SDA submission:
Ministerial Review of the State industrial relations system

Reference Term 1:
Review the structure of the WAIRC with the objective of achieving a more streamlined and efficient structure

1. While efficiency is a laudable objective, the outcomes need to be weighed against the value. For example if the President were to be replaced by a Supreme Court judge, the salary savings may be at the expense of employers and employees having high level cases decided without the experience of a practitioner with an understanding of the intricacies of labour law, which is a unique and complex jurisdiction.

2. There are some minor procedural matters that could be dealt with fairly simply and would make an improvement to user experience, such as a review of Regulations pertaining to the administrative operation of the WAIRC, and a general refresh of the WAIRC website to ensure links are not broken, and that documents are user friendly and organised in a logical and accessible manner.

3. For example, with reference mainly to the unfair dismissal arena:

   Current forms are antiquated, repetitive and difficult to fill in:

   i. Form 2 includes a cover sheet to be filled in, then the same details to be filled again in the document itself (with strange line inserts and text formatting) and again in the research information section – this could be resolved with an update to the form.
   ii. Form 2 asks for the Applicant to sign the document when it is also possible for the form to be lodged on the Applicant's behalf – this could be noted on the document.
   iii. The form is then stamped as received by the WAIRC and the Applicant must serve it on the Respondent with all the appropriate forms and advice included, and then a Form 4 Stat Dec to the WAIRC to say that this has been done – this could be reviewed so that the WAIRC enacts the notification to the employer, similar to the FWC process.
   iv. Some of the documents included for the Respondent in this step do not appear to be available on the website, but would be useful public knowledge, particularly the guidance to relevant cases.
   v. Form 2 notes that the application must be lodged within 28 days, but does not note that this must be within office hours on the 28th day. This should be included on the form, or a note to draw attention to the appropriate Regulations, and office hours should be included on the form itself.
   vi. Regulations should be amended so that receipt of email applications should be accepted up to midnight on the final day, per the federal jurisdiction and in line with community expectations (which would obviate the previous point).

Web site issues:

i. Web searches operate with the Boolean search functionality, but most users are not aware of the parameters of the search tools so would not be able to enact complex searches using "and" "or" or "jokers".
ii. There is a log-on step to enable submission of a web form, but the web form does not save so has to be completed within a single session.
iii. The web page notes that forms can be lodged in office hours which is logical for hard documents, but it does not notify that forms lodged online outside of these hours on the final day of lodgement will be considered as received "out of time".
iv. The general search and the search of orders does not find the "Termination, Change and Redundancy General Order" listed in the terms of reference for this review – but it can be found by scrolling through the 'General Orders' icon on the home page.

4. The WAIRC staff will doubtless have many other examples of issues that could be dealt with through some simple changes to the Regulations and the web site.

Reference Term 3:

Consider the inclusion of an equal remuneration provision in the Industrial Relations Act 1979 with the objective of facilitating the conduct of equal remuneration cases and other initiatives in the Western Australian Industrial Relations Commission.

5. The SDA has coverage of the retail, pharmacy, hairdressing and beauty sectors, which are female dominated. The work in these areas has historically been gender segregated with service seen as an inherent female trait which is undervalued and not financially rewarded.

6. The SDA supports an Equal Remuneration provision which should have capacity to flow on to the setting of the minimum wage and award updates in the State Wage Case.

7. The Queensland jurisdiction has capacity to make equal remuneration orders for work of equal or comparable value. The SDA supports adoption of such provisions in the WA system such that a case could be run without need to provide a comparator industry, and with capacity to look at historical undervaluation of work.

8. The WAIRC has indicated during the proceedings of State Wage Cases that it is of the view that the current provisions and principles allow for an equal remuneration case to be brought. However such a case would of course be resource intensive, so it would be prudent to insert an equal remuneration provision to remove any ambiguity and allow for a union to be confident that a case could be heard, before potentially wasting resources in a jurisdictional or technical objection.

9. Unequal remuneration is not the only issue causing differentials of pay and conditions between men and women, and the SDA has made submissions to the federal Finance and Public Administrations References Committee *Inquiry into*

gender segregation in the workplace and its impact on women's economic equality. We would be pleased to provide copies of those submissions if that is useful to the Secretariat.

