United Voice Submission

Industrial Relations Review
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Who we are

United Voice welcomes the opportunity to make a submission on behalf of our members to the review of Western Australia's industrial relations system.

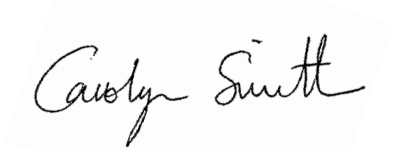
United Voice is a union of workers organising to win better jobs, stronger communities, a fairer society and a sustainable future. In Western Australia, there are over 18,000 United Voice members working in a diverse range of industries including government and private health, disability support, aged care, emergency services, government education, early childhood education and care, cleaning, hospitality, security, and manufacturing.

At least half of all United Voice members in Western Australia are employed directly in the public service and many more are employed in the private sector within the state industrial relations jurisdiction. With members in both the state and federal industrial relations systems, we are uniquely positioned to provide insight and comment on our experience.

United Voice members welcome the opportunity to be involved in this review to ensure a fair and accessible industrial relations framework for Western Australia. Our members have fought hard for many years to protect and bolster working conditions, workplace rights and entitlements for all Western Australians.

United Voice has sought to comment on a number of the terms of reference and we urge the review panel to support our recommendations.

For more information on this submission, please contact Carolyn Smith via Carolyn.smith@unitedvoice.org.au or (08) 9388 5400.



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United Voice WA, Secretary

Table of Contents

Executive Summary **4**

Summary of Recommendations **5**

1. Western Australian Industrial Relations Commission **7**

1.1 Efficiency of the WAIRC 7

1.2 Access to the WAIRC 9

2. Definition of Employee **11**

2.1 Domestic Worker Exclusion 11

2.2 "Gig Economy" Workers 13

3. Minimum Conditions **14**

3.1 Minimum Conditions & IR Act 14

3.2 Improve Minimum Conditions 14

3.3 Updating Minimum Conditions 18

3.4 Portable LSL 18

4. Equal Remuneration Order **20**

4.1 Pay Equity 21

4.2 Equal Remuneration Orders 22

4.3 Proposed ERO for WA 26

5. State Awards **27**

5.1 Relevance of State Awards 27

5.2 Award Reviews 28

5.3 Opposition to a WA Award Review Process 29

6. Compliance **30**

6.1 Increased Penalties 30

6.2 Industrial Inspectors 31

7. Local Government **31**

Executive Summary

All Western Australians deserve to live in dignity. All workers are entitled to a fair opportunity to provide for themselves and their families and work in an economy based on jobs which are safe and secure with guaranteed hours and fair wages.

The rules that made Australia fair are broken. At a time when inequality is the highest in over 70 years, wage growth is lowest on record, but company profits have gone up 40%. Further, 40% of people are in insecure work and there are over one million Australians who are underemployed and want to work more. The richest 1% of Australians now owns more wealth than the bottom 70%.

Nationally, workers are facing attacks to their rights at work, the minimum wage has fallen below the poverty line and wage theft is now so common that it has become a business model for some employers. Working people need better and stronger rights at work to keep up with the growing power of employers and reverse growing inequality.

It has always been the role of unions to defend and extend rights at work. Creating and protecting secure jobs and decent working conditions is a top priority for United Voice. We are committed to protecting vulnerable workers from exploitation in order to avoid large numbers of working poor, a disenfranchised underclass, and low intergenerational social mobility.

An effective workplace relations system ensures the dignity of workers by protecting the right to fair and just treatment in the workplace, fair and just access to wealth and security, and allows people to have a voice in their workplaces and communities.

Our primary concern throughout this review is to prevent against a reduction in working conditions and entitlements as we have experienced with similar reviews at a national level. A foundational principle for this review must be that all current and future workers will not be left worse off and will not see a reduction in their entitlements as a result of this review.

The recommendations of this submission also advocate for positive reform to industrial relations laws to increase rights for Australian workers, including in relation to the safety net, to close the gender pay gap, delegate rights and other organising rights, protection against unfair treatment, work-life balance and employer compliance. While we have sought to comment on a number of the terms of reference of this inquiry, our silence on other matters should not be taken to be in support.

There are matters outside the terms of reference for this review that are important for the state industrial relations system that we expect will not to be considered during the review. Importantly, section 44 of the *Industrial Relations Act 1979* (WA) is unique to the state system and must be retained.

Further, union membership, freedom of association, the right to organise and the right to collective bargaining are meaningless unless employees have the right to be represented and advised by their union about workplace issues, and to be represented by their union in collective bargaining. There is no evidence of any problems with the current right of entry provisions that require review.

As a result of our diverse coverage we have members in both federal and state industrial relations systems and have extensive experience representing their interests in both jurisdictions. As a national union we have also had the opportunity to draw from the experience of members and

union officials in other jurisdictions such as the Queensland industrial relations system. We have also had the opportunity to consider a range of other submissions across the union movement as they have been developed, including that of UnionsWA. There is, as you will see, a great level of consensus evident across those submissions around many important industrial issues for Western Australian workers.

Summary of Recommendations

Recommendation one: that the Western Australian Industrial Relations Commission remains a laypersons tribunal to ensure that all workers in Western Australia have access to justice on matters of an industrial nature.

Recommendation two: that the Western Australian Industrial Relations Commission must streamline and modernises its processes to ensure all workers in Western Australia have ease of access to justice on industrial matters. This includes; timely resolution of matters, the automatic updating of allowances in awards, website upgrades and application processes suitable for a modern industrial relations system.

Recommendation three: that all employees in the state system be given access to an anti-bullying jurisdiction through the Western Australian Industrial Relations Commission as that provided through the Fair Work Commission.

Recommendation four: that the *Industrial Relations Act 1979* (WA) incorporate general protections as that provided by the *Fair Work Act 2009* (Cth) to protect workplace rights and freedom of association for all employees and to provide protection from workplace discrimination.

Recommendation five: the definition of employee in the *Industrial Relations Act 1979* (WA) should be removed and replaced with the definition of employee in the *Fair Work Act 2009* (Cth).

Recommendation six: the Western Australian Industrial Relations Commission should work with stakeholders to develop clear indictors of employment for gig economy workers in recognition of the fact that people doing work using digital platforms deserve the same protections and rights as other workers.

Recommendation seven: that the Industrial Relations Act 1979 (WA) incorporate minimum conditions of employment that mirror the National Employment Standards to the extent they provide stronger protections than the Minimum Conditions of Employment Act 1993 (WA).

Recommendation eight: that the statutory minimum conditions of employment in the amended Industrial Relations Act 1979 (WA) reflect provide for best practice minimum conditions and include: Family and Domestic Violence leave, right to request flexible working conditions, rights for union delegates and penalty rates as statutory minimum conditions.

Recommendation nine: that the statutory minimum conditions of employment in the amended Industrial Relations Act 1979 (WA) should not be subject to periodical reviews by the Western Australian Industrial Relations Commission.

Recommendation ten: that the terms of reference of this review are expanded to include a review on the portability of LSL for Western Australian workers under the *Long Service Leave Act 1958* (WA).

Recommendation eleven: that Western Australia adopt an ERO system modelled upon the provisions of the Queensland ERO provisions, with additional provisions from the *Fair Work Act 2009* (Cth).

Recommendation twelve: that introducing a formal process for the updating of private sector State award in the state system will come at a huge cost to government and will have little benefit for workers.

Recommendation thirteen: in the event that this review proceeds with an award updating process, further consultation with the union movement is required to develop extensive safeguards for the protection of current and future employees and to ensure all conditions are upheld or improved and are not reduced.

Recommendation fourteen: that employer compliance in the state system is enhanced by: higher penalties for identified conduct such as wages theft and modern slavery and ability for unions to run prosecutions for breaches.

1. Western Australian Industrial Relations Commission

An underlying tenet of effective industrial relations laws is the ability to have workplace issues resolved in a timely and effective manner. An effective industrial framework allows for ease of access by all stakeholders in dealing with the core business of negotiations and settling bargains; ensuring the relevance of industrial instruments; recognising the rights and responsibilities that come from taking industrial action and effectively representing members in the workplace.

The below recommendations propose changes to the structure of, and access to, the Western Australian Industrial Relations Commission (**WAIRC**) to enhance the efficiency of processes without becoming removed from its objective as a "Laypersons Court". These recommendations draw directly from experiences of union members and officials in their dealings with the WAIRC.

