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Mr Mark Ritter SC
Ministerial Review of the WA Industrial Relations System 2017

Dear Mr Ritter,

SUBMISSION TO MINISTERIAL REVIEW OF WA INDUSTRIAL RELATIONS SYSTEM

Thank you for your invitation to make a submission to the Review.

To put my submission into perspective, I have more than 30 years' experience in industrial relations in this State. I have an undergraduate degree in economics and a Master's in Business Administration. I was an industrial inspector for many years and did many of the Department's prosecutions for breaches of the State's awards. I was the Department's Senior Policy & Legislation Officer during most of the then Government's terms in office during the 1990s, charged with making industrial relations waves for the then Minister. I drafted much of the Department's submission to the 1995 Fielding Review of WA Industrial Relations Legislation. For the past 20 years I have been an industrial relations consultant acting variously for employers, employees, unions, and the Commonwealth Government. Some of the litigation I have conducted has resulted in the State and Commonwealth amending their legislation.

The Terms of Reference of the Review also need to be put into proper perspective. They presume a continuation of the basic structural form of the current industrial relations legislation, which itself dates back to the original 1912 Act[1]. The principal role of the Commission continues to be, at least in theory, and despite *Workchoices* and the *Fair Work Act 2009* (FW Act) largely emasculating its ability to do so, resolve disputes between employers and unions by the making of awards and the approving of agreements about industrial matters within a framework where each party – including the Commission – has a well-recognized and accepted role to play. The terms of reference do not seem to evince any strong desire to change this.

Even putting to one side the effect on the State industrial relations system of the

[1] See *Industrial Arbitration Act* 1912-1949 (W.A.), with Annotations by F. T. P. Burt (Government Printer, Perth)

Commonwealth takeover over of most of it by the exercise of the Corporations power in the Constitution, it is arguable that the pattern enshrined in the current WA Industrial Relations Act 1979 (the IR Act) has ceased to be relevant in the current era.

To put this into further perspective, you should consider that when IR Act came into effect[2], the following were some of the characteristics of the work environment:

- Union density was around 50% and the metal trades industry and the Metal Trades Award was the bench mark for determining the relativities of every other award rate of pay;
- Restrictive work practices abounded by force of law: it was a criminal offence to bake or deliver bread between 8.00pm Friday and midnight Sunday[3]; only small or exempt retail shops could be open before 8.00am and after 6.00pm weekdays to sell a restricted range of products and supermarkets shut at 1.00pm Saturdays[4]; petrol was sold only at a limited number of rostered service stations after general shop closing hours on weekdays, weekends and public holidays[5];
- Men at Work were rocking those who weren't but wanted to be, Mental as Anything described the BLF's view of the Accord and most employers and Moving Pictures delivered *What About Me,* the aspirational class's future anthem;
- Intel's i80286 was the newest greatest thing in personal computing power for those who had one, Lotus 123 was consigning VisiCalc to the software graveyard and GUI was the interface shorthand typists had with their IBM Golf-ball typewriters when chocolate slowed down their typing.
- Government departments had tea ladies and Permanent Heads, Sunday pub sessions had live bands and it would be 10 years before Government Ministers got mobile phones in their cars; porn came wrapped in brown paper from the newsagent and you needn't bother trying to contact a Government department when WA were playing the Vics in the State of Origin midweek at Subiaco.
- The Government as well as the banks were ripping you off with FID and BAD fees;

[2] In actuality after some major legislative slicing and dicing in the early 1980s designed to make an Act that would not upset everyone and what eventuated has been described as a jurisprudential smorgasbord that offends every canon of good legal practice.

[3] *s.9 Bread Act 1982*

[4] *ss.85-92 Factories and Shops Act 1963*

[5] Ultimately abolished only in 1995

and

- Only industrial umpires didn't wear white coats.

The WA industrial relations environment today is a very different beast. In the private sector where the State system is still operating, most workplaces are small and not unionized, award observance is minimal, industrial agreements with unions are rare and disputes with them even rarer, leaving the only major role played by the Commission being to preside over unfair dismissal and denied contractual benefit claims and making annual variations to award wage rates that employers and their employees largely have no say or interest in making submissions about. The public sector industrial environment comprises the major employment area still within the State jurisdiction but nobody can tell without a detailed analysis whether a local council is in or out of it (for avoidance of doubt and given the nature of the public-sector functions they perform; all local councils should be in the State system).

