

SUBMISSION TO THE INDEPENDENT REVIEW OF THE WA INDUSTRIAL RELATIONS SYSTEM

Introduction

This submission is premised on the following historical perspective¹:-

- The current system evolved out of a concern that the ordinary civil law in the late 19th and early 20th centuries disadvantaged employees. It was designed to redress the imbalance by providing an appropriate forum where disputes could be ventilated and resolved and the outcomes have legal effect.
- The system evolved from dealing with disputes at the enterprise level to dealing with them on an industry level and eventually at a state and national level, with scope subsequently being provided for dealing with a number of employment related matters at the enterprise and individual level.
- The ordinary civil law still disadvantages employees, but it also disadvantages small contractors who provide personal services once carried out by employees and small businesses because the cost of litigation, the time involved in invoking the remedies available and the win or lose outcomes makes resort to the civil law an unattractive option.
- Disputes between employees and employers and between principals and subcontractors and between small businesses are not going to go away. There is a need for certain minimum conditions to be established, for them to be varied over time and circumstance and for an alternative dispute resolution forum, backed up by coercive powers, where disputes can be quickly resolved at low cost and with a minimum of formality.
- The WAIRC can fulfill this role in a way compatible with the federal industrial relations system.

Referral of Powers

The Commonwealth invites the States to harmonise industrial relations across the country by referring their industrial relations powers to the Commonwealth, which would see the *Fair Work Act 2009* apply to almost all employees. This should not occur because of the limitations of Commonwealth legislative power², the consequent extremely over prescriptive regulation it engenders and the abysmal bureaucratic functioning of all Commonwealth public service agencies. One only need compare the speed and effectiveness of the AIRC in assessing the no disadvantage test and compliance with legislative requirements before certifying collective agreements prior to Workchoices with the dismal performance – on every measure - of the Workplace Authority bureaucrats after Workchoices (and the subsequent amendments prior to the *Fair Work Act 2009*) came into effect.

¹ See Burt F *Annotated Industrial Arbitration Act 1912 -1949* Govt Printer, for history to mid 1950s and Marcel Brown *Western Australian Industrial Relations Law* 1987 UWA Press

² It is arguable that the making of modern awards by the AIRC, the entire unfair dismissal regime and the previous processes for approving employment agreements is beyond Commonwealth's legislative competence.

Mirror legislation

An alternative proposed is for the State to mirror the Commonwealth legislation. This should also be resisted because the Commonwealth legislation is – at least in theory – designed to not exceed the Commonwealth’s legislative powers. This limits the scope for the State to provide better legislation under its greater, albeit limited, plenary powers. For example, the judicial power of the Commonwealth is required to be exercised by a court whereas the State is not so constrained in the manner in which it provides a remedy. Commonwealth legislation also suffers from a peculiarly obscurantist drafting style that is prolix, circular and not conducive to ready comprehension by anyone not legally trained.

The Current State Legislation

The WA *Industrial Relations Act 1979* in its current form is the bastard offspring of a tryst between the section 50 parties designed to get the ALP’s 1984 amendments to the original 1979 Act passed by the Legislative Council in 1985: only the provisions they all agreed upon got through. Some of the outcome has been described as “a jurisprudential smorgasbord that offends every canon of good legal practice.”³

The Minimum Conditions of Employment Act 1993 was the Liberal Government’s safety net for the introduction of individual workplace agreements under the *Workplace Agreements Act 1993*. The Department advising the Minister for Labour Relations had no input into any of the legislation until asked to write the Second Reading speeches.

The legislative underpinnings of the State IR system have resulted in an industrial relations system that requires professional practitioners with considerable knowledge of the history of the system and of the legal precedents that apply but which are largely no longer properly relevant. It still has arcane practices required to be followed⁴. Despite the best efforts of the Registry staff and the Commissioners themselves, the system cannot be described as “user friendly” or generating desirable outcomes for the uninitiated.

While completely new legislation is desirable, the terms of reference do not indicate that this is the intention. Accordingly, this submission looks at the legislation as it now is and makes broad recommendations based on the existing provisions. Emphasis will be placed on the major aspects of the recommended changes. Only references to comparable or equivalent provisions in the current or previous Federal legislation will be made to reduce the size of the submission.

The Industrial Relations Act 1979

Part 1

The Act should be made to apply to all personal services relationships plus those relationships conferred by another Act or by consent and not be limited to employer-employee or union - employer relationships. A personal services relationship is one that would fall within the personal services income test in the *Income Tax Assessment Act 1997* and the legal status of the entities would not be a jurisdictional issue. Additional jurisdiction can be conferred for particular areas⁵ or as an eligible court under the *Fair*

³ Gerard Overman - Senior Assistant Crown Counsel in letter to author.

⁴ Eg A Notice of Answer & Counter Proposal being required in response to an unfair dismissal claim.

⁵ Eg The *Construction Contracts Act 2004*

Work Act 2009 or the parties can confer jurisdiction regardless of the nature of the relationship.