1.1 Efficiency of the WAIRC

The WAIRC is an administrative tribunal that is created by statute as a court of record and has a judicial seal.[1] The WAIRC exercises judicial, arbitral and administrative powers. As such, the WAIRC is unlike other federal tribunals, such as the Fair Work Commission (**FWC**), which for constitutional reasons do not exercise judicial power.

Timely Resolution of Matters

Our experience under a Liberal State Government has been that public-sector employers are able to use the WAIRC through drawn out conciliation processes to delay timely resolution of industrial issues. The WAIRC in most cases is obliged by the *Industrial Relations Act 1979* (WA) (**IR Act**) to pursue conciliation as far as possible, with formal arbitration as the last resort. The WAIRC will not allow the claim to be listed for hearing until it is satisfied that further conciliation would be unavailing. An objective of the IR Act is to expedite resolution of industrial disputes not resolved by amical agreement. However, there is no express objective to expedite processes during conciliation.

Workers are entitled to expect speedy resolution of industrial issues and intervention by the WAIRC where unscrupulous employers are taking advantage of processes to delay resolution. The objectives of the IR Act should be strengthened to give commissioners more scope to intervene, and an obligation to act, where issues are not being resolved within an adequate time frame.

Updating Allowances

One of the most prominent functions of the WAIRC is conducting the annual State Wage Case. In accordance with section 50A of the IR Act, the WAIRC must make a General Order adjusting the rates of wages under State awards and setting the minimum wage under the *Minimum Conditions of Employment Act*.[2]

Following the General Order, minimum pay rates in State awards are automatically updated. Allowances however, require a subsequent application to be made prior to being updated. This is in stark contrast to the national system where allowances in awards are automatically updated. If awards can be automatically updated, allowances should follow suit. This would foster efficiency, and streamline processes within the WAIRC.

[1] *Industrial Relations Act 1979* (WA) s 12.
[2] *Industrial Relations Act 1979* (WA) s 50A.

WAIRC Public Website

The WAIRC website is poorly set out and is not user friendly. Related information is split across multiple sections and links between sections and to external information are poorly integrated and often broken or out of date. As the public website is the gateway to the WAIRC, investing in an upgrade focused on usability and content relevance has clear merit.

Application Process

Our experience has proven that the process of making an application to the WAIRC lacks accessibility in a number of ways that work contrary to the objects of the state system as a laypersons court.

Information about coverage is particularly poorly laid out, although it is one of the most crucial pieces of information required. The coverage guide fails to clearly articulate who is covered by the state system and who is not. This is in sharp contrast to the FWC website which has plain English and clearly accessible guides relating to coverage.

Although forms are available online, instructions as to the application process, as well as guidance as to necessary forms for different types of claims, are lacking. Additionally, the forms themselves are difficult to follow and not conducive to easy completion and filing. The WAIRC should refer to the FWC forms as exemplars, which have information including that about eligibility to apply, who to contact for application assistance, language assistance and a handy glossary.

Our experience with filing an application has also proved frustrating, overly time consuming and out of step with modern processes. Forms relating to service of documents cannot be lodged online and must be returned to the registry office in person. Applicants must lodge their forms, serve a stamped copy to responding parties, then complete and return a statutory declaration confirming they have done so to the WAIRC. Like the FWC, the WAIRC should be capable of serving all relevant forms following an application. Further, all forms should be made available to submit online.

President Position

While we agree with past submissions that have questioned the position of President have merit, we would not support the appointment of a Supreme Court Judge to act as a 'floating President' for applications to the full bench. Such an appointment is out of line with the quasi-judicial nature and layperson's use of the WAIRC and would likely introduce more formality and increase the length of time to deal with matters.

Recommendation one: that the Western Australian Industrial Relations Commission remains a laypersons tribunal to ensure that all workers in Western Australia have access to justice on matters of an industrial nature.

Recommendation two: that the Western Australian Industrial Relations Commission must streamline and modernises its processes to ensure all workers in Western Australia have ease of access to justice on industrial matters. This includes; timely resolution of matters, the automatic updating of allowances in awards, website upgrades and application processes suitable for a modern industrial relations system.

1.2 Access to the WAIRC

Anti-Bullying Jurisdiction

Bullying is a persistent and significant problem that adversely affects a significant number of Western Australian employees each year. Bullying can have a devastating effect on employees, resulting in high stress levels, anxiety, depression, loss of self-esteem, a loss of the ability to perform work, ill health, and in extreme cases, suicidal tendencies. According to the *State of the Sectors 2017* report, 10% of state public sector employees felt they had experienced bullying in the 2016/2017 year.[3]

The new anti-bullying provisions introduced into the FW Act in 2014 appear to be providing some relief to employees from this conduct. We would recommend adopting similar provisions in the state system to address the current gap in protection.

Western Australia

As there is no single piece of legislation that prohibits workplace bullying in Western Australia, there are limited avenues for workers to seek relief from such conduct. Instead a variety of legislation exists that may apply depending on the specific circumstances of the bullying behaviour and the impact on the employee.[4]

For example, under the *Occupational Health and Safety Act 1984* (WA) (**OSH Act**), an employer has a duty to provide and maintain a working environment in which employees are not exposed to hazards. As bullying has a negative effect on the health and safety of employees this presents a hazard in the workplace and is unlawful under the OSH Act. WorkSafe inspectors are tasked with ensuring compliance with the OSH Act, however their actions are targeted at preventing and managing bullying behaviour in the workplace as opposed to dealing with an individual's specific situation. Further, WorkSafe does not have the authority to enforce disciplinary actions on the persons accused of bullying, nor can they award compensatory relief. As such, the ability of the OSH Act to provide relief to employees from bullying conduct is minimal.

Unlike the FW Act, there is no specific anti-bullying jurisdiction in the IR Act. While evidence of bullying behaviour may lead to an unfair dismissal claim, bullying is not a claim in and of itself. This is an unacceptable position that creates a two-tiered system that denies workers access to important legal recourse that is now available to workers at the FWC.

Fair Work Commission

Since 2014, the FWC has jurisdiction to make an order to stop bullying at work.[5] Bullying is defined by the FW Act as repeated unreasonable behaviour at work that creates a risk to health and safety.[6] Prior to applying to the FWC, individuals are encouraged to address bullying at work through appropriate processes within their workplace, following a bullying or grievance policy.[7] The FWC is

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[3] Public Sector Commission, '2017 State of the Sectors', October 2017, https://publicsector.wa.gov.au/sites/default/files/documents/psc_state_of_the_sectors_2017.pdf.
[4] *Occupational Health and Safety Act 1984* (WA);*Workers' Compensation and Injury Management Act 1981* (WA); *Equal Opportunity Act 1984* (WA); *Fair Work Act 2009* (Cth); *Industrial Relations Act 1979* (WA).
[5] *Fair Work Act 2009* (Cth) s 789FF.
[6] *Fair Work Act 2009* (Cth) s 789FD(1).
[7] Fair Work Commission, 'What is the process', https://www.fwc.gov.au/disputes-at-work/anti-bullying/what-is-the-process.

empowered to make any order it finds appropriate to prevent further bullying, with the exclusion of ordering payment of a pecuniary amount.[8]

The number of anti-bullying applications and outcomes has been relatively consistent since the jurisdiction commenced in 2014. In 2016–17, a total of 722 applications for an order to stop bullying were lodged with the Commission. This constitutes approximately 2% of all applications made to the FWC that year. This number was consistent with the number of applications in previous years. Further, of these 722 applications only 60 of these were finalised by a decision with the rest being withdrawn early or resolved during the course of proceedings. Only three applications resulted in a stop bullying order.[9]

On 9 February 2017, the Department of Employment released a post-implementation review assessing whether the right of recourse to the FWC for workers who have been bullied at work remains appropriate. While the review's considerations and findings reflect the contested and complex nature of the anti-bullying jurisdiction, it supported retention of the jurisdiction given the overall benefit to the community.[10]

Our experience with the FWC bullying jurisdiction has been that it has acted as deterrence, promoting employers to act quickly in response to bullying allegations. Further, the legislation has afforded clarity as to what legally constitutes bullying and what does not which aids in making an application. Incorporating a jurisdiction that mirrors the FW Act would at least give some workers some relief and clarity about entitlement to apply for relief. Further, as the FWC has clearly not been overwhelmed by anti-bullying complaints this should to some extent mitigate against concerns of some stakeholders about the negative impact on business of an anti-bullying jurisdiction.