I make my submissions on the basis that the regulatory system as it now exists for the private sector is archaic and should be replaced by one that focuses on the actual working relationships that exist. I don't specifically address the stated terms of reference in my submission but the proposals I make on specific features have the effect of addressing many of the stated terms. For the sake of brevity, I will not provide arguments in support of some of the proposals I make, but I will be happy to answer any queries you may have about them.

THE MINIMUM CONDITIONS OF EMPLOYMENT ACT 1993

Proposal 1

The artificial distinction between contracts of service and contracts for services used to determine the extent of the State jurisdiction should be abandoned: all contracts for the personal performance of work should be within its jurisdiction. The Minimum Conditions of Employment Act 1993, suitably strengthened and renamed, should apply to all workers who earn personal services income, as well as to traditional employees and employers.

Employers, whether in the State or Federal system have an incentive to avoid having employees because awards are so restrictive and confusing and so sham contracting is rife. It is a practice almost impossible to stamp out and difficult and costly to prove.

Although both State and Commonwealth regimes now tend to put greater weight (in deciding the employee –v- contractor issue), on whether the worker is really "carrying on a

business", this has only made it marginally easier for the decision to be made. And in some cases, more difficult and clearly wrong. The problem is that the concept of "carrying on a business" remains decidedly early 20th century in legal character. Has the worker invested capital (i.e. money) in the business? Is the worker remunerated by "profits" rather than an income based on hours worked or amount of product produced? A motor vehicle courier using his own car may be considered a contractor but not one supplying his own bicycle to do the same job[6] - although that outcome might have been different if the High Court knew what bicycles cost. The distinction becomes meaningless if all such contracts in the State system are subject to regulation.

If the income derived from the contractual performance of work is personal services income within the meaning of the tax laws (even if there is an interposed entity), is a wage or any other similar form of remuneration, the change will make the contract subject to regulation. Corporations will not be able to exploit workers performing personal services for them by sham sub-contracting arrangements or by having them incorporate. There will be no benefits obtainable from sham contracting. There will be just workers and the other party to the contract. The costs and time and effort involved in establishing that serviced apartment cleaners are not independent contractors[7] and who was their employer or that a Kalgoorlie sex worker in a brothel was an employee[8] and had an unfair dismissal remedy, will be avoided for workers in the State system. It will be all personal services income contracts that are not employment relationships subject to the FW Act that will be subject to regulation.

Proposal 2

The Minimum Conditions of Employment Act 1993 should be amended to provide for the following:

<u>Termination</u>

a) *Reasonable notice of termination of the working relationship as permitted by section 762 of the FW Act with the minimum period not being limited to a maximum of 5 weeks – i.e. if the current maximum of 5 weeks is not reasonable in all the circumstances then it will not satisfy the minimum condition and the minimum condition will also override any express agreement for a period of notice*

[6] *Hollis –v- Vabu [2001] HCA 44*

[7] *Fair Work Ombudsman –v- Quest South Perth Holdings Pty Ltd* [2015] HCA 45

[8] *Phillipa –v- Carmel [1996] IRCA 451*

that is not reasonable;

This will overturn the majority decision in *Richards –v- Nicoletti*[9] which is surely wrong in both law and equitable principle. It will avoid the need for long serving workers who have formal notice provisions in written contracts entered into when they were first employed, to have to show that the original contract of employment was no longer binding on the parties because of promotion or other changes over time.[10] If even written agreed notice periods are unreasonable or inequitable in all the circumstances, then equity should prevail.

b) *Prohibitions on termination of the working relationship for any of the reasons specified in section 772 of the FW Act;*

c) *The voiding of any contractual terms that seek to give effect to the contract being a notional fixed term contract that is rolled over at the end of the notional term and which has the effect of avoiding the requirement to give reasonable notice*[11]*;*

d) *The voiding of contractual terms whereby workers are engaged on a notional casual basis but where the true relationship does not satisfy the common law definition of casual.*[12]

<u>*Minimum Remuneration*</u>

a) *A minimum hourly rate of pay that is percentage linked to average weekly earnings and the average weekly hours worked in WA and which is payable for each hour of work up to the average number of hours worked each week in WA. For any additional hours worked above the average a penalty rate of pay should apply*.