Reference Term 4:

Review the definition of "employee" in the Industrial Relations Act 1979 and the Minimum Conditions of Employment Act 1993 with the objective of ensuring comprehensive coverage for all employees.

10. The SDA believes that all workers should be afforded at least basic protections and minimum wages, no matter how the working relationship is characterised. We are alarmed at evidence that players in the so-called 'gig' economy are seeking to undermine traditional employment relationships and portraying them as contract work.

11. To this end the SDA supports a redefinition of those who would otherwise be covered by minimum conditions, such as adopting the definition of 'worker' as used in the Worker's Compensation Act.

12. This should provide some protection to both domestic workers and those in the 'gig' economy where work performed indicates any kind of on-going employment relationship. This has been intimated by a recent decision in the UK finding that Uber drivers should be entitled to basic employment rights.

13. Legislation should be updated so that unions and inspectors have right of entry to such places where work is carried out or records are kept.

14. It would be an unfortunate consequence of maintaining the integrity of the State system if loopholes in the definition of 'employee' were to provide opportunity for businesses seeking to operate outside of the industrial relations legislative framework. Rather WA could be at the forefront of such issues and be an example to the rest of the country.

Reference Term 5:

Review the minimum conditions of employment in the Minimum Conditions of Employment Act 1993, the Long Service Leave Act 1958 and the Termination, Change and Redundancy General Order of the Western Australian Industrial Relations Commission to consider whether: (a) the minimum conditions should be updated;

15. The SDA would like the following issues to be dealt with:

    i. The right to paid domestic violence leave should be included as a minimum condition of employment
    ii. Employers should be required to issue payslips with basic information such as employment status, pay rate, number of ordinary hours and any penalties or

loadings included. It is very difficult for employees to know if they are being paid correctly without this information.

iii. Employers should be required to keep a record of employee start and finish times. If such records are not kept it can be difficult or impossible to calculate overtime payments that may not have been appropriately paid at the time.

iv. Employee representatives should be able to access any and all records relating to an employee's work, not just those defined as compulsory employment records – this is particularly important in understanding any disciplinary processes that may have occurred prior to a termination.

v. All employees should be entitled to redundancy payments – the fact that an employee works for an employer who has less than 15 employees does not diminish that employee's ongoing expenses in the case of redundancy. If the Government wishes to protect small business from the obligation of paying redundancies the Government should provide funding for such employees in the case of redundancy.

vi. Employees should have a right to request flexible work arrangements similar to the federal jurisdiction with the right to appeal any denied request.

vii. Employee right to request 52 weeks extra parental leave if declined should only be permissible on reasonable business grounds; for the grounds to be provided in a written response within a defined timeframe; and to be appealable.

viii. Portable long service leave should be considered for some employees, similar to that provided by the Construction Industry Portable Paid Long Service Leave Act. This may become a more pressing issue particularly with the expansion of the so-called 'gig' economy in particular industries and occupations.

(b) there should be a process for statutory minimum conditions to be periodically updated by the Western Australian Industrial Relations Commission, without the need for legislative change.

16. The SDA would be comfortable with the WAIRC having capacity to update conditions on application of one of the parties with standing, with the capacity for all parties to make submissions.

Reference Term 6:

Devise a process for the updating of State awards for private sector employers and employees, with the objectives of: (a) ensuring the scope of awards provide comprehensive coverage to employees;

17. Were Awards to be reviewed, the SDA submits that a set of principles should first be devised to guide the process, and parties should be able to contribute to the formulation of such principles.

18. The most efficient change to Awards would be to review and redraft scope clauses so that it is clear who is covered based on the nature of the work. Some workers who may reasonably expect to be covered by an award may currently fall out of scope, such as workers in small mobile phone accessory and repair shops which

were of course not contemplated at the time the Shop and Warehouse (Wholesale and Retail Establishments) Award was enacted.

19. Similarly beauty shops and eyebrow threading stalls do not currently have likely award coverage. If scope clauses were written to include types of work, the Commission should under its current powers be able to update clauses to tweak scope as technological or social changes create new kinds of work. Such changes should be with invitation to the parties bound to make submissions or comments.

(b) ensuring awards reflect contemporary workplaces and industry, without reducing existing employee entitlements;

20. The SDA believes the current awards provide fair and reasonably comprehensive entitlements, albeit that some of them may be difficult for a layperson to read and understand.