General Protections

The WAIRC can make an order of unfair dismissal where the dismissal of an employee is found to be harsh, oppressive or unfair. The WAIRC can also make an order of unlawful termination if a state system employee is dismissed for a prohibited reason; or because of certain workplace rights held by the employee, the exercise or no exercise of those rights, or to prevent the exercise of those rights.

The IR Act provisions only provide legal recourse where there has been a dismissal. There is very limited remedy provided in the IR Act for where an employee considers they have been treated detrimentally in their employment, but where they have not been dismissed (aside from freedom of association). Further, some workers may be prevented from bringing a claim for unfair dismissal where they are on probationary period or have been employed for less than three months. As a result there will be many employees who have been treated harshly or unfairly by their employers, but who will have no legal recourse.

Fair Work Act

The general protections pursuant to the FW Act are intended to protect workplace rights, protect freedom of association, provide protection from workplace discrimination, and provide effective relief for persons who have been discriminated against, victimised, or have experienced other unfair

[8] Ibid s 789FF(1).
[9] Fair Work Commission, Annual Report 2016-17.
[10] Department of Employment, *A right of recourse for workplace bullying Post-implementation review of Part 6-4B of the Fair Work Amendment Act 2013*, 2017.

treatment. Adverse action under the general protections is taken when an employer dismisses, injures, detrimentally alters the position of, or discriminates against an employee because that person has a workplace right, has exercised a workplace right or proposes to exercise that workplace right. Adverse action is not limited to dismissal, an employee may make a claim under general protections where their employment has not been terminated. Due to constitutional limitations, the FWC does not have jurisdiction to determine a general protections application and is limited to conducting conciliation.

We acknowledge that state system employees will have some recourse to the above protections under existing unfair dismissal provisions and antidiscrimination legislation. However, unfair dismissal and unlawful termination do not provide adequate relief from harsh and unjust conduct by an employer for all employees and the broader protections provided by the FW Act would address these gaps. The WAIRC should be amended to incorporate general protections provision from the FW Act to ensure workers in WA are not disadvantaged.

As was recommended in the review of the Queensland industrial relations framework, as the WAIRC is not restricted by the constitutional limitations of the national system regarding the exercise of judicial power, we would recommend that the WAIRC can hear and determine applications of alleged contraventions of the general protections provisions.[11]

Recommendation three: that all employees in the state system be given access to an anti-bullying jurisdiction through the Western Australian Industrial Relations Commission as that provided through the Fair Work Commission.

Recommendation four: that the *Industrial Relations Act 1979* (WA) incorporate general protections as that provided by the *Fair Work Act 2009* (Cth) to protect workplace rights and freedom of association for all employees and to provide protection from workplace discrimination.

2. Definition of Employee

The fundamental concept of who constitutes an employee is a complex consideration in the Western Australian legal framework. While Australia does have strong legislative frameworks governing worker protections, there are some gaps in the industrial framework that leave workers vulnerable to exploitative pay and working conditions and with little access to recourse. These gaps in the state system are failing workers and contributing to a rise in inequality in Western Australian.

It is important to stress that if this review recommends that the definition of employee be amended to remove the domestic workers exclusion (as proposed below) an immediate next step will be the creation of an industry award for domestic service workers.

2.1 Domestic Worker Exclusion

The FW Act does not have jurisdiction where an individual directly engages a worker, as the individual is not a constitutional corporation. In these direct employment arrangements, the IR Act will apply.

[11] Industrial Relations Legislative Reform Reference Group, *A Review of the Industrial Relations Framework in Queensland*, December 2015, page 110.

The definition of "employee" in section 7 of the IR Act specifically excludes a person engaged in domestic service in a private home from being an employee. In practical terms this exclusion means that workers who are directly engaged by an individual to provide support in their private home are not employees for the purposes of either the state or the national systems. This exclusion does not apply to persons engaged to provide domestic services in a private home if they are engaged by a third party.

> *"the definition of employee has been extended to cover persons employed by agencies or domestic service businesses who are sent to work in private homes. There has been the potential for exploitation of these person in the past because the Act did not cover work in a private home. These people, of course, are no different from any other persons employed by a business enterprise and ought to have access to the rights and be subject to obligations imposed by the industrial relations system. The Act will still not apply to persons actually engaged to perform private domestic service by way of an arrangement with the householder himself."*[12]

As they are not considered to be employees, these workers are denied the protections afforded by the IR Act and the right to the minimum conditions of employment under the *Minimum Conditions of Employment Act 1993* (WA). Domestic service workers are therefore entirely dependent on negotiated common law contracts. Considering a contract may be as informal as a verbal agreement, and there is a risk that some workers may not understand the terms and conditions they are agreeing to, this leaves domestic workers with minimal protections.

This exclusion is unique to the rest of Australia where no such jurisdictional exclusion exists. In other Australian jurisdictions workers in private residences receive protection under the FW Act as employees (i.e. nannies and au pairs) or independent contractors. Given the heightened potential for exploitation of these workers, who are often low paid, work in isolation and have little bargaining power, it defies belief that this exclusion still operates in Western Australia.

Domestic Workers & the NDIS

As the consumer directed care model rolls out in both the disability and aged care sectors, it is becoming increasingly common for people with disabilities, or their representatives, to enter into direct employment relationships with workers to provide direct care and support in the home. These employment arrangements are often facilitated by a disability service provider through a shared management or brokered employment model. Individuals can also opt to directly employ a worker, without the involvement of a third-party provider.

Where these private employment arrangements are facilitated through a service provider, such as My Place Foundation Inc, identifying the employer is essential to determine what level of protections are afforded to the worker. This is not always a simple process.

For example, one of the service packages provided by My Place provides that My Place will cover the administrative aspects of employment, including paying wages, calculating tax and super, arranging public liability insurance and even train and supervise the direct care worker. However, as the care

[12] Western Australian Parliament, Hansard (12 November 1987, 5797).

recipient is the one who employs the direct care worker, they are taken to be the employer and not My Place.

Employing the direct care worker directly is clearly desirable for the client as it allows complete choice in who will be providing their services. Engaging a service provider like My Place to administer the employment relationship is also desirable as the individual will not be burdened with the legal or administrative requirements under a standard employment relationship. Service providers like My Place are able to attract clients to their services by charging a fee for administering the employment relationship while promoting the 'benefits' of the client being the employer.

> *"An advantage of you or your family being the employer is that, under certain conditions', support people can be employed under 'private and domestic' arrangements which offers greater flexibility in pay levels, conditions and hours of work as the support person is not deemed to be an 'employee' in the traditional legal sense"* (My Place Website http://www.myplace.org.au/services/index.html).

The legal relationship in these circumstances becomes a common law contract, which may serve to undermine the basic terms and conditions of employment for our members. With the roll-out of the NDIS is WA, these employment arrangements will continue to contribute to a cohort of workers who are denied access to minimum conditions of employment and denied the right to secure and decent jobs.

The Domestic Workers Convention

The implications of the exclusion in the IR Act extend beyond the local industrial relations framework. The International Labour Organization Protocol of 2014 to the Forced Labour Convention, 1930 requires that relevant labour laws apply to all workers in all sectors of the economy. Australia's ratification of the ILO's Domestic Workers Convention (No. 189) and Recommendation (No. 201) is prevented by the domestic worker exclusion in the IR Act.

2.2 "Gig Economy" Workers

United Voice recommends that the definition of employee should be broad enough to capture so called platform or gig economy workers.

People doing work using digital platforms deserve the same protections and rights as other workers. Automation and digital technology offer huge potential to make work and society better. However, they must be used wisely, as tools to build a society with inclusive prosperity, not to widen inequality and make more work insecure.

If left unregulated, the gig economy will continue to undermine the protections and safeguards that are at the heart of the Australian industrial relations system. 'Flexibility' shouldn't mean forcing people to try and make ends meet with unreliable jobs.

United Voice recommends that the law should be changed to confirm the circumstances in which gig workers are employees, and who their employers are. We acknowledge that the very nature of the gig economy requires an eclectic and new approach to regulation. The development of indicators of employment will go some way to providing clarity. Gig workers should be afforded specific protections unique to their circumstances such as protection from being fired on the basis of customer ratings and the right to contest non-payment, ratings, and qualification test results.

