

15 December 2017

Ms Loraine Field
Secretariat
Ministerial Review of the State Industrial Relations System

Email: irreviewsecretariat@dmirs.wa.gov.au

Dear Ms Field

MINISTERIAL REVIEW OF THE STATE INDUSTRIAL RELATIONS SYSTEM

I refer to the letter from the Hon Bill Johnston MLA dated 3 October 2017 and the letter from Mark Ritter SC dated 18 October 2017 inviting the Law Society of Western Australia to make a submission to the Ministerial review of the State industrial relations system.

The Law Society makes the following submissions.

1. Amendment to *Long Service Leave Act 1958 (WA)* in line with other States in respect to the recognition of continuity of service between associated entities

Transmission of business under the WA industrial relations system to possibly align with the Federal system

The *Fair Work Act 2009 (Cth)* (FW Act) transfer of business provisions are an improvement on the provisions in the State system insofar as they deal with leave, redundancy pay, etc. It would be desirable to have the *Long Service Leave Act 1958 (WA)* (LSL Act) align with this and to make similar provisions in the State system.

There is a current disconnect between FW Act and LSL Act such as, for example, the definition of “continuous service” which can often raise challenges in determining certain entitlements under both pieces of legislation.

2. Costs applications in WAIRC and IMC matters

There is a need for the Western Australian Industrial Relations Commission (WAIRC) and Industrial Magistrates Court of Western Australia (IMC) to award costs in certain circumstances, possibly in line with section 570 of the FW Act.

Some alternatives include:

- Leave as a no costs jurisdiction;
- Costs by special order (as in FW Act); or
- Costs by special order (as in FW Act) only from conciliation conference.

The Law Society's view is that a party should not be at risk for costs until the conciliation conference fails, and then only if the party, for example, acts unreasonably from that point in the pursuit or conduct of the proceedings.

3. Industrial agents code of conduct

There is a code of conduct for industrial agents (IAs) who are non-certificated lawyers, but it is rarely enforced. There needs to be higher standards of conduct required and enforcement, such as the review of an IA's conduct by a Registrar each year on application to renew the IA's registration.

As you would be aware, unlike legal practitioners, IAs have no annual practising certificate costs and no CPD requirements to fulfil. They may also have much lower professional indemnity insurance. These are real issues.

4. Issue of leave to appear for lawyers and paid agents

There is an anomaly in the proposition that participants should be self-represented to avoid lawyers or agents overcomplicating the proceedings when lawyers and agents may appear as of right if they are employed by an employer organisation or union. In the Society's view, this is unsatisfactory.

The Law Society would support a modification to the legislation to permit representation as of right. That might be made subject to a power exercisable by the WAIRC and IMC to exclude a representative who is obstructive.

If, contrary to this submission, the requirement for leave or permission to appear is to be retained, there should be a provision to allow that to be determined upfront.

5. Possible broadening of denied contractual benefits jurisdiction

The contractual benefits jurisdiction is a useful jurisdiction for both national system and other employees to recoup amounts owed under a contract – this jurisdiction provides simple, low cost and quick resolutions. It is, however, stymied by the salary cap. The Law Society suggests that the jurisdiction should be open for all employees, but the monetary limit should be as in other courts – for example, the WAIRC could determine any claim but only award up to \$750,000 on any claim.

6. Court / tribunal filing and procedures

Interlocutory processes and increase in Court/tribunal powers to deal with such processes (informal conferences, matters dealt with “on the papers”, etc)

The WAIRC and IMC need greater flexibility in dealing with matters as part of conciliation or pre-trial conferences.

This includes giving the Registrar or Clerk of Court the ability to strike-out claims which do not meet jurisdictional requirements or are simply hopeless “on the papers”.

The WAIRC and IMC forms, processes and procedures also need updating. For example, there is no requirement to provide an affidavit of service, no ability to file documents by email, no ability for orders to be granted by email on application by email and no costs associated with filing a response or defence.

7. Public service jurisdiction for matters

This is a highly complex area where there is often disagreement as to the meaning of sections. The definitions are complex, although this may be a function of the *Public Sector Management Act 1994 (WA)* which is beyond the scope of this review. There is a

need to streamline into a single public service function within the WAIRC without numerous boards for different public sector employees.

8. Local Government

Problems arising from the classification of local governments as trading corporations need to be resolved. When making the local government Modern Award Review Process, then President Giudice commented that it would likely only apply to a handful of local governments in the Federal system. Since then, many local governments have adopted what one commentator described as “self-identifying as a trading corporation”.

The result has seen local governments challenging jurisdiction in State and Federal commissions – even denying being a trading corporation when employees are engaged under a FW Act enterprise agreement.

The problem extends to other incorporated bodies such a non-profit organisations and charities.

If you wish to discuss the above further, please do not hesitate to contact me.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Alain Musikanth', with a flourish at the end and two dots below the signature.

Alain Musikanth
President