The fixing of a minimum rate of remuneration based on average earnings in WA and average hours worked has the benefit of allowing it to adjust to the economic cycle automatically and without the strained efforts of justification currently engaged in during annual wage reviews. Award wages should be adjusted on the same basis. A wage case should be held only when there is compelling argument that there should not be an automatic increase.

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[9] **(**2016) 96 WAIG 504

[10] See for example *Quinn v Jack Chia (Australia) Ltd (1992) 1 VR 567*

[11] See the failed attempt to do this to avoid redundancy payments in *Trigg & Ors –v- Group Training South West Inc & Anor* [2017] WAIRC 00017

[12] See *Williams v McMahon Mining Services Pty Ltd* [2010] FCA 1321 where the Federal Magistrates Court decision that Williams was not a casual employee despite all the paperwork to the contrary, was upheld by the Federal Court.

b) *Part time or casual workers remunerated on an hourly basis to be engaged for a minimum period on any day*;

c) *The casual loading for truly casual work be increased to a percentage that will discourage its current use by employers of throwing the economic cost of uncertainty on to the worker.*

The casual loading under the Act is currently 20 percent. The value of the paid leave entitlements in the private sector is 16.67% (ignoring compassionate leave). The higher costs of casual engagement are considered by many employers a small price to pay for the ability to adjust the workforce numbers with ease, avoid having make provision for paid leave, notice, or redundancy and to obtain great flexibility in rostering and the ability to largely avoid unfair dismissal claims by simply reducing the number of hours of a particular worker until the person leaves. Workers who work regularly and on what is frequently a full-time basis, are called casuals but not treated as such, apart from denying them paid leave and related benefits[13]. Voiding such contractual terms if the relationship is not casual at common law will reduce the exploitation. The notional casual loading being paid should not be able to be set off against unpaid leave entitlements[14] but be taken to be the ordinary rate of pay for the worker.

A significantly higher casual loading will also make resort to casual employment less attractive an option. An example of how the current system is abused in even the public sector, is that of public school teachers: a casual teacher gets a 20 percent loading on a permanent teacher's rate of pay but if they both work all the school days in the year, the casual teacher actually earns less overall for the year because the permanent teacher gets 12 weeks of paid holidays. A full time teacher on (for example) $1000 per week will earn $52,000 for a year's employment while the casual who works the same 40 weeks and does not get paid for the public holidays and paid leave gets $45,600.

<u>*Paid Leave*</u>

The ability to contract out of all paid and unpaid leave entitlements where the remuneration paid to the worker for average hours of work exceeds a nominated amount.

Perhaps surprisingly, there are many workers who would prefer to do this – FIFO workers

[13] *See Roberts & Another –v- Chubb Security Services Pty Ltd 2004 WAIRC 13385* where the two employees worked more than 8 years as "casuals" despite the award limiting casual employment to a maximum of 13 weeks.

[14] See *Williams v McMahon Mining Services Pty Ltd* [2010] FCA 1321 where this was argued to be possible.

on remote minesites are not there because they enjoy the work environment and are usually not paid for the periods off site anyway. Many workers would prefer, at least for a while, the higher remuneration. A premium greater than the cost to the hirer of paying the leave would be required, given that any period of paid leave also requires the hirer to engage and pay a replacement worker. It need not be as high as the FW Act's high-income threshold.

Unfair Contract Terms

a) *Post-employment restraints are void unless the worker is reasonably remunerated for the period of and the extent of the restraint;*

While the courts are generally reluctant to enforce post-employment restraints for good policy reasons, they are commonly put in contracts for *in terrorem* purposes rather than to protect a legitimate commercial interest, but if the employer wants to legitimately restrain a former employee, the employer should pay for it.

b) *"No litigation" and "no damages" terms in contracts are void;*

c) *No unilateral right to vary the terms of the contract are permitted;*

d) *Stand down without pay clauses are to be prohibited;*

These clauses simply throw the cost of uncertainty onto the worker who is in less a position to absorb the loss than the employer.

e) *Clauses allowing the principal unlimited power to direct a worker to perform any work within the competence of the worker without paying the worker a premium for the right to do so, to be prohibited*[15].

That is not employment but serfdom. Unless the worker is clearly engaged as a lackey an employer has engaged someone to perform a function – not be a serf – and should be required to negotiate any change in the workers duties.