Recommendation five: the definition of employee in the *Industrial Relations Act 1979* (WA) should be removed and replaced with the definition of employee in the *Fair Work Act 2009* (Cth).

Recommendation six: the Western Australian Industrial Relations Commission should work with stakeholders to develop clear indictors of employment for gig economy workers in recognition of the fact that people doing work using digital platforms deserve the same protections and rights as other workers.

3. Minimum Conditions

3.1 Minimum Conditions & IR Act

Legislated minimum employment standards are a feature of the national and state systems. The minimum conditions of employment provide a minimum standard of pay and conditions that underpin all employment arrangements in the state system. Generally, they operate to provide a safety net of minimum standards that act as a benchmark for the making of industry awards and enterprise agreements. Minimum standards cannot be diminished through bargaining process.

The Minimum Conditions of Employment Act 1993 (WA) (**MCE Act**) provides the statutory minimum conditions of employment for state systems employees. The MCE Act provides a basic safety net of standards including minimum wages, hours of work and leave entitlements.

In the Federal system, minimum conditions are embedded within the FW Act. The National Employment Standards (**NES**) apply to all employees covered by the FW Act from 1 January 2010. An award or enterprise agreement must not exclude the NES, and are ineffectual to the extent that they contravene the NES.[13] There are ten minimum workplace entitlements in the NES including maximum working week, leave entitlements and right to request flexible working arrangements.

United Voice recommends that the IR Act incorporate the minimum conditions of employment. This would be consistent with the structure of the national system and provide for a single piece of legislation dealing with workplace relations for the State system.

During the Queensland review, concerns were raised over whether the minimum standards would be something that the Queensland Industrial Relations Commission had jurisdiction to enforce. As was recommended in the Queensland review, to provide clarity the IR Act should expressly state that the WAIRC has jurisdiction to deal with disputes over the application or operation of the minimum standards of employment.

3.2 Improve Minimum Conditions

While the concept of minimum standards within the IR Act is desirable, a simple incorporation of existing minimum employment standards is not appropriate.

While the NES and the minimum conditions overlap to a great extent, there are some provisions of the NES that exceed the provision under the MCE Act. For example, casual loading in the state system is 20% while in the national system it is 25%. The minimum conditions incorporated into the

[13] *Fair Work Act 2009* (Cth) ss 55(1), 56.

IR Act should reflect the current MCE Act to the extent that they exceed the NES. Where the MCE Act falls short of the NES, the NES should prevail.

Further, the amended standards in the IR Act should be set higher than the minimum standards set by both the MCE Act and the NES. The state industrial relations system should lead by example when it comes to issues such as domestic and family violence (DFV) and pay equity. Innovative provisions such as DFV leave and supporting workers to access their union representatives will in turn enhance workforce participation and economic productivity for the benefit of all Western Australians.

Family Domestic Violence Leave

There is no standardised requirement for employees covered by the state system to access DFV leave. Over the year from 2014-15 to 2015-16 the number of incidents of DFV reported to WA Police has increase by 17.5%. In 2016-17 there were over 50,000 DFV incidents reported in Western Australia and over 4,500 calls to helplines. DVF is distinctly gendered with women accounting for almost two thirds of all family and domestic violence-related homicides.[14]

Workplaces are both affected by and have a role in supporting and ensuring the safety of working people. Two thirds of women who have reported DFV are in paid employment.[15] DFV has major impacts on the lives of those it affects, including making it difficult to maintain standard work hours and retain paid employment. Research indicates the variety of ways DVF can negatively impact on employment including decreased performance and productivity, increased absenteeism, job loss and disrupted work history.[16] One in five survivors of DVF report violence continuing while at work, most commonly through harassing or abusive emails or phone calls.

Employment and financial stability are critical to escaping a violent and abusive relationship. Stable, secure employment is a cost effective preventative measure which sends a message of cultural intolerance towards violence against women.

As incidences and awareness of DFV have grown, unions have led the case for the introduction of additional leave entitlements. Shockingly this move was opposed under the previous Liberal State Government. For example, during bargaining in 2015 the Department of Education refused to introduce an additional 10 days leave for DFV leave, leaving workers to rely on existing personal leave accruals.

Further, the right to DFV leave has recently been removed from workplace agreements across up to 30 Commonwealth public service employers, on the orders of the federal workplace authority, which answers directly to Minister for Women Michaela Cash. These employers include Department of Prime Minister and Cabinet, Human Services Department and the Australian Taxation Office.

[14] Australian Bureau of Statistics, 'Victims of Family and Domestic Violence', 13 July 2016, http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4510.0~2015~Main%20Features~Experimental%20Family%20and%20Domestic%20Violence%20Statistics~6.

[15] Australian Council of Trade Unions, Domestic Violence', 13 July 2016, https://www.actu.org.au/our-work/policy-issues/domestic-violence.

[16] Industrial Relations Legislative Reform Reference Group, *A Review of the Industrial Relations Framework in Queensland*, December 2015, page 75.

United Voice proposes that a DFV clause be included in the IR Act as a specific minimum condition of employment. The clause should be modelled upon the Australian Council of Trade Unions family and domestic violence 'model clause'.[17]

> *"The minimum Domestic Violence Leave provision proposed by the ACTU aims to make it easier for survivors of domestic violence to remain in paid employment and manage stressful and time consuming tasks like finding a new home and attending court. It does this by providing access to ten days paid leave and an additional two days unpaid leave per year."*[18]

Flexible Working Arrangements

The MCE Act does not include provisions guaranteeing access to flexible working arrangements. It is well documented that women disproportionately take on domestic and child caring duties, and are far more likely than men to be primary care providers. Women are thus most impacted by a lack of flexible working arrangements. This is evidenced by the trend of women leaving the workforce after child birth, and overrepresentation of women in casual, part-time, and low paid employment.

Enshrining flexible working arrangements in the IR Act would go to ensuring women and carers are able to stay in the workforce. This would also have some positive flow on effects for closing the gender pay gap. Flexible working arrangements can also go to assisting employees navigate demanding or challenging times outside of their work life, such as DFV.

> *"Providing flexibility around working hours will help make the workplace safer for everyone."*[19]

The IR Act should be amended to include flexible working arrangements mirroring section 65 of the FW Act. We would recommend an additional amendment to subsection 1A(a) to extend the coverage to dependants rather than limiting it to school age children.

Union Delegate Rights

All workplaces should promote fair, cooperative and productive environments in which employees are treated fairly and with respect for freedom of association and their right to be represented at work. The true gap in the IR Act's freedom of association laws are the recognition of the rights of Union Delegates. Delegate rights are the manifestation of the fundamental right for workers to be represented in their workplaces. In practice, this means providing workers with the right to consult with union officials in the workplace and the right to have Union Delegates represent their workplace group.

The IR Act should be amended to include specific recognition and rights for Union Delegates as an additional minimum condition of employment. This would include:

- Workers must be given every opportunity to join their union;
- A right for workers to represent their union, its members and persons eligible to be members of that union;

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[17] Australian Council of Trade Unions, 'ACTU Model Clause', https://www.actu.org.au/media/886613/actu-model-family-and-domestic-violence-leave-clause-revised-18-march-2.pdf.
[18] Australian Council of Trade Unions, Domestic Violence', 13 July 2016, https://www.actu.org.au/our-work/policy-issues/domestic-violence.
[19] Ibid.

- Right for a delegate to attend and speak at inductions for new employees or to invite their union to attend inductions.
- Rights for a delegate to have private and confidential discussions with their union, its members, and persons eligible to become its members;
- Rights to ask an employee or official of the union to attend the workplace;
- Recognition of a delegate's role in bargaining and a right to fully participate in bargaining without interference from their employer;
- Rights for delegates to hold discussions of a reasonable duration in paid work time;
- Right to hold discussions in a room that is appropriate for the discussion sought;
- Rights to make reasonable use of the employer's facilities and equipment at the workplace, including information technology to communicate with members and eligible members;
- Additional paid leave rights for delegates to enable them to attend delegate training, assist with dispute resolutions or union related matters.

Penalty Rates

While the NES and the NEC Act both provide for protections on hours of work, neither have regard to when the hours are performed.

Penalty rates are an integral and essential part of our industrial relations system and have been for almost 100 years. They play an important role in determining accepted patterns of work and delineating social and unsocial work hours. There is a longstanding agreement in Australia that weekends and time with family, friends and community is valuable and those who miss that due to work should be compensated.

