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Mr Mark Ritter SC
Francis Burt Chambers
L 23, 77 St Georges Terrace
PERTH WA 6000

By email

Dear Mr Ritter SC

Ministerial review of State Industrial Relations System

Thank you for inviting Slater & Gordon to make submissions on the ministerial review of the State Industrial Relations System.

When regard is had to the Terms of Reference, it is our view that there are a number of areas of the state industrial relations system that require review.

Rather than set out comprehensive submissions for each of those areas, we offer a brief outline of areas that require review at the Schedule to this letter. After considering the Schedule, should you require a more comprehensive submission on any of those areas, please contact us and we will be able to prepare a comprehensive submission to that effect.

Further, there are a number of areas of the current State Industrial Relations System that work well and in our respectful opinion they do not require amendment to their operation. These matters likely fall outside the Terms of reference but please contact us if you require a comprehensive submission on these areas, which are as follows:

1. The section 44 provision under the *Industrial Relations Act 1979* (WA) (**IR Act**). This provision works well as it enables the commission to enquire into and deal with any industrial matter. To narrow the operation of this provision would be incongruous to the Term of Reference 2.

2. The right of entry provision under part 2, Division 2G of the IR Act should not be disturbed.

3. The regulation of organisations under Part 2 Divisions 4 and 5 of the IR Act is working well and does not require amendments.

Finally, we have no objections to this brief submission being published on the internet.

Yours faithfully

Daniel Stojanoski
Associate
SLATER AND GORDON

Schedule

Areas of the State Industrial Relations System that require review		
Area	**Term of Reference**	**Brief detail**
Anti-bullying	2, 4 and 7(b)	• There is a lack of any proper recourse in the state system for a worker that is being bullied in the workplace. Please note that we have prepared comprehensive submissions on this area, which have been submitted as part of this review.
Lack of general protections in the state system	2 and 7(b)	• There is no proper recourse for an employee in the state system to be protected from adverse action. The Federal system has general protections that work relatively well and could be mirrored to a large extent, noting our view they are unnecessarily complex and difficult for a person that is not legally trained to traverse. • A new jurisdiction should be created in the Western Australian Industrial Relations Commission (**WAIRC**) to deal with these workplace rights. • On a comparative assessment, Queensland's industrial relations laws were comprehensively reviewed in 2015 whereby the *Industrial Relations Act 2016* (Qld) (**QLD IR Act**) was passed by the Queensland Parliament late last year (2016) and came into effect on 1 March 2017.[1] One of the significant changes brought about by the new QLD IR Act is the introduction of new powers granted to the Queensland Industrial Relations Commission (**QIRC**) to deal with adverse action claims brought by QLD state system employees including those from the state public sector.[2] The new QLD IR Act gives power to the QIRC to make orders with the purpose of preventing workplace bullying.[3] The adverse action provision largely mirrors that contained in the *Fair Work Act 2009* (Cth) including being a civil remedy provision.
Judicial oversight of Public Sector Commissioner instruments	2 and 7(b)	• Section 23(2a) of the *Industrial Relations Act 1979* IR Act together with section 97(1)(a) of the *Public Sector Management Act* 1994 (WA) (**PSM Act**) make it clear that the Commission does not have jurisdiction to enquire into or deal with employees attempting to obtain relief in respect of the breaching of public sector standards. • Jurisdiction in respect of the breaching of public sector standards should be vested with the Commission to bring transparency and independence to enforcing those standards.
Abolish Public Service Appeal Board	1 and 2	• The Public Sector Appeal Board should be abolished and the Commission in its general jurisdiction or the Public Service Arbitrator could absorb its jurisdiction. This would have the effect of achieving a more streamlined and efficient structure of the WAIRC. There is often confusion with employees that are not legally trained as to what WAIRC jurisdiction they file their claim in. • There exist a number of problems with the operation of the jurisdiction of the Public Service Appeal Board, and in our view a major one of those is that there is no power for the Public Service Appeal Board to convene conferences to conciliate a matter prior to it been heard. For a conciliation to be held, it would have to be at the initiative of the

