



Our Ref: 82246

Mr Mark Ritter SC
Ministerial Review of the State Industrial Relations System
Level 4 Gordon Stephenson House
140 William Street
PERTH WA 6000

Dear Mr Ritter

MINISTERIAL REVIEW OF STATE INDUSTRIAL RELATIONS SYSTEM – RELEASE OF INTERIM REPORT

I refer to your 20 March 2018 letter, inviting a further written submission from the Public Sector Commissioner (PSC) in relation to the Review's Interim Report, insofar as it deals with Term of Reference 2.

The opportunity is appreciated to provide additional comments (to those contained in the PSC's earlier submission) on the areas identified. Turning to each in turn, the PSC offers the following views on the relevant matters:

[Proposed recommendations 23 to 26]

24...the 2018 IR Act include a single system for public sector employers and employees to refer industrial matters to the WAIRC so that all employees who are currently subject to the jurisdiction of the PSA and the PSAB will now be subject to the ordinary jurisdiction of the WAIRC...

25. Subject to the request for additional submissions below, there be consequential amendments to the *Public Sector Management Act 1994 (WA)* (PSM Act) and the *Health Services Act 2016 (WA)* (HS Act) to allow government officers to refer industrial matters to the ordinary jurisdiction of the WAIRC.

26. In exercising the jurisdiction referred to in [24] above, the WAIRC have the jurisdiction and powers to make the same orders as it may make in exercising its jurisdiction in relation to the private sector.

The PSC anticipates no problems with adoption of this recommendation.

Indeed this approach is consistent with the most recent changes to the PSM Act made through the *Workforce Reform Act 2014*, dealing with the jurisdiction of the Industrial Commission (as opposed to any constituent authority) in relation to redeployment and redundancy, both voluntary and involuntary.

[Paragraphs 27 to 34]

28. The extent to which a breach of a public sector standard by an agency under the PSM Act may be referred, challenged or appealed by a public sector employee or an organisation on their behalf, to the WAIRC, and the remedies that may be awarded by the WAIRC.

It is understood from paragraphs 604 and 605 of the Interim Report that the Review's favoured option at this stage may be to provide for single access to the WAIRC alone (in lieu of breach of standard access to the PSC).

Apart from requiring repeal of Part 7 of the PSM Act, it is considered adoption of this course would have significant ramifications for the overall functions and responsibilities of the PSC.

In that regard, a major role of the PSC is to monitor and report on compliance with standards generally. If assessment of non-compliance were taken away from adjudication by the PSC (and placed with the WAIRC) it is difficult to see how the PSC could effectively and independently perform this task.

It is acknowledged that disciplinary matters, which are subject to a standard, are now only reviewable by the WAIRC; however, they represent but a small element of overall HRM decision-making. To excise all other areas from the oversight of the PSC would represent a fundamental change to an integrated and holistic approach to oversight which has been in place for almost 25 years.

It is worth noting that aspects of the overall system for standards administration include the facts that –

- the breach claim regulations provide for non-employees to lodge breach claims against the Employment Standard. This provides for the PSC to consider claims against this Standard by members of the community applying for positions;
- the current process provides for agencies to address any issues in the first instance as part of correcting practices and addressing the concerns of their employees; and
- as part of the PSC's compliance assistance role under PSM Act section 21(1)(d), while not all breach claims may result in a breach determination, the PSC is able to make recommendations as part of improving practices.

The mooted changes to jurisdiction may therefore well need to be considered and progressed within the broader context of an overall review of the PSM Act and the role it establishes for the PSC. That role derives directly and fundamentally from the *1992 Report of the Royal Commission into Commercial Activities of Government and Other Matters Part II* – refer specifically to paragraphs 6.2.1 to 6.2.8. Relevantly and in particular, those paragraphs stipulated, amongst other things:

"...We believe that only an appropriately resourced and empowered independent agency can be relied upon to maintain proper standards...

...the Commissioner should...