Many United Voice members work in insecure jobs without guaranteed hours of work. Not knowing how much income they will receive from one week to the next greatly increases the stress people and themselves living under and makes planning and budgeting extremely difficult. Penalty rates make up a large portion of the take home pay of many Australian workers. For many United Voice members, penalty rates comprise more than 30% of their wages and compensate for low hourly rates in undervalued industries.

Penalty rates form an important component of the safety net within Modern Awards. The sectors in which penalty rates apply can generally be characterised as low paid, and any consideration of penalty rates needs to be mindful of their role in contributing to the incomes of some of the lowest paid and most vulnerable workers in Australia.

The current move to deregulate penalty rates is principally driven by the sectional interests of some employers to reduce labour costs and increase business margins at the expense of the incomes of low paid workers.

Despite what many employer groups have been arguing about a 24/7 economy, weekends still matter. Working weekends, evenings and public holidays means regularly missing out on time with partners, children, grandchildren and friends. It often means being absent for family celebrations, important milestones, social activities and community events.

Placing a premium on work at certain times is necessary and important in order to preserve the distinction between leisure and work. A purely economic analysis of the hours of work over-

simplifies the significance of these issues and avoids the long held public consensus surrounding these matters. The IR Act should be amended to include penalty rates as a statutory minimum condition of employment.

3.3 Updating Minimum Conditions

While it is beneficial for all parties to have minimum conditions of employment maintained to industry standards, United Voice would oppose a process of periodic reviews of conditions in the absence of strong safeguards to ensure that entitlements cannot be reduced as an unintended consequence of this process.

Further, we would question whether it is appropriate for statutory minimum employment conditions to be amended by an unelected commissioner of the WAIRC who is not accountable to the public.

Further, as discussed below at section five in the context of State award updates, any automatic process for updating conditions will be costly for the government and resource intensive for union stakeholders.

Recommendation seven: that the Industrial Relations Act 1979 (WA) incorporate minimum conditions of employment that mirror the National Employment Standards to the extent they provide stronger protections than the Minimum Conditions of Employment Act 1993 (WA).

Recommendation eight: that the statutory minimum conditions of employment in the amended Industrial Relations Act 1979 (WA) reflect provide for best practice minimum conditions and include: Family and Domestic Violence leave, right to request flexible working conditions, rights for union delegates and penalty rates as statutory minimum conditions.

Recommendation nine: that the statutory minimum conditions of employment in the amended Industrial Relations Act 1979 (WA) should not be subject to periodical reviews by the Western Australian Industrial Relations Commission.

3.4 Portable LSL

While not specifically within the terms of reference of this inquiry, United Voice recommends that the review considers the case for portability of Long Service Leave (**LSL**) within the *Long Service Leave Act 1958* (WA) (**LSL Act**) to cover industries such as the security, contract cleaning and community services (including aged care, disability, homecare and ECEC workers) industries. Portability of LSL will ensure it is implemented in an inclusive way for the whole workforce.

The case for portability of LSL is based on equity grounds, that employees should not be disadvantaged because of their occupation, the nature of their employment, where they work, the size of their employer or whether their employment is in the public or private sector. Many workers, through no fault of their own, are unable to work with the same employer long enough to qualify for LSL. This often occurs in industries that are project based (cleaning and security), where work is highly transient (care sector) or where the organisation is reliant on government funding (community). Without portable LSL these workers are denied practical access to LSL.

A key pillar of the argument for extending LSL portability is that labour market mobility has changed over time and fewer people are working for long periods with a single employer. Conversely, people

are changing jobs more frequently, work is intensifying and people are working longer as the population ages.

There have been a number of recent inquiries which have considered whether the single employer based LSL model is sufficient to meet the needs and realities of the modern workplace.[20] The changing nature of Australia's workforce, specifically the increase in workforce mobility, means that many workers are missing out on LSL that they would otherwise be entitled to access. Portability of LSL in Western Australia should be extended to these named industries, reflecting the inherent and emerging nature of employment relationships in the current labour market.

Certain sectors or industries may be more likely to benefit from portable long service leave than others. For the purpose of this submission, information on specific industries where portable LSL is proposed for Western Australia has been included. This is not an exhaustive list and should not be taken to be as such.

Cleaning & Security

Both the security and contract cleaning industries operate on a similar contract model. End-users of security and cleaning services include governments, large commercial operators (such as financial institutions or facilities managers), manufacturing and industrial, aviation, maritime, tourism and hospitality industries. These end-users encourage competition by advertising their need for services by tender and inviting providers to bid for the right to supply the service at a competitive price.

In both cleaning and security, the major operating cost is labour, which accounts for more than 80% of the cost of supplying the service. End-users attempt to ensure best practice and value for money by re-tendering every three to four years. Often this results in a change of cleaning or security provider. Providers can improve their chances of winning or retaining work and increasing profit margins by reducing operating costs. As the major operating cost is labour, providers compete for work by attempting to reduce their labour costs as much as possible.[21]

When a provider is replaced, the employment of the workers engaged by that provider ceases as a matter of law, unless those workers are re-deployed to another site managed by their employer. In both the cleaning and security industries, it is common practice that employees will apply for work with the 'incoming contractor', and are often (but not always) successful. Through this cycle, workers in these industries can continue working at the premises of a particular end-user for many years, but will continually change employers every three or four years.

This competitive contracting environment means cleaners and security guards are extremely vulnerable to losing their employment, or losing their entitlements, every three to four years when contracts for security or cleaning services are re-tendered.

A recent United Voice survey shows that while for cleaners and security officers the average length of service in the industry is more than ten years, workers will average between four and seven employers during their careers. In other words, for cleaners and security officers, their employer

[20] NSW Statutory Review, August 2016; Victorian Parliamentary Review, June 2016; Australian Senate Inquiry February 2016; Productivity Commission Inquiry, December 2016.
[21] "Inquiry into Portability of Long Service Leave Entitlements", Submission to the EEJSC, United Voice Victoria, 7 August 2015.

changes about once every four and a half years.[22] Of those with more than seven years' service in the industry, only 26% had ever qualified for LSL. Similarly, the average length of continuous service in the cleaning industry among a sample of over 100 cleaners was over 20 years. Of those with more than seven years in the industry, only 39% had ever qualified for LSL.

Community

The community sector covers a wide number of industries, including home care, aged care, disability support and ECEC. The ACT is the only jurisdiction to have established a portable LSL scheme for the community services sector, which commenced operation in July 2010. The scheme was implemented in response to the ACT Community Sector Task force's 2006 report *"Towards a Sustainable Community Services Sector in the ACT",* which recommended the legislation of a mandatory portable long service leave scheme for the sector to create a more sustainable career path for community services workers. As of 1 July 2016 the scheme was expanded to include aged care workers.

As the ageing of the population creates additional challenges and opportunities for community services organisations, it will be important for organisations to have these strategies in place to attract and retain an older, and potentially predominantly female, workforce of the future. These flexibility options provide an employee benefit to the community services sector which would constitute a genuine comparative advantage in attracting staff. They also create opportunities for employers and employees to cooperatively decide on the most appropriate form in which the retention incentive provided by portability should be taken.

Recommendation ten: that the terms of reference of this review are expanded to include a review on the portability of LSL for Western Australian workers under the *Long Service Leave Act 1958* (WA).

4. Equal Remuneration Order

The Australian industrial relations system is broken and is failing to achieve equal pay for working women in Australia. Unequal pay outcomes between women and men are a stark indicator of the different ways women and men engage with the workforce and how they are valued for it.

Industrial and occupational gender segregation in the workplace has an important and complex relationship to women's economic equality. Previous policy attempts to address pay inequity have focused too far on the top end of town and the gender pay gap instead of the gender pay chasm between female and male dominated industries. Any move to address pay equity must focus on working women, especially those in the low-paid, feminised care sectors.

Pay equity inquiries in Queensland and New South Wales have led to the entrenchment of equal remuneration principles in in those states. This has enabled successful claims by dental assistants, community service workers, childcare workers and librarians, and created a mechanism by which workers in these industries can demonstrate the need for pay increases and go on to achieve them.

[22] "Inquiry into Portability of Long Service Leave Entitlements", Submission to the EEJSC, United Voice Victoria, 7 August 2015, page 7.

