who is an employee and who should be held accountable in regard to employment is a controversial area and is far too complex to do justice to in a brief submission, but we will try.

<u>The issue</u>

In the time since the current definitions of employer and employee were adopted in the WA employment legislation, organisations have found an increasing number of sophisticated, innovative and often questionable ways of evading their duties as employers and their obligations to pay fair wages and associated conditions and benefits by referring their responsibilities to others or by contriving to have them appear to be a contractor or the like. Cost shifting, cost avoidance and risk shifting often lay at the heart of these contrivances.

The Australian Tax Office neatly sums the situation up on their web site when the say:

> *It's against the law for a business to incorrectly treat their employees as contractors. Businesses that do this are:*

- *not meeting their tax and super obligations*
- *denying workers their employee entitlements*
- *illegally reducing their labour costs and gaining an unfair advantage over their competitors.*

Unfortunately, under current definitions of employee under WA Industrial Relations Laws, a number of current contrivances are not against the law. We would add however that for organisations to dodge their duties to provide fair outcomes for people who are for all intents and purposes workers is contrary to the objects of the WA Industrial Relations Act

In our view, the basic principle should be that persons primarily engaged in the delivery of skills and labour should be treated as employees and have all the rights and obligations of employees notwithstanding what contrivance or "dodgy" practice that may be entered into. As the saying goes: A rose by any other name is still a rose. (With apologies to William Shakespeare.)

Speaking generally, the increasing reliance on what is variously described as near employment arrangements (employees other than by legal definition under some or other piece of legislation), Gig Economy, platform employment, and the so called "Uberisation" of employment creates a significant challenge to traditional definitions of employment. Employee one day and so called subcontractor with a personal ABN the next, notwithstanding that the corporate law states that ABN's are not for that purpose, is an all too common issue.

The one thing we have no doubt about is that these various models of engaging employees are all designed to shift the risk to the employees, dodge Workers Compensation premiums, remove even the most basic entitlements to minimum hours and pay, avoid paying superannuation – the list goes on. All of these outcomes are undesirable and will create serious social and economic problems in the long run.

In the case of the HSUWA, these issues arise in areas such as hospital in the home, aged care, home care and Disability Services (NDIA/NDIS). Patient or client directed care and a number of other arrangements are a source of significant employment risk to employees. These are rapidly growing areas in a rapidly growing industry and need to be addressed urgently. Without adequate regulation, the increase in patient/client directed care and the engagement of persons to deliver that care via a wide variety of means both direct and indirect, will almost certainly result in a significant loss of protections to the individuals engaged to deliver the care and support. Furthermore, this will impact on a very large and growing workforce.

<u>Potential solutions.</u>

The issue of when employment is employment is a perennial and complex issue upon which much rests. In the industrial relations arena it has become even more complex with the reformation of Commonwealth Industrial laws and their rebasing on the corporations powers and the concept of trading corporations. While this has had a major impact on the breadth of application of the WA Industrial Relations Act, there is still work for the WA Act to do, including ensuring that there are no unregulated corners for unscrupulous employers/engagers of labour to take advantage of by whatever means.

Under the FW Act some attempts have been made to enable at least some of the issues to be addressed. Not all with the same degree of success.

The Sham Arrangements provisions, s. 357 to s. 359 inclusive, at least provide an avenue for examining the issue. Some limited success has been achieved. As to whether the coverage of the FW Act would leave space to test the issue in the State Jurisdiction may be problematic in practice, however, where engagement by individuals is involved such a provision is likely to prove useful, if only as a deterrent.

The franchisor/franchisee provisions of the FW Act. s.558A to s.558C, are also designed to prevent organisations at the top of a commercial/Administrative pyramid form dodgy practices and dodging accountability for employees employed by ostensibly independent but actually commercially dependent and controlled employers below them. While those provisions were inserted into the FW Act in response to a particular high profile situation (others have since come to light) the principle of holding the organisations in a position of power and authority to account is not a new principal either in commercial matters generally or in employment particularly. For example, the WA OSH Act 1984, s.23C to s.23F, deems certain workplace situations to be treated as employment in regard to various contract work, labour arrangements generally and labour hire arrangements, and imposes responsibility, liability and a duty of care on the various organisations in a chain of contracting. In so doing the OSH law ensures shared responsibility and accountability for the OSH aspects of employment and near employment and cutting off or at least significantly reducing the opportunity for dodgy practices.