...(b) be responsible for ensuring compliance with the basic principles and, to that end, be empowered to establish standards for public sector agencies by regulation or administrative instruction and to audit agencies to ensure that these principles and standards are being adhered to; and

(c) report to Parliament on all matters falling within his or her jurisdiction...

...the Commissioner would have a particular responsibility for..

...(b) reviewing and reporting on general management practices; and

(c) ensuring compliance with standards in recruitment, promotion, discipline and the like, and for monitoring the related legislative and administrative arrangements...

...the office should be constituted as an independent parliamentary agency. The Commissioner must be required both to report to the Parliament and to be accountable to such committee of the Parliament as is concerned with the organisation and operations of the public sector..."

Removal of the standards breach relief procedures from the PSC's current role would appear to represent a significant diminution of current oversight responsibilities.

31. Whether proposed recommendation [25] should include the repeal of s 96A(1) of the PSM Act, and the amendment of s 96A(2) and s 96A(5)(b) of the PSM Act insofar as they restrict the rights of public sector employees to refer to the WAIRC a decision to terminate their employment under the *Public Sector Management (Redeployment and Redundancy) Regulations 2014 (WA)*.

The approach to management of redeployment and redundancy of public sector employees is clearly a matter for policy determination by the Government of the day.

The current arrangement reflects the previous Government's policy objective which was to deal with and resolve such matters within clearly set and limited timeframes. Therefore PSM Act Part 6 and the supporting *Public Sector Management (Redeployment and Redundancy) Regulations 2014* essentially provide for:

- Registered employees to be dealt with within a finite six month period. During this time decisions affecting their employment are subject to review by the Industrial Commission, provided a matter is raised within 21 days of any relevant decision being made.
- At the end of the six month period as a registered employee, employment ceases by virtue of Regulation 30 – that is, there is no specific action to be taken by the employer to give effect to termination.

At this point it is considered that any concerns a registered employee may have had about their treatment would have been addressed by the processes available under 1. above. The Industrial Commission would therefore, where required, just be left to focus on the extent to which entitlements on termination are met.

It was determined that providing any options at the point of termination to review or revisit issues leading up to that stage would leave open a clear avenue to draw out or extend unacceptably the finite six month timeframe.

It is a policy matter for the current Government as to whether it wishes to adjust flexibility for finalising matters in this area.

33. Whether the jurisdiction of the WAIRC should be expanded to allow the WAIRC to make General Orders for public sector discipline matters, with the consequent repeal of s 78 of the PSM Act.

This would be consistent with proposed abolition of constituent authorities. However, to the extent that s.78 relates to decisions made in the context of the redeployment and redundancy arrangements (s.78(3) and (4) refer) retention of the associated 'limiting' provision may need to be factored in.

34. Whether, given the discussion in Chapter 3 of the Interim Report, the recommendations proposed in response to Term of Reference 2 above, and any submissions provided in answer to the other questions in response to Term of Reference 2 above, the Review should recommend to the Minister that the PSM Act be reviewed.

If fundamental changes are to be made to the scope of the PSC's monitoring of compliance with standards through removal of the PSM Act Part 7 relief procedures, it is considered the overall integrated role of the PSC under the PSM Act would need to be revisited and adjusted.

Accordingly, it is considered that pursuing associated changes to the role of the PSC would need to have regard to the independent review of the PSC commenced on 9 April 2018 by the Department of the Premier and Cabinet. In that regard, it is to be noted that Ms Carmel McGregor PSM has been appointed to review the PSC's capability, functions, structure and performance and to recommend any changes – specifically including any changes that may be required to the PSM Act to support longer term public sector reform - necessary to ensure the PSC has the ability to meet the Government's reform objectives and future challenges.

I trust the above comments are of assistance to the Review. Please do not hesitate to contact Ms Melissa Travers, Assistant Director Legislation and Reviews, at Melissa.Travers@psc.wa.gov.au or on telephone no.6552 8584, if further clarification is sought on any of the above matters.

Yours sincerely



Lindsay Warner
ACTING PUBLIC SECTOR COMMISSIONER

30 April 2018