United Voice welcomes the opportunity to represent our members' concerns on this crucial issue. Many members of our union work in industries marked by high levels of gender segregation. Two thirds of United Voice's members are women and a significant proportion of them work in highly gender-segregated sectors: Early Childhood Education and Care (**ECEC**), aged care, disability care and health care.

4.1 Pay Equity

Equal pay has been recognised as an industrial relations imperative by Australian states for decades. In 1951 the International Labor Organisation adopted Convention Number 100 which enshrined equal remuneration for men and women workers for work of equal value. In response, a number of Australian States introduced equal pay legislation, precipitating assumption of the 'equal pay for equal work' principle by the Federal Conciliation and Arbitration Commission in 1969. However almost 50 years later, gendered pay inequity persists.

Gender pay gap

The gender pay gap is the difference between women's and men's average weekly full-time equivalent earnings, expressed as a percentage of men's earnings. It is a measure of women's overall position in the paid workforce and does not compare like roles. Gender pay gaps are an internationally established measure of women's position in economy. It is clear that gender pay gaps in favour of men are a common feature of economies worldwide.

Gender pay gaps remain a persistent feature of the Australian workforce. Australia's national gender pay gap has hovered between 15% and 19% for the past two decades. Australia's full-time gender pay gap currently stands at 15.3%. Western Australia has the highest gender pay gap, at 22.8%. This is compared to South Australia with the lowest at 9.8%.[23]

All gender pay gaps matter as they are a driver of income inequality and result in poorer outcomes for women in terms of their immediate and long-term economic security. The World Economic Forum projects it will be another 170 years before the Australian gender pay gap is overcome at the current rate of convergence.

Gender segregation

Australian workplaces are highly gender segregated vertically (the domination of high status jobs by men), horizontally (the concentration of men and women in separate industries), as well as by employment status (the relative levels of women doing part-time and casual work).

In the 1980s, Australia had the most gender segregated workforce in the OECD. Although we are no longer the most extreme, our levels of gender segregation have since been eclipsed by the US and the UK, the level of gender segregation in industries and occupations in Australia remains exceedingly high. In 2010, gender segregation levels were higher in Australia than they were in France, Greece, Israel, Poland, New Zealand and Portugal.[24]

Despite decades of formal legal equality in Australia, levels of segregation appear to be deepening, rather than reducing. The Table 1 below shows the change in the percentage of female employees

[23] Workplace Gender Equity Agency, *Australia's Gender Pay Gap*, 2017.
[24] Rawstron, K. (2012) 'Diverging Paths: Occupational Sex Segregation, Australia, and the OECD', The Australian Sociological.

for the four most gender-segregated industries in Australia: Health Care and Social Assistance and Education and Training, which are female-dominated; and Construction and Mining, which are male-dominated.[25]

Table 1: Proportion of female employees by industry, 1995 and 2015

Industry	Percentage of female employees in 1995	Percentage of female employees in 2015	Difference
Health Care and Social Assistance	76.4	79.2	+2.8
Education and Training	65.4	70.6	+5.2
Construction	14.8	12.0	-2.8
Mining	12.0	12.9	+0.9

The contribution of gender segregation to the gender pay gap in Australia is beyond dispute. KPMG estimates that occupational and industrial gender segregation is responsible for 30 per cent of the gender pay gap and its role in perpetuating economic inequality between men and women is increasing. However, the contribution of gender segregation to the gender pay gap is not always well understood. The gender pay gap will not be corrected by women moving into traditionally male-dominated jobs and industries and vice versa.[26] Instead, the devaluation of gendered work must be recognised and rectified.

> *"Women's work has historically been undervalued… if a woman is doing it or saying it – it is just not as important."*[27]

The primary reason for high levels of industrial and gender segregation in Australia is the persistent undervaluing of forms of work that were historically performed by women in the 'domestic sphere' on an unpaid basis. A number of other factors also contribute to the disparity, such as discriminatory hiring and pay decisions, women's disproportionate performance of unpaid caring work.

A variety of legal mechanisms have been introduced in Australia to address the undervaluation of feminised industries since the 1980s, but none has yet proved adequate. Nor can enterprise bargaining remedy the gender pay disparity resulting from gender segregation and the historic undervaluation of care work.

4.2 Equal Remuneration Orders

Although equal remuneration and the gender pay gap are not analogous, equal remuneration will go some way to closing the gender pay gap by addressing the gender-based undervaluation of certain industries.[28] However, the unions experience with equal remuneration order (**ERO**) applications

[25] Australian Bureau of Statistics (ABS) (2016a) Labour Force, Australia, Detailed Quarterly, May 2016, cat. No. 6291.0.55.003, cited in Workplace Gender Equality Agency (WGEA) (2016b) Gender segregation in Australia's Workforce, August 2016, p.5.
[26] R. Cassells, A. Duncan, R. Viforj, '*Gender Equity Insights 2017: Inside Australia's Gender Pay Gap*', March 2017, Bankwest Curtin Economics Centre, p 40
[27] Ibid.
[28] 2017 State Wage Case Order, [101].

under the FW Act are that they are lengthy, costly and protracted matters. This is despite the FW Act articulating a clear means for addressing pay inequity.

As a union that represents workers in a number of historically gendered and low-paid industries, United Voice knows that ERO are a necessary addition to the state system in order to progress pay equity in Western Australia. The configuration of EROs federally under the *Fair Work Act 2009* and in Queensland's industrial relations legislation provides useful guidance as to how this may be best achieved.

WAIRC & ERO

The ability to bring an ERO case under the current IR Act is unclear. The WAIRC has spent some time considering the compatibility of an equal remuneration principle with the Wage Principles pursuant to section 50A(3). In 2017, the WAIRC *"noted that the Wage Principles enable a claim to be brought where award wages do not reflect equal remuneration for work of equal value".*[29]

This is deficient in several senses. Firstly, the lack of clarity regarding jurisdiction is not conducive to cases being brought. The WAIRC has not yet had an ERO application before it. Avenues to further pay equity should not be dependent on a test case being run on grounds of jurisdictional uncertainty. Vagueness is not the necessary commitment to equal remuneration that will contribute to closing the staggering gender pay gap in Western Australia. Legislation has a pivotal role to play in ensuring fairness and equality in remuneration for all women.

Further, the IR Act only makes promoting equal remuneration for men and women for work of *equal value,* not *ensuring* equal remuneration for men and women for work of *equal or comparable value*, an object of the legislation.[30] This is out of step with language of the FW Act, and other jurisdictions with robust equal remuneration provisions such as Queensland.

Fair Work Commission & ERO

Section 302 of the FW Act empowers the FWC to make EROs. The FWC is to take into account the *"orders and determinations made by the Fair Work Commission in annual wage reviews" as well as "the reasons for those orders and determinations".*[31] An ERO must not reduce rates of remuneration, and employers must not contravene an order.[32] Any modern award, enterprise agreement or order of the FWC has no effect to the extent that it is less beneficial to an employee than a relevant ERO.

Our experience under the FW Act is that ERO applications have proved to be lengthy, costly and protracted matters. This is despite the FW Act articulating a clear means for addressing pay inequity. For example, United Voice made an application for an ERO for the ECEC industry in 2013 and we still have a long way to go to achieve equal pay.

Comparator industry

The most pertinent feature of the FWC ERO system is the requirement for a comparator industry in order to establish undervaluing of an industry on the basis of gender.

From 2015 onwards, the FWC has held that;

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[29] Ibid, [259].
[30] *Industrial Relations Act 1979* (WA) s 6(ac).
[31] Ibid s 302(4).
[32] Ibid s 303, 305.

> *"the Commission must be satisfied that an employee or group of employees of a particular gender to whom an equal remuneration order would apply do not enjoy remuneration equal to that of another employee or group of employees of the opposite gender who perform work of equal or comparable value. This is essentially a comparative exercise…. We do not accept that s.302(5) could be satisfied without such a comparison being made."*[33]

Applications under section 302 of the *Fair Work Act* must therefore;

- Establish that the workforce is dominated by women and that this is casually connected to undervaluing of the industry, with reference to a male comparator industry; and
- Outline steps that would be necessary to address inequity.

