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3 January 2018

Attn: Secretariat
Ministerial Review of the State Industrial Relations System
Department of Mines, Industry Regulation and Safety
Level 4, Gordon Stephenson House
140 William Street
PERTH WA 6000

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

Dear Mr Ritter

MINISTERIAL REVIEW OF STATE INDUSTRIAL RELATIONS SYSTEM

I refer to your letter dated 19 October 2017 in relation to the above.

Thank you for the opportunity to make a written submission to the Ministerial Review into the State industrial relations system.

Given the desire of successive Governments to retain a separate State industrial system, it is my view that this system already provides relatively easy access and speedy resolution of industrial matters, at least in the area that I know, the State Public Sector.

However, I have the following the comments in relation to areas that I believe there is room for improvement.

Multiple Adjudicative Bodies

The Western Australian *Industrial Relations Act 1979* relevantly provides for a number of first instance adjudicative bodies in addition to the Commission. They are the Public Service Arbitrator, the Public Service Appeal Board and the Railways Classification Board. These constituent bodies are constituted by one or more Commissioners and in some cases are supplemented with additional nominees.

There is no obvious reason why one body should not be given jurisdiction under the Act to deal with all industrial matters within its scope, namely the Commission constituted by a Commissioner sitting alone at first instance. If there ever was justification for the separate referral of industrial matters concerning government officers to a constituent body it is not now evident. There is no reason to suppose that the Commissioners collectively lack the expertise or impartiality necessary to deal with all industrial matters, or that the Chief Commissioner is incapable of deploying Commissioners according to their individual strengths.

Appeal

The Full Bench serves a useful function in providing an avenue of appeal from all first instance decisions. While it is generally accepted an error in the exercise of first instance discretion is required to give rise to a right of appeal, this should be stated in the Act.

The Industrial Appeal Court is not constituted as a specialised appellate body. Therefore, it may be that its appellate function, under the Act, could be satisfactorily discharged by the Court of Appeal. If an appeal panel is thought to be unnecessary a final avenue of appeal to a single Supreme Court judge may be an option if an avenue of appeal to the Supreme Court is considered necessary.

Right of Referral

There are only limited rights under the Act for employees to personally refer industrial matters. These should be extended to cover all industrial matters that concern an outcome that is confined to an employee as opposed to those that have an "industry" wide application.

Under the Act a private sector employee may only refer a claim to the Commission in relation to an unfair dismissal or the denial of contractual benefit.[1]

A public sector employee who is a 'government officer' may "appeal" to the Public Service Appeal Board against:

- a decision to reduce their classification or terminate their employment for substandard performance;[2]
- a finding made on a special inquiry that the employee committed a breach of discipline other than a s 94 breach of discipline;[3]
- a decision to suspend the employee on partial pay or without pay;[4] or
- a decision to take disciplinary action against the employee.[5]

'Disciplinary action' is defined to include a reprimand, the imposition of a fine, transfer to another public sector body, transfer to another office, post or position within the same public sector body, reduction in remuneration, reduction in classification, and dismissal.[6]

A public sector employee other than a 'government officer' may refer a finding or decision of the kind referred to above (provided it is not a finding or decision made in the context of a s 94 breach of discipline) to the Commission to enquire into and deal with as an industrial matter.[7]

A public sector employee, whether a 'government officer' or not, may refer a finding that the employee has committed a s 94 breach of discipline, or a decision to suspend the employee with partial pay or without pay in the context of such a breach of discipline, to the Commission to enquire into and deal with as an industrial matter.[8]

An 'organisation' or 'association', inter alia, may refer a matter to the Commission for compulsory conciliation. There is provision for "any question, dispute or disagreement in relation to an industrial matter" outstanding at the conclusion of such a conference to be heard and determined by the Commission.[9] It is not clear that the disposal of a matter

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[1] Act, s 29(1)(b).

[2] *Public Sector Management Act 1994* ("PSMA"), s 78(1)(b)(i).

[3] PSMA, s 78(1)(b)(ii).

[4] PSMA, s 78(1)(b)(iii).

[5] PSMA, s 78(1)(b)(iv).

[6] PSMA, s 80A.

[7] PSMA, s 78(2).

[8] PSMA, s 78(2).

[9] Act, s 44(9).

which then proceeds to arbitration in this way is limited to the relief that can be awarded if an application is otherwise commenced under the Act: [2017] WAIRC 452. It should be. Also, where an application in relation to an industrial matter is required to be brought within a specified time, seeking a conciliation conference in relation to that type of matter should also be subject to the same time limitation.

Subject to what I have said earlier, I believe, there should be provision for referrals to be generally made by employees in their own right.

Referrals should be dealt with by the Commission constituted by a commissioner sitting alone at first instance. An appeal should continue to lie to the Full Bench, and from the Full Bench to an appeal court, however constituted (but on limited grounds, as is presently the case).