[1] See, for example, the report of the Queensland Industrial Relations Legislative Reform Reference Group "A review of the industrial relations framework in Queensland" December 2015 available at https://s3.treasury.qld.gov.au/files/review-of-qld-industrial-relations-framework.pdf
[2] See Chapter 8, Part 1, Division 3 of the *Industrial Relations Act 2016* (Qld).
[3] Section 309 *Industrial Relations Act 2016* (Qld).

		parties via separate legislation (*Employment Dispute Resolution Act 2008* (WA)), but even then, if one party does not agree to conciliate under that legislation, a conciliation cannot be held and a matter must proceed to hearing. • The powers of the Public Service Appeal Board as to remedy are limited and may be confined to a remedy or penalty that was otherwise available to the employer under the PSM Act. This is because under section 80I(1) of the IR Act the Public Service Appeal Board only has jurisdiction to "adjust" the decision made by the employer. There is no scope to award compensation.[4]
Access to compulsory conferences for health services employees	2	• Part 11, Division 4 of the *Health Services Act 2016* (WA) deals with appeals and referrals of substandard performance and disciplinary matters with respect to health services employees. This division[5] precludes health services workers, who are public sector employees from accessing the WAIRC under its general jurisdiction, for example applications brought to the WAIRC under section 44 of the IR Act are precluded. • Removing this restriction allows better access to the WAIRC for public sector employees.[6]
Varying industrial agreements	2	• Section 43 of the IR Act does not allow the Commission in proceedings to vary an industrial agreement without the consent of the parties.[7] • An exception should be introduced whereby the Commission may vary an industrial agreement in circumstances where intervention is necessary to preserve the health and safety of employees concerned.
Definition of "employee"	4	• The definition of "employee" in the IR Act should be broadened to capture emerging forms of engaging workers akin to the extended definition in section 5 of the *Workers' Compensation and Injury Management Act 1981* (WA).
Update penalties	7	• Increase penalties applicable to breaches under Part 3 section 83E of the IR Act.
Simplification of enforcement	7	• Simplify enforcement by removing distinction between the Industrial Magistrates' Court's general jurisdiction and prosecution jurisdiction in section 81CA of the IR Act, permitting all breaches of the IR Act, an order or an industrial instrument to be brought by an employee affected or an organisation of employees.
Retrospective pay orders	2	• Clarify power of the WAIRC to make an order for retrospective pay increases under section 42I of the IR Act (uncertainty created by inconsistent single Commissioner decisions).[8]

[4] See, for example, *Maria Elizabeth Re v The Inspector of Custodial Services* (2013) 93 WAIG 1776 at 1779 citing the Industrial Appeal Court decision in *State Government Insurance Commission v Johnson* (1977) 77 WAIG 2169. In the *Johnson* decision, Mr Johnson sought a declaration that he had been unfairly dismissed and sought monetary compensation, however when consideration was given to the term "adjust" it was determined that the Public Service Appeal Board did not have jurisdiction to make such an order as there is no ability or scope available to the Public Service Appeal Board to "adjust" the dismissal and award compensation.

[5] Consider also section 80I(1)(c) of the IR Act.

[6] Consider also, comments made in this brief submission with respect to the abolition of the Public Servicer Appeal Board.

[7] Other than under its powers under section 44(6a) in relation to a compulsory conference under section 44 IR Act.

[8] Kenner C (as he was then) in *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority* (2011) 91 WAIG 694 when issuing an enterprise order pursuant to section 42I of the IR Act determined at 728 that in his opinion there is no power under the IR Act for the retrospective operation of an enterprise order and disagreed with the approach of Smith SC (as she was then) in *Public Transport Authority v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch* (2004) 84 WAIG 2406 at 2455.