What constitutes an employee depends heavily on the definition of employee and of employer. Provisions such as those contained in the OSH Act and the franchising provisions of the FW Act are valid tools to prevent the avoidance of accountability for and duties towards employees.

The franchisor franchisee provisions cover a narrow set of circumstances. The WA OSH laws cover a much wider range. We say a similar approach needs to be taken in regard to the duties to employees / near employees generally under our employment laws. This becomes particularly necessary in circumstances where the contractor can be shown to be utilising contracting out and various forms of subcontracting to avoid paying the employees of the contractor the same wages and conditions it pays its own workers for the same work.

The Workers Compensation Act has a significantly broader definition of employee than does the Industrial Relations Act. Having stated the obvious, we are advised that exactly who is an employee for the purposes of that Act has become heavily determined by what has become complex and almost impenetrable case law. This is an issue that will need to be addressed by the separate review of Workers Compensation laws that is under way. Never the less, this broader definition can be utilised to inform an updated definition of employee under WA employment laws.

The Australian Taxation Office (ATO) and tax laws have long played out a battle between taxpayers and the ATO as to who is an employee for the purposes of the laws they administer. The ATO has a very strong system of calling out contrivances for getting around the intention of the law. In so doing they have developed a broad definition of employee and a strong sense of what is and is not a contrivance. Particularly in more recent years, it can

be said that the ATO has developed a strong sense of what constitutes a contrivance to avoid taxation, particularly corporate taxation, and that the legislators have become increasingly responsive to closing the loopholes. We say the same approach needs to be taken in regard to employment law and employers contriving avoidance of those laws.

In the examples above, it is to be noted that, particularly in regard to OSH law and more recently, franchisor franchisee law, it has been necessary to take a two pronged approach to protect against avoidance. It has been necessary to address both the issue of what constitutes an employee, what constitutes an employer and what constitutes the duty of employers including where the duties of employer's rest, in order to ensure that the desired outcomes of the legislation are achieved. We suggest a similar approach needs to be taken in regard to employment law generally.

Finally, note needs to be taken in regard to the approach that has been taken in the United Kingdom, in particular the recent Uber decision in that country, currently subject to appeal.

Government Work – Contract specification of employment conditions and arrangements.

While it is likely beyond the scope of the review, it needs to be noted that ***there is nothing to prevent Government from specifying employment conditions and arrangements in their contracts when they contract for services or fund services***. This particularly applies where those services have a high labour component. In our view this extends to significant areas of service funded by government. As with top tier contractors and franchisors, the funding provided by Government, the volume of service it is intended to fund and the conditions attached to the funding go a long way to determining the employment arrangements, wage rates and conditions that apply to the employees of those funded services.

Unintended Consequences.

Our intention in regard to this part of our submission go to the contracting out of hospital work, developments in disability services, aged care, hospital in the home, and to a lesser extent some areas of the work of health professionals working for small providers, various forms of allied health service contractors and labour hire agencies; areas that have by and large traditionally been direct employment. There are many other similar areas of work. We leave it to other Unions to advise their areas of concern.

The avenues for finding solutions that we have suggested would have much wider application including potentially to areas that have traditionally been accepted as legitimately areas of contract for service. Without stepping away from the fundamental principal that just because someone else is doing it or because it has been a practice for a long time it does not make it right, we are not proposing a revolution. To avoid unintended consequences and unnecessary controversy, if an expanded definition approach is taken, it may be necessary to define what is intended to be covered and what is not intended to be covered.

Union Coverage

The approach proposed above may have implications for Union coverage. We have not attempted to examine this question. Subject to what immediately follows, our intentions are

to not disturb traditional areas of coverage.

The one area of change we believe needs to be addressed goes to individual subcontractors. Under federal laws organisations of employees can enrol subcontractors in their traditional areas of coverage as members. Currently under the WA IR Act, state registered unions do not have the same rights, as membership it restricted to employees as defined in the Act. For Unions with s.71 arrangements this is likely to be moot, however for standalone Unions like the HSU of WA, it is an issue as a number of our members work across multiple employers under various arrangements. In addition, if the employment laws are to be varied in order to discourage contrivances to avoid those laws, Unions have an important role to play in achieving this objective and of course precariously engaged employees must have the right to join unions. In order to facilitate our playing that role ***state registered unions need to be able to join as members, subcontractors and similar employees, including the employees of labour hire companies and employment agencies providing employees to areas of coverage otherwise covered by the Union.***

Thank you for considering these matters.

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