Enforcement

The provisions of the MCE Act should be enforceable by way of the imposition of a penalty[16]*, orders for restitution, damages, injunction, declaration, rectification, along with*

[15] If such terms are unfair terms for the purposes of the *Competition & Consumer Act 2010* then they should also be for personal services and employment contracts: see for example ACCC *–v- JJ Richards & Sons Pty Ltd* [2017] FCA 124

[16] Currently a breach is treated in the same way as a breach of an award and enforceable under section 83 of the IR Act. This limits penalty proceedings to those being brought before an industrial magistrate. This should

accessorial liability and have scope for class action claims where more than one worker is affected by a course of conduct. Recoverable costs should be limited to those set out in a scale established by regulation.

Relationship with Awards and Registered Agreements

The minimum conditions should not be implied terms in awards and registered agreements but kept separate and discrete. Awards and registered agreements should be prohibited from containing terms inconsistent with the minimum conditions if they result in outcomes less beneficial to the worker.

THE LONG SERVICE LEAVE ACT 1958

Proposal 3

If long service leave is to continue to be a worker benefit, then its provisions should be incorporated into the MCE Act and funded in the same manner as the construction industry portable paid long service leave scheme.

Long service leave is an anachronism originally dating from colonial days and that began to be incorporated into awards in the early 1950s. Twenty or so years ago, when I had the task of developing a policy paper on creating flexibility in long service leave for a MOLAC[17] meeting that the WA Government was hosting, my research showed that less than 10 percent of private sector employees remained employed for long enough to qualify for any long service leave[18]. The figure today is probably even less.[19]

It is arguable that the period of leave should be reserved for the taking of courses that will upgrade worker skills or facilitate the obtaining of new ones. A funding scheme modelled on the Construction Industry Portable Paid Long Service Leave scheme is recommended.

THE TERMINATION CHANGE AND REDUNDANCY GENERAL ORDER

Proposal 4

Redundancy pay to be provided for in the MCE Act but based on age, years of service and likely future employability rather than just years of service. The exclusion of the

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be the preferred jurisdiction and the question of what penalty should be imposable is addressed later in these submissions but the penalty should also be expressly reflected in the MCE Act itself.

[17] Ministers of Labour Advisory Council

[18] At that time, the minimum period of continuous employment for any long service leave entitlement to vest was 10 years and then only on termination of employment. The 13 weeks leave could not normally be taken until 15 years continuous employment had been served.

[19] Currently the minimum qualifying period for an entitlement in the private sector to vest – again only on termination of employment - is 7 years.

obligations for employers with fewer than 15 employees be removed.

The *Termination Change and Redundancy* General Order is a legacy of the Australian Industrial Relations Commission case of that name dating from 1984[20]. It reflects the Metal Trades industry as it was in those days and is an anachronism for that reason. That pattern of working life, as does much of the manufacturing industry it was intended for, no longer exists in the State system or elsewhere.

However, the redundancy pay provisions now in the Commission's General Order should not be inserted into the MCE Act. The 1984 Metal Trades TCR case from which it is derived is no longer a relevant model. It is completely illogical, (for example) for a 25-year-old who loses his job for economic or technological reasons after 3 years' service, to be entitled to 7 weeks redundancy pay while a 60-year-old who loses her job after 20 years' service is entitled to only 10 weeks.

Redundancy pay is intended to compensate for the loss of non-transferable benefits such as accumulated sick leave and the difficulty of learning new skills and obtaining further employment and the disruption to life after a lengthy period in one work environment. The older you get, the less variety in work experience you have and the less tolerant you become of know it all kids in charge, the harder it is to get alternative employment. A worker made redundant in his or her late 50s onwards is largely unemployable.

As a general principle redundancy pay should not be payable to any worker under 50 who has less than 10 years continuous service. For those over 60 with 10 or more years' service, who likely will be largely unemployable, it should be significantly higher. Six months and twelve months respectively seems a reasonable minimum. The current exemption for terminations arising out of "the usual and customary turnover of labour" will be redundant: a worker who loses his or her job after 10 plus years has not done so because of any usual or customary turnover of labour. The reduction allowed by reason of the worker being also eligible for some long service leave payment should be abandoned. A redundancy scheme modelled on that used for the Construction Industry Portable Paid Long Service Leave scheme should be considered the preferred option.

MODERNIZING AWARDS

The Nature of Award Coverage

It is necessary to say something, in fact a great deal, about how awards currently apply,

[20] (1984) 8 IR 34

before considering what changes might be considered desirable.