Part 2 – Division 1

The Commission should be constituted as the Industrial Division of the State court system (an Industrial Relations Court?), comprising the Commission in Court Session with all members being legally qualified and having comparable powers to a Supreme Court judge, legally qualified and industrially experienced Commissioners with the power to judicially determine disputes about rights and industrially experienced Commissioners with predominantly conciliatory and arbitral powers for dealing with disputes about interests. Day to day management of the Commission would remain in the hands of the Registrar as head of a government department.

Part 2 – Division 2

The Commission when exercising judicial powers (ie disputes about rights) should not be constrained by many of the common law doctrines that remain inequitable⁶. The unconscionable conduct and other *Trade Practices Act 1974* provisions designed to redress the balance of power in transactions between parties should be available as remedies to the Commission.

The Commission should have conferred the same associated jurisdiction as is conferred on the Federal Court and Federal Magistrates Court.

There should be no specific unfair dismissal or denied contractual benefits jurisdiction. Those matters should fall within a general right of an employee or subcontractor to receive fair treatment from the principal and refer a dispute over whether the treatment was fair or whether there were amounts owing under the contract, to the Commission for determination.

Particular applications alleging unfair treatment (unfair dismissals) should continue to have to be lodged within 28 days of the alleged unfair treatment occurring or the remedy becomes no longer available.

Reinstatement or re-employment should not be the preferred option of settling an unfair or unlawful dismissal allegation unless it was in an area such as the public service which had specific disciplinary process that had been breached.

There should be no exclusions from a remedy based on the size of the undertaking (ie number of persons engaged) or of the remuneration of the worker. There should be a graduated limitation on compensation available for economic loss depending on length of service and capacity to obtain alternative employment or engagement for such disputes. The longer the period of engagement and the less likelihood of alternative economic activity being available, the greater the compensation or damages that should be available. The damages principle applying from *Addis –v- Gramophone Company*⁷ should be expressly overturned. Aggravated damages should be available for particularly egregious bad treatment.

Equitable remedies other than compensation should be available.

⁶ See for example Joellen Riley's discussions in *Employee Protection at Common Law* 2005 Federation Press ISBN 9781862875906

⁷ (1909) AC 488

The powers of the Commission should be commensurate with its jurisdiction, including injunctive relief. There should be a power to award costs against a party or the party's representative on the same basis as existed under sections 658 and 824 of the *Workplace Relations Act 1996*.

Representation by a legal practitioner, union official or paid agent should only be allowed in rights disputes by leave of the Commission on the same basis as applied under Division 3 of Part 3 of the *Workplace Relations Act 1996*.

Any reference of a dispute to the Commission should be on the basis of simple dispute notification and the current service and "waiting for a response" requirements before listing the matter for a conference should be abolished. A dispute would be notified, the Commission would notify the other party of it and a conference should be scheduled as soon as practicable. The Commission should have powers to compel attendance.

If the conference did not resolve the dispute, programming orders would be made. The "rocket docket" approach adopted by the Federal Court with such changes as are consistent with unrepresented parties appearing should be followed. Mediation should be a compulsory part of the process along with Early Neutral Evaluation.

Any trial of a matter where the Commission was exercising judicial powers should not be conducted in the usual civil procedure pattern but strongly utilize the Commission's power to inform itself in any way it thinks fit and without regard to the rules of evidence, including adopting an interrogative approach and summoning witnesses and compelling evidence from them that it thinks will enable substantive justice to be done.

Division 2A Awards

Awards in their current form – applying to industries and classes of employee and with particular unions as parties to them – should be abolished and replaced with modern awards (made by way of General Orders) similar to those under the *Fair Work Act 2009*. However, such awards should not be confections of the major provisions of the awards that are being replaced as the AIRC has done with the modern awards under the *Fair Work Act 2009*.

If awards are to be a safety net then they should specify minimum wages, hours and leave entitlements and do away with most of the provisions relating to penalty rates and overtime which were largely inserted into awards for social reasons (ie to discourage employers from requiring employees to work unsociable or excessive hours) and not to reward employees. The work value of a particular employee's labour does not change with the hour the work is performed. If work covered by particular awards is significantly performed outside the standard Monday to Friday daylight hours, the remuneration payable can properly reflect this without penalty rates. With modern awards the relativities between classifications across awards becomes largely irrelevant.

Most of the attraction of AWAs and employee collective agreements for small business prior to the *Fair Work Act 2009* was the ability to get rid of penalty rates. There was and is no shortage of people willing to work all sorts of odd and long hours for flat rates that did not incorporate the penalty rates in awards, even in times of labour shortages.

The section 50 parties should be involved in the making of awards with the Commission in Court Session empowered to create and vary or cancel awards on its own motion. The awards would apply to persons engaged as employees in broad industries and the section 50 parties would not be named parties to the awards.

Division 2B – Industrial Agreements

Industrial agreements should be capable of being made between employees collectively (with unions as their bargaining agent with representation rights) on a similar basis as enterprise agreements under the *Fair Work Act 2009*. The agreements should be subject to a no disadvantage test measured against the modern award.

However the no disadvantage test should not be applied as a condition of registration but as a consequence of it: if the employee proved to be disadvantaged against the modern award at any stage of its operation, the employee would be entitled to be compensated to