The ramification of this approach is that a binary comparison of industries does not enable the FWC to acknowledge the inherent undervaluation of female dominated industries. Comparators obscure inherent undervaluation because this undervaluation is entrenched in not only remuneration but also the organisation and classification of industries as "women's work".[34]

Previous Pay Equity Inquiries in NSW and QLD said that requiring a male comparator and relying on comparative assessment would be unduly limiting on an application. Indeed, when the Child Care Workers equal remuneration case was before the NSW Industrial Relations Commission and was assessing the usefulness of comparator based evidence, the NSW Commission agreed with expert evidence that *"the uniqueness of work by child care workers limited the usefulness of selecting a particular male dominated industry as a 'comparator'"*.

The requirement of finding a male comparator is complex and adds to the delay and the cost of running ERO cases. It is also retrograde step. The pre-requisite of a male comparator fails to consider the historical, institutional and cultural undervaluation of feminised work and how industrial standards and benchmarks have been set in Australia.

Case Study – ECEC ERO

United Voice and the Australian Education Union currently have an equal pay case for early childhood educators and carers before the FWC. Application for an ERO under section 302 of the FW Act was made in early 2013.

It was in hearing this claim that the FWC departed from its previous position and brought in the requirement of an industry comparator in late 2015. The unions have submitted the *Manufacturing and Associated Industries and Occupations Award 2010* as the appropriate male comparator for the Diploma Level and Certificate III classifications of *the Children's Services Award 2010*.[35]

The case is an effort to ensure educators receive the professional pay they deserve. It is premised on the argument that ECEC workers are not paid equally to employees in male dominated industries

[33] Fair Work Commission, 'Summer 2015: Quarterly practitioner update', https://www.fwc.gov.au/resources/quarterly-practitioner-update/summer-2015.
[34] Slater and Gordon Lawyers, 'Be Bold for Change- equal pay in 2017', 23 March 2017, https://www.slatergordon.com.au/blog/%E2%80%9Cbe-bold-change%E2%80%9D-%E2%80%93-equal-pay-2017.
[35] Ibid.

who perform work of equal or comparable value. United Voice's ERO will also contribute to creating and sustaining a viable, skilled early childhood education workforce for the future.

Despite many submission and hearings over the last four years this case is still ongoing. It has proved to be an expensive, complex and time consuming process for the unions involved. The requirement to find a male comparator industry has proved to be unduly limiting and has added to the complexity of the process.

Queensland ERO

The ERO system under Queensland's *Industrial Relations Act 2016* (**Queensland Act**) can be sharply contrasted with the federal system to demonstrate that it is a preferable model for Western Australia.

Queensland has claimed to have the *"most advanced industrial measures for dealing with pay inequity in Australia, through a combination of legislation and the Equal Remuneration Principle adopted by the Queensland Industrial Relations Commission as a Statement of Policy."*[36]

The Equal Remuneration Principle (**ERP**) was established by the Full Bench of the Queensland Industrial Relations Commission on 29 April 2002, based upon the "Equal Remuneration and Other Conditions Principle" introduced by the NSW Industrial Relations Commission in 2000.

Most significantly, the ERP does not require male comparators in order to establish undervaluation on a gendered basis. This means that unlike the FW Act, "equal or comparable value" in the Queensland Act has not been interpreted to require a comparator industry. While comparators are not mandated, they are however utilised in claims to exemplify appropriate remuneration. Furthermore, comparisons are not restricted to similar work.[37]

The ERP make is clear that Queensland's industrial relations system is committed to deciding upon equal pay "transparently, objectively and in a gender neutral way".[38] The Queensland model is therefore preferable to that under the FW Act.

Case Study – ECEC ERO (QLD)

In December 2003 the Liquor Hospitality and Miscellaneous Union (**LHMU**, now United Voice) filed an application for equal remuneration for ECEC workers in Queensland. The Full Bench accepted that the work of ECEC workers had been majorly undervalued *"having regard to the historical gender-based undervaluation of the work and in light of the current objective assessment of the value of their work".*[39]

The Queensland Commission found that gendered ideas and assumptions had impacted the assessment of conditions and hazards, and duties, skills and responsibilities of ECEC workers in

[36] Queensland Industrial Relations Commission, 'Pay Equity: Time to Act', September 2007, p 1.
[37] *Queensland Services, Industrial Union of Employees AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others* (A/2008/5), p 45.
[38] Queensland Industrial Relations Commission, 'Pay Equity: Time to Act', September 2007, p 35
[39] *Child Care Case* (2006) 182 QGIG 318 at 357.

previous wage setting cases. A substantial pay raise was awarded to rectify "appallingly low wages".[40]

Case Study – Dental Assistants ERO (QLD)

The LHMU made an application for an ERO in December 2003 to increase remuneration, provide an extended career path, and grant additional allowances for dental assistants employed under the *Dental Assistants (Private Practice) Award*.

Although not strictly required to do so, the LHMU drew comparison to the rates of pay and classification structure in the *Engineering Award-State 2002* to demonstrate that the dental assistants' classification structure provided lower wages despite comparable qualifications.

The Full Bench of the Queensland Industrial Relations Commission granted a once off 11% increase to be phased in over two years beginning 13 February 2006. Additionally, the Full Bench established an Equal Remuneration Component to mitigate future inequalities that would arise from the lack of formalised bargaining under the Dental Assistants' Award. The Equal Remuneration Component is *"an amount of 1.25% of the base rate to be added to after the annual granting of the State Wage Case General Ruling".*[41] Dental assistants were also granted an increased uniform allowance and financial assistance to obtain qualifications.

4.3 Proposed ERO for WA

The IR Act should be amended to provide clear ERO powers for the WAIRC, based upon those in the Chapter Five, section 201, and section 204 of the Queensland Act. As noted above the Queensland ERO is preferable to the FW Act ERO as there is no requirement for a male comparator industry.

In addition to the provisions of the Queensland Act, the IR Act should include:

- A provision which states that an ERO must not reduce rates of remuneration, as in section 303 of the FW Act;
- A provision that explicitly prevents employers from contravening an ERO, as in section 305 of the FW Act; and
- A provision invalidating provisions of industrial instruments which are inconsistent with an ERO, as in section 306 of the FW Act.

Further, Section 6(ac) of the *Industrial Relations Act* should be amended to reflect commitment to equal remuneration as an object of the state industrial relations system and therefore read "ensure equal remuneration for men and women for work of equal or comparable value".

Recommendation eleven: that Western Australia adopt an ERO system modelled upon the provisions of the Queensland ERO provisions, with additional provisions from the *Fair Work Act 2009* (Cth).

[40] Ibid.
[41] Ibid p 36

5. State Awards

United Voice's position is that introducing a formal process for the updating of private sector State awards will come at a huge cost to government and will have little benefit for workers. Provided that the WAIRC retains adequate powers to review and amend State awards to lift entitlements where they fall behind industry standards, this is sufficient to ensure fair and adequate working conditions for workers in the state system.

The terms of reference of this review presuppose that a formalised award updating process for the state system is required. In the event that this review recommends an award updating process be developed it is imperative that this process does not mirror the failed award modernisation process in the national system. Any attempt to replicate this in the state system will have a devastating impact on workers conditions and will come at a significant cost to government and all stakeholders.

In this event, further consultation with the sector will be required in order to develop strong safeguards for any review process that will ensure there is no reduction in working conditions for all current and future workers. Further, developing clear structures and guidelines such as prioritising of certain awards and narrowing the scope of review would help facilitate an efficient process for review.

5.1 Relevance of State Awards

For more than 100 years, the award system has provided an important safety net for Australian workers. Over the years, awards have evolved to include a range of basic entitlements such as rates of pay, minimum and maximum working hours, annual leave, redundancy provisions, and penalty rates for overtime, weekend or night work.

Although enterprise bargaining has now become the primary method of setting working conditions, it is not logical in every sector of the economy. The practicalities of wide spread bargaining is difficult without the necessary economic wherewithal to be successful. This is further exacerbated by employers who do not see the value of enterprise bargaining. The private sector coverage of the state system is dominated by small and medium sized businesses that are unlikely to have the resources or inclination to negotiate an industrial agreement. Workers in this sector are likely to be reliant on the relevant award to ensure relevant and appropriate conditions of employment.

Nationally, award reliance continued to increase between 2014 and 2016. There are now 2.3 million Australian workers, 22.7% of all employees, who are on the National Minimum Wage or who are reliant on awards for their wages. This is up from 1.86 million, 18.8%, at May 2014. Most of those workers are women (61.8%), and most of them are adults (21 and over) (85.6%) at May 2016. Since 2009 the number of enterprise agreements has dropped by 31% and there has been a 13% drop in the number of workers covered by these agreements.