Section 37 of the IR Act, which makes most awards a common rule applying to all employers in the industry to which the award relates, provides:

37.Effect, area and scope of awards

(1) An award has effect according to its terms, but unless and to the extent that those terms expressly provide otherwise it shall, subject to this section —

(a) extend to and bind —

(i) all employees employed in any calling mentioned therein in the industry or industries to which the award applies[21]; and

(ii) all employers employing those employees;

and

(b) operate throughout the State, other than in the areas to which section 3(1) applies.

[(2), (3)deleted]

(4) An award, and any provision of an award, whether or not it has been made for a specified term, shall, subject to any variation made under this Act, remain in force until cancelled, suspended, or replaced under this Act unless, in the case of an award or a provision made for a specified term, it is expressly provided that the award or the provision, as the case may be, shall cease to operate upon the expiration of that term.

(5) Subsection (4) does not prevent the cancellation, suspension, or replacement of an award in part.

The section effectively reproduces the "common rule" provisions in the original 1912-1979 Act[22]. The current IR Act when it first came into effect in early 1980, continued in operation all the awards made under the preceding Act.[23] Most of the those awards still exist[24] and in particular the scope clauses of them, which in accordance with the emphasized part of section 37 above, determines to which employers the award will now apply, based on the industries of the employers who were initially bound by it.

Because the pre-1980 awards have been continued in operation and have common rule application by virtue of almost identical provisions to those in section 85 of the 1912-1979 Act, so do some of the decisions of courts in respect of the evidentiary requirements to establish that the award applies to a particular employer today. As Burt J (as he then was)

[21] My emphasis added

[22] *s.85 Industrial Arbitration Act 1912 - 1979*

[23] *s.117(1)(g)*

[24] There are about 250 awards and about 100 were operative prior to the 1979 IR Act coming into force. One common one still relevant dates to 1947.

put it in one often cited case[25]:

Each and every award must relate to an industry and what the industry is, is in every case primarily a question of construction of the particular award. It may be that the question is not only primarily but finally a question of construction, and it may be that the award as a matter of construction fails to give the final answer and requires for that purpose that findings of fact be made.

An award if made in terms "to relate to the ship building industry" would be of the first-mentioned kind. An award expressed to relate, as the one under construction here is expressed to relate, to "the industries carried on by the respondents set out in the schedule attached to this award" is of the other kind. In such a case, the industry to which the award relates cannot be made known without definition of the industries carried on by the respondents. And this is necessarily a question of fact.

An example will illustrate some of the problems this causes.

The scope clause of the Shop & Warehouse (Wholesale & Retail Establishments) Award[26] which dates from 1976 reads as follows:

> *This award shall apply to all workers employed in any calling or callings herein mentioned in the industry or industries carried on by the Respondents named in Schedule "C" and to all employers employing those workers*.

The callings mentioned obviously include shop assistants – persons engaged to sell goods. However, the Respondents listed in Schedule C are not identified by the industries in which they are engaged[27] but only by their name. Whether a particular industry employing shop assistants is now covered by the award can only be determined by evidence that the particular industry in question is one that is, or was, carried on by one or more of these named respondents. What is more, it has to be an industry carried on at the time the award was first made[28]. Hello Apple Store and Telstra Shop.

And it is not just new technologies and the industries they create. Where is the evidence to establish what was an industry carried on by a named respondent in 1976 going to come from? Back when I was an industrial inspector, it was considered that video shops were not covered by this award because none of the named respondents – so far as we could establish – were ever engaged in hiring films. This was despite video cassette tapes and head cleaning products being on the list of things a special retail shop could deal in. Film renting or film hiring were also industries covered by the Clerks (Commercial, Social

[25] *WA Carpenters, Joiners, Bricklayers and Stonemasons Union -v- Glover [1970] 50 WAIG 704*

[26] http://forms.wairc.wa.gov.au/awards/SHO001/p39/SHO001.docx

[27] Compare for example the schedule to the Metal Trades (General) Award 1966 at 80 WAIG 370 which does list the industries the award applies to.

[28] *Freshwest Corporation Pty Ltd v TWU* [1991] 71WAIG 1746 (IAC) at 1748

and Professional Services) Award 1972 but the people who hired out to you your video cassette, were not performing clerical work as defined in that award[29], so it too did not apply.