Remedies

The Act provides for potentially different forms of relief from dismissal for public sector and private sector employees. In practice it means compensation in lieu of reinstatement is unavailable in the case of public sector employees who are found to have been unfairly dismissed. This makes it difficult to justify settlement of claims on a financial basis as there is no financial exposure in an adverse outcome for an employing authority, other than back pay if reinstatement is ordered. In my opinion there is no reason why the available relief in either case should be different.

Role of decision-maker

The Act should explicitly set out:

- the role of the adjudicating body in reviewing a decision; and
- the role of the Full Bench in reviewing the decision of the Commission.

Under the Act the role of the Commission and Public Service Appeal Board in relation to disciplinary matters, in particular unfair dismissal claims, is confused. On the current state of the case law, the Public Service Appeal Board conducts a *de novo* review of the decision appealed against.[10] The Commission, in enquiring into and dealing with an 'industrial matter', conducts a review of the reasonableness of the decision in an unfair dismissal case,[11] save perhaps in a case of summary dismissal,[12] but has a *de novo* jurisdiction where a referral is made under the *Public Sector Management Act 1994*[13] and may well have a *de novo* jurisdiction where something short of dismissal is complained of.[14] This is productive of great uncertainty and unnecessary cost in the conduct of proceedings before the

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[10] ***Harvey v Commissioner for Corrections, Department of Corrective Services*** [2017] WAIRC 728, [15]-[38].

[11] ***Bi-Lo Pty Ltd v Hooper*** (1992) 53 IR 224, effectively approved by the Industrial Appeal Court in ***Transport Workers' Union of Australia, Industrial Union of Workers, WA Branch v Tip Top Bakeries*** (1994) 58 IR 22.

[12] Where an employee is summarily dismissed the question whether the conduct complained of in fact occurred is relevant to the lawfulness of the employer's decision to dismiss the employee, but it does not necessarily follow that the dismissal was unfair. See ***The Queen v The Industrial Court of South Australia; Ex parte General Motors-Holdens Pty Ltd*** [1975] 10 SASR 582, cited with approval in ***Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers*** (1988) 68 WAIG 677.

[13] ***Johnston v Acting Director General, Department of Education*** [2002] WAIRC 6155.

[14] ***Meikle v Director General, Department of Education*** [2017] WAIRC 876, [7], [33].

Commission and the Public Service Appeal Board, which almost inevitably proceed as hearings *de novo*.

In my view, the role of the adjudicating body, in relation to disciplinary decisions, at first instance should be to review the reasonableness of the employing authority's decision at the time when that decision was made and upon the information then relied upon to make that decision.

Except perhaps in a case of summary dismissal,[15] there is no reason in principle why the Commission should be required to conduct a *de novo* review of an employer's decision in every case. There is no reason for distinguishing employment in the public sector in this regard.

Conciliation

The current default position, under s 44(10) and (11) of the Act, is that the Commissioner conciliating a matter, where it is not resolved by that conciliation, also arbitrates it. This is not appropriate or consistent with the practice in other forums. The default position should be for a different Commissioner to hear and determine the matter unless the parties consent to the conciliating Commissioner hearing the arbitration.

The present approach has a tendency to undermine the conciliation process, in that it can discourage parties from being candid and invite unnecessary dispute about bias in the subsequent arbitration.

The provisions concerning the Public Service Appeal Board do not allow for the calling of conciliation conferences. If the Public Service Appeal Board is retained this should be remedied.

Enforcement

The Act contains only limited means to enforce orders made and none to secure compliance with witness summonses issued under the Act. A more convenient and extensive general power to enforce and secure compliance is needed in the Act.

Local Government employers and employees

The authorities concerning the status of Local Governments lean towards the view that they are generally not constitutional entities capable of being covered by the *Fair Work Act* 2009 *(Cwth)*. If that is correct, nothing needs to be done to have them covered by the *Industrial Relations Act 1979*. If it is incorrect, State legislation can achieve nothing, as the *Fair Work Act 2009* will apply to the exclusion of such State Legislation. Apart from these issues it is desirable that persons employed in the administration of the State, including those employed in Local Government, be covered by the same industrial system.

Definition of employee

I can see no benefit in extending the definition of employee for the purposes of the *Industrial Relations Act 1979* to include relationships which are not employment as that relationship is understood by the law. The task of determining whether an employment relationship has arisen in any particular situation proceeds by the application of familiar tests. The content of that relationship and its incidents are settled by the Common Law and are not peculiar to industrial matters.

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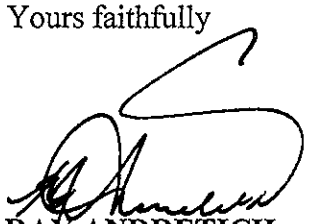
[15] Where the lawfulness of the employer's conduct may be relevant to the fairness of the dismissal. See footnote 12 above.

Yours faithfully



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