21. That being said there are some matters that could be addressed, even if a comprehensive review is not undertaken such as updating maternity and paternity provisions to reflect the parental leave provisions of the Minimum Conditions of Employment Act (eg, removing gendered language and adding the capacity to apply for a further 52 weeks leave.) Such updates should already be possible under the powers of the WAIRC to vary awards if they are less favourable or need updating.

(c) ensuring awards are written in plain English and are user friendly for both employers and employees;

22. The bread and butter of awards, the pay and basic conditions, are well summarised in easily accessible documents produced by Wageline. The more complex matters, which are not necessarily easily understood by a layperson are also areas that are likely to require industrial support of a union or an employer advocate. Such areas intersect with other legislation and/ or rely on interpretations of case-law, in addition to the potential advantage of a specialist to interpret the meaning of language.

23. That is to say, words have meaning and simplifying words is likely to alter meaning. Attempting to simplify language is not a simple affair, and is very resource intensive for all parties, with unclear practical benefit. This has been the experience of unions involved in the ‘plain language’ process for the modern Pharmacy Industry Award.

24. Attached is a submission from the SDA and other unions after several rounds of submissions and discussions, which demonstrates the complexity of any single clause within an award. There are many pertinent issues raised in this document, but for example paragraph 68 contests the proposed changes to overtime wording, which may have a very significant impact on overtime entitlements for casuals and part time workers.

25. Given that this award was only struck in 2010, it is easy to see how a review of State awards would be even more complex, and with a smaller pool of employees covered it would be difficult for unions to justify the expense of allocating staff to this matter to the potential detriment of resourcing more pressing areas.

26. If awards are to be reviewed for plain English and user-friendliness this would require allocation of Government funds for unions to allocate extra staff.

27. There would also need to be an appeal process if clauses are put into an award and later discovered to have unintended consequences.

(d) ensuring that any award updating process is driven by the Western Australian Industrial Relations Commission, with appropriate input from the award parties and other relevant stakeholders.

28. The SDA believes that award updating should be driven by application of the parties bound by each award. The SDA does not think that the State should follow the federal example of opening up awards to any affected party as this has the effect of adding complexity and prolonging negotiations without improving outcomes for employees.

Reference Term 7:

Review statutory compliance and enforcement mechanisms with the objectives of: (a) ensuring that employees are paid their correct entitlements; (b) providing effective deterrents to non-compliance with all State industrial laws and instruments; and (c) updating industrial inspectors' powers and tools of enforcement to ensure they are able to effectively perform their statutory functions.

29. The SDA does not believe that the current fines are high enough to act as a deterrent to deliberate acts of employer failure to keep records. Given the likelihood of being discovered is low and the penalty is low, businesses are almost encouraged not to keep records and to effectively shift the burden to employees to make a case for a claim of underpayment.

30. The SDA supports an increase in fines, to at least the maximums provided in the federal jurisdiction, with the Industrial Magistrates Court able to take account of corporation versus sole trader capacity to pay. Such fines should be indexed, or regularly reviewed such as the penalty units in the federal system.

31. Industrial Inspectors should be empowered to issue infringement notices, rather than having to go through a prosecution process for inappropriate record keeping. Unions should be able to make applications to the Inspectorate on behalf of members if breaches are reasonably suspected.

32. In cases where records have not been kept as required, there should be a reverse onus of proof on claims for underpayments; that is to say that a lack of records from employers should prejudice their defence, and the starting position should therefore

be the most favourable position for the employee for the whole period of dispute. For example, if there are not records available to show the average hours for a part time employee for a Long Service Leave claim then a calculation should be based on the employee working full time hours unless the employer can provide credible evidence to the contrary.

33. The Long Service Leave Act should be amended to reflect this change, rather than the current loop-hole which states that the average weekly number of hours be "calculated by reference to such hours as are ascertainable if the hours actually worked over that period are not known".

34. The LSL Act should also stipulate that records must be transferred with a transmission of business and that failure to do so may attract penalties to both the seller and the buyer. There is also gendered language in this Act that should be updated.

35. As discussed at term 5, the SDA supports a requirement that employers issue pay slips, which would make it more difficult for employers to argue that records have never existed. The employer should be required to keep copies of pay slips as well as other records.