If awards with common rule are to have a proper place in the WA industrial system then new awards will need to be created. Most awards have fairly common substantive terms, although the wording of the terms varies considerably. Ordinary hours are mostly Monday to Friday between 6.00am and 6.00pm with penalty rates applying if ordinary hours are worked outside these hours or on weekends. Annual leave, personal leave, public holidays, parental leave and notice provisions are essentially the same, if often expressed in different forms. Some awards are substantially identical, with identical classifications, wage rates and terms with only the industry to which they apply being different: there seems little logical reason for there to be separate awards, with essentially the same terms and conditions applying to the same classifications of employee in, (for example) hotels, motels, clubs, and restaurants.[30]

One problem facing any reform of the award system is that it is union rights and powers in respect of membership that is the discriminating basis of award coverage: for example the United Voice union has no say in respect of workers who are only eligible to join the Shop Distributive and Allied Employees Association: it cannot enroll one as a member, cannot take a dispute with an employer about one to the Commission, and cannot obtain an award applying to such members or seek an amendment to an existing award covering such persons.

Changing how awards apply must take into consideration such issues.

The number of private sector awards could probably be reduced to under 25 and differ only in respect of those industries where the work performed is significantly different to the norm – e.g. the domestic construction industry is vastly different from the café industry.

THE APPLICATION OF AWARDS

Proposal 5

Modern awards should be created based on industries and workers involved in them, without regard to the historical constitutional coverage of particular unions. The industries

[29] *Federated Clerks' Union of Australia, WA Branch v. Cary* (1977) 57 WAIG 585 at 586,

[30] Hotel & Tavern Workers Award; Motel Hostel Service Flats and Boarding House Workers Award; Club Workers Award; Restaurant Tearoom & Catering Workers Award.

should be reviewed periodically and Unions WA should be the representative of the labour movement as a whole in these reviews. Unions should have no independent right to seek to amend or make an award. A right to represent any individual, regardless of eligibility for membership in the union, should exist for any enterprise where the union does have constitutional coverage of a majority or a substantial number of employees. Any Commission decision on a dispute arising under an award would be applicable only to the employer the subject of it.

Proposal 6

The Commission to review awards periodically to ensure they maintain relevance to the industries that exist or are coming into being. The review is to look at the scope of the industry covered, the technology involved and any changes over time and the relevant provisions in the award that may be in need of updating.

For example, the $7.70 special allowance in the Building Trades Construction Award 1987[31] paid in part for, as the award says - *the removal of loadings from the various building awards consequent upon the introduction of <u>this paid rates award in the industry</u>* - might be considered somewhat redundant since paid rates awards have not existed for more than 35 years.

Is there still in existence a marine stores industry – and no it has nothing to do with boats - to which the Marine Stores Award 1958 can apply?

Proposal 7

There should be a dedicated award for the labour hire industry that recognizes the unique characteristics of the labour hire industry: the employer does not control the work and has no powers of direction, the client can dispense with the services of the worker at any time without fear of an unfair dismissal claim and if the labour hire firm cannot find alternative work, it too is safe from an unfair dismissal claim. Most award provisions dependent on continuity of service with the employer are not relevant to the industry.

Labour hire firms tend to recruit people on a notional casual basis although the work pattern is usually anything but casual in fact or law. It is populated by employees who are largely low skilled, recent foreign citizens and perform duties requiring little skills or interpersonal abilities such as security officers or cleaners and 12 hour shifts are common. The industry is dominated by a few big players having multiple pre-FW Act certified

[31] Clause 9(5)

agreements with no penalty rates applying and several quasi-criminal organisations utilizing workers who have ABN registrations. The awards which have provisions for labour hire firms – almost exclusively federal awards – apply the same terms and conditions to employees as directly employed workers, despite the significant difference in the nature of the relevant industries. A dedicated award with special common provisions which apply regardless of in which industry the work is performed will provide an appropriate level of protection to the worker and flexibility to the actual employer.

THE STRUCTURE AND CONTENT OF AWARDS

It was a big mistake, right from the beginning, letting Superior Court judges who presided over the Court of Arbitration in the early 20th century, anywhere near the drafting of awards. They took penal Acts of Parliament as the proper basis for the structure of awards: each contained a title, an index of provisions, a set of definitions and substantive provisions relating to obligations and rights that were laid out in ways that were not inherently logical and that the average person without a legal background was never going to be able to easily follow.