United Voice has always been an advocate for industry based awards. As a union with diverse coverage, we understand the limitations of bargaining to address the position of low paid workers. Nationally, many of our members work in award-reliant industries. Members in these industries are often in low paid and precarious employment and have little to no bargaining power. These workers are reliant upon industry awards to ensure fair and adequate working conditions, workplace rights and entitlements.

5.2 Award Reviews

It is beneficial for all stakeholders to have a streamlined state award system, which provides ease of access to stable and secure award conditions and enhanced employer compliance. While we acknowledge that some State awards have not been reviewed for some time, we have serious concerns about the complexity and resources required to update State awards. Our experience with award reviews in both the national and state system has been that it is a complex, resource intensive and costly process that has put employee entitlements at risk and has resulted in a deterioration of conditions for some workers.

WAIRC

The WAIRC currently has the power to vary or cancel awards by application or to vary awards on its own motion to reflect statutory or other requirements such as to promote efficiency or to facilitate implementation.[42]

In 2005-06 United Voice contributed to a review process of various State awards. This proved to be a very drawn out and resource intensive process that produced few benefits for our members. While some amendments to State awards were made, the impact of these amendments did not justify the extent of resources and costs on the part of the union required for this process. Further, the lack of safeguards and clear objectives underlying this process resulted in extensive and drawn out negotiations with other stakeholders in which the union was forced to justify existing entitlements in awards that were threatened under the guise of being 'modernised'.

FWC

The Federal award modernisation process began in March 2008. The FWC reviewed more than 1,500 awards and subsequently created 122 modern awards that came into effect on 1 January 2010. Unions were involved in every stage of this process making detailed submissions on dozens of awards and representing workers at hearings. In 2014 the four yearly reviews of modern awards commenced and are expected to be completed by mid-2018.

Like our experience in the state system, our experience of the award modernisation and award review process has been that the union has been required to direct a significant amount of resources, time and money to what has proved to be a long and complex process that has left many workers worse off.

Case Study – Cuts to Penalty Rates

There is no clearer example of the devastating impact on workers of an award review process than the recent cuts to penalty rates.

Applications to vary penalty rates in six hospitality and retail awards were among some of the specific issues considered by the four-year modern award review. During 2015 and 2016 a specially constituted Full Bench of the FWC heard evidence from 5,900 submissions and 143 lay and expert witnesses.

[42] *Industrial Relations Act 1979* (WA), ss 40, 40B.

United Voice made submissions and gave evidence as part of this process to protect penalty rates for our members. Workers provided evidence that penalty rates were an essential part of weekly wages and the devastating impact of a reduction in income where penalty rates were reduced.

A group of 11 large employer associations, including the Australian Hotels Association, argued that weekend and public holiday penalty rates in awards should be cut. They were supported by a range of conservative politicians.

In February 2017, the Full Bench handed down its 551-page decision to cut Sunday and public holiday penalty rates for workers. The cuts were effective on July 1st and the repercussions felt immediately by workers already working in low paid jobs. The federal court later turned down an attempt by United Voice and the SDA to protect the pay of low paid workers.

Australian workers will lose $1.42 billion in wages each year due to this one decision. Some of Australia's lowest paid workers are affected by this decision. 700,000 workers across the retail, pharmacy, hospitality and fast food sectors can have their take home pay reduced. Further, workers on EBAs are losing their safety net.

"I am a university student and my weekend and public holiday shifts are important to my pay, without the extra income my education will be at risk. I work extremely hard to be able to support myself and to cut my wages when I am doing the exact same work is incredibly unfair." (United Voice Delegate, Hospitality).

While the FW Act explicitly states that the award modernisation process is not intended to result in reductions to take home pay, hundreds of thousands of Australian workers have had their pay cut, in some instances by up to 30%, as a direct result of the cuts to penalty rates under the award review process. This is a pay cut low paid workers cannot afford and do not deserve and will lead to undue hardship for many workers already struggling to make ends meet.

"United Voice believes that the system has once again failed to protect workers and warns that business groups will attempt further attacks on worker entitlement in other industries. When our industrial relations laws are used by employers to cut pay and undermine the existing entitlements of workers in our country, when the courts refuse to intervene and when our Government refuses to utter a word in support of these workers, the system is broken." (Jo Schofield, United Voice National Secretary)

"Penalty rates are an essential part of weekly wages for millions of Australians and wages should never be cut…If the independent umpire can cut pay then that system is broken. It's not what it was designed or set up to do". (Sally McManus, ACTU Secretary)

5.3 Opposition to a WA Award Review Process

As noted above, United Voice's position is that introducing a process for the updating of private sector State awards will come at a huge cost to government and will have little benefit for workers. As can be seen from our experience of the federal award process, the unintended consequence was the ability to reduce entitlements under the guide of 'modernisation'.

In the event that a formal award updating process is developed, the State Government must ensure that the union movement is sufficiently resourced to contribute to the process to ensure no worker

is left worse off. This would mean providing funding for at least one FTE for UnionsWA and, as the union party to the majority of affected awards, at least one FTE for United Voice for the duration of this process and any future review.

However, it is important to make abundantly clear that this funding would only go part of the way to mitigating the strain on union resources. As our past experience has shown, this process is not something that can be completed in isolation and will require substantial input from across the union including union members, officials and executive.

Provided that the WAIRC retains adequate powers to review and amend State awards to lift entitlements where they fall behind industry standards, this is sufficient to ensure fair and adequate working conditions for all workers in the state system. In practical terms this means that entitlements for current and future employees can only be upheld or improved and will never go backwards.

Recommendation twelve: that introducing a formal process for the updating of private sector State award in the state system will come at a huge cost to government and will have little benefit for workers.

Recommendation thirteen: in the event that this review proceeds with an award updating process, further consultation with the union movement is required to develop extensive safeguards for the protection of current and future employees and to ensure all conditions are upheld or improved and are not reduced.

6. Compliance

6.1 Increased Penalties

The current maximum penalty for an employer (organisation, or association) breaching an agreement in the state system is $2,000. (Individuals are only liable for a $500 penalty).[43] These minimal penalties do not act as sufficient deterrence for unscrupulous employers from taking advantage of vulnerable workers.

The inadequacy of penalties and their inability to act as deterrence has been an issue taken up by unions in both the state and national system as contributing to the rising inequality in our country. Unfortunately, examples of worker exploitation are no longer rare. Rather, these practices have become normalized and are particularly prevalent in some sectors. For example, wages theft in Australia is now so common that in some places it's the business model. The 'savings' for employers generated by robbing employees of their wages are far greater than the fines that can be incurred. It is 'profitable' for employers to steal wages and pay the fine should a claim be brought for underpayment and back-pay. There have been documented instances of migrant workers forced to hand back part of their pay in cash, at the threat of visa cancellation.

> *"The massive increase in inadequate fines for dodgy employers from the Fair Work Ombudsman demonstrate that the rules are broken for working people…The fines are so low*

[43] *Industrial Relations Act 1979* (WA) s 83(4).

that companies are now stealing workers' wages, and big business is just copping the fines as a cost of doing business." – Sally McManus, ACTU Secretary[44]

Increased penalties for employers who are found to have breached awards or agreements in the state system on a number of identified categories could help deter this level of conduct against workers. This would include instances of wages theft and modern slavery.

6.2 Industrial Inspectors

Our experience is that industrial inspectors do not play a sufficient role in compliance. In the past unions have filled the gap left by industrial inspectors. However, reduced union resources have meant that unions are facing difficulties in adequately resourcing prosecutions for non-compliance. It is appropriate for unions to be actively prosecuting for breach of compliance through internal prosecution units. Unions should be entitled to retain penalties or fines from employers that would be used for the sole purpose of recovering money for workers subject to this conduct.

Recommendation fourteen: that employer compliance in the state system is enhanced by: higher penalties for identified conduct such as wages theft and modern slavery and ability for unions to run prosecutions for breaches.

7. Local Government

United Voice supports the submission made by the Australian Services Union in relation to the term of reference number 8 regarding local government employees.

[44] Australian Council of Trade Unions, 'Massive increase in inadequate fines for wage theft', 25 October 2017, https://www.actu.org.au/actu-media/media-releases/2017/massive-increase-in-inadequate-fines-for-wage-theft.