And the various Commissions further copped out by later adopting the mostly infelicitous drafting of clauses by union and employer association representatives who, if they didn't have delusions about possessing the skills of Parliamentary Counsel, expressed their intention *in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon….*[32]. but they still sought to follow the penal Act template. This has led to the situation where courts have been forced to hold … *it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand.*[33]

Just the sort of thing an employer will understand when perusing the document.

This has had a further consequence: the enforcement of awards has all the hallmarks of a criminal prosecution with a contravention of a particular term of an award treated as if it was the equivalent of a criminal offence. Only the evidentiary burden is different. Until 2001 the regulations relating to the enforcement of awards actually specified that the

[32] *Kucks v CSR Ltd* (1996) 66 IR 182
[33] *Ibid at 184*

practice and procedure under the *Justices Act 1902* was to be followed in proceedings and under that Act, each "charge" had to be separately specified to avoid being bad for "duplicity"[34]. The legacy remains in both the State and Federal legislation[35] that requires separate breach proceedings to be brought in respect of each term of the award alleged to have been contravened[36] on each occasion it has occurred.

This has two effects. Firstly, an enormous amount of knowledge and effort has to be put into identifying and formulating the contraventions. When I was an industrial inspector sitting on interview panels, I would give applicants a short test to have them identify the award contraventions and the amount of underpayments involved for a simple hypothetical case occurring over a 1 week period. Most could not do it.

When overtime, penalty rates for ordinary hours that differ from day to day, paid leave and various other terms of the award are alleged to have been contravened over an extended period and possibly under different award terms because of variations to the award and increases in wage rates over time, the task of determining whether breaches have occurred, what they are, calculating the extent of underpayments and drafting statements of claim becomes very specialized. Governments and unions have limited resources to devote to such work, especially where the costs are not usually recoverable in legal proceedings.

The second effect is that Governments who are prepared to throw the book at employers, where there are substantial penalties available for each breach[37], have the advantage of being able to lean on employers to cop a plea or settle at the pre-trial conference stage, regardless of the merits of the defence, in order to reduce their exposure to penalties totaling hundreds of thousands of dollars for multiple breaches of terms of awards involving total underpayments that may be insignificant in comparison. Whether this amounts to society achieving more or less substantial justice or is an abuse of power is a debatable point, but in the interests of promoting compliance and reducing the compliance burden on both employers and the inspectorate enforcing awards, the structure and content of awards should be changed.

Proposal 8

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[34] s.42

[35] *s.83(1) IR Act and s.539 FW Act 2009*

[36] A further legacy remaining in the State legislation is s.83A(3) of the IR Act which deems an industrial magistrate's court order for the payment of unpaid award entitlements found to be owing to be an order to pay a penalty – because the *Justices Act 1902* made no provision for orders for restitution, only for penalties.

[37] e.g.: $63,000 for contravention of an award term in the FW Act

Award provisions should be written in terms similar to simple contracts – i.e. in plain language providing, for example, that the employee will be paid a wage calculated in accordance with the sum of X, Y and Z (the amounts due for ordinary wages, overtime, penalty rates, leave, allowances etc), thereby imposing only one payment option and giving rise to only one contravention if the correct amount is not paid. A contravention of any or all terms of the award over any period of time also should be a single contravention of the award and attract a penalty dependent on the nature of the breaches, the extent of the underpayments and non-compliance and the period over which they occurred.

The following is an example of how such a clause might be written:

A worker shall be paid each fortnight a wage. The wage shall be calculated as follows:

1) Number of ordinary hours worked in the fortnight x hourly rate of pay;

   Plus

2) Number of additional hours worked in the fortnight x relevant rate of pay for additional hours;

   Plus

3) Number of hours of work payable at penalty rates x relevant penalty rate of pay;

   Plus

4) Number of hours of paid annual leave taken in the fortnight x hourly rate of pay;

   Plus

5) Number of hours of paid personal leave taken in the fortnight x hourly rate of pay;

   Plus

6) Number of hours of other payable leave x hourly rate of pay;

   Plus

7) Number of occasions an allowance is payable in fortnight x amount of relevant allowance;

   Plus

8) Any amounts due on cessation of employment.

Proposal 9

Where the modernized awards have common entitlements such as paid leave or penalty rates for night or weekend work, the clauses specifying or giving effect to them should have identical wording[38]*.*

If there is only one way a clause is expressed, it will be interpreted in the same way for all awards- and hopefully it will be better expressed than the following one from the

[38] Compare for example the substantively same provisions but different wording used in the penalty rates clauses in the Hospitality Industry, the Restaurant Industry and Registered and Licensed Clubs modern awards

Restaurant, Tearoom & Catering Workers Award does:

9. - ADDITIONAL RATES FOR ORDINARY HOURS

(1) An employee who is required to work any ordinary hours prior to 7.00 am or after 7.00 pm on any day Monday to Friday, both inclusive, shall be paid at the rate of an extra $1.00 per hour[39] for each such hour, or part thereof worked.

An employee to whom this award clause applies finishes the ordinary hours of work at 7.30 pm on each of the weekdays. For that week, is she to be paid $2.50 in additional pay for the hours worked after 7.00pm or $5.00?

Proposal 10

Where penalty rates and allowances are applicable based solely on the hours the work is being done and not any unique circumstances, the penalty rates and allowances should be the same and be expressed as a percentage of the relevant award rate. The pernicious practice of the FW Commission to reference allowances to a standard rate simply causes confusion.

The Restaurant Tearoom and Catering Workers Award provides for an additional $1.66 per hour or part thereof for ordinary hours worked after 7.00pm weekdays. That amount is 8.4% of the basic cook's hourly rate of pay ($19.82) and only 8.9% of the lowest classified employee's ordinary hourly rate. A basic cook working in a private hospital would get 12.5% of the cook's rate of pay ($20.84) or an extra $2.60 per hour for the entire shift if it commenced between 12.00noon and 6.00pm. The job is the same so the penalty loading and probably the wage should be the same. The overtime meal allowance in the restaurant award is $11.30 and in the private hospital $8.35. There is no logic to the amounts or even to why there is such an allowance since both establishments have kitchens that can prepare meals.

COMPLIANCE & ENFORCEMENT

That there is a reference item relating to "updating" industrial inspectors' powers and tools of enforcement, suggests there is seen to be a deficiency in the existing legislation. This is not the case: state industrial inspectors have more powers than their Commonwealth counterparts[40] , including the ability to require truthful answers to

[39] Dollar amount reduced from $1.66 for ease of illustration

[40] see ss.708-713 FW Act

questions[41]. There is no privilege against self-incrimination nor any obligation to caution a witness. As we used to jokingly say when I did the job: we have more powers than police officers, except we are not allowed to shoot people.

I personally have been able to successfully prosecute cases in the industrial magistrate's court and to prepare cases in the Federal Circuit Court without having any of the powers of an industrial inspector. If I can do it[42], they don't need any additional powers. However, the penalties for obstruction are very inadequate and need to be increased significantly and incorporate accessorial liability.

Proposal 11

The powers of industrial inspectors not be changed but the penalties for obstruction be increased and provision be made for persons to be accessorily liable.

PUBLIC SECTOR EMPLOYEES AND THE RIGHT OF ACCESS GENERALLY

Public sector employees have very limited rights of access to the WAIRC unless they have been dismissed, are a member of a union which does have a right of access and can take up the cudgels on the employee's behalf, or they are appearing in a public matter such as a State wage case simply as a member of the public. Nor for that matter do private sector employees.

Most private sector employees are not union members. Nor are most public sector workers. The requirement for it to be a union or employer that brings a section 44 dispute to the Commission limits the rights most employees have in relation to disputes with the employer and the remedies that can be obtained.

Moreover, the formal disciplinary processes used by public sector employers - often through employing former police officers in their investigatory arms – tend to have a "guilty till you prove your innocence" focus: the investigators are not seeking the truth of the matter in issue but evidence that will "convict". The investigatory reports that are compiled are frequently biased and often of poor evidentiary quality. But the employers frequently rely upon them and recommendations to dismiss and they are difficult and expensive to challenge on appeal.

Proposal 12

Public and private sector workers should have an ability to bring a dispute in their own right to the Commission for resolution.

Proposal 13

[41] s.102(1)(b) IR Act

[42] See *Trigg & Ors –v- Group Training South West & Anor* [2017] WAIRC 00017

Where a public-sector employee is "charged" with a serious disciplinary matter that may result in termination of the employee's employment, the employer should be required to satisfy the Commission that the "offence" occurred by the proper presentation of evidence and the Commission should determine what should be the appropriate penalty.

I thank you for the opportunity to make this submission and will be happy to answer any queries you may have.

Yours sincerely

GRAHAM McCORRY

Date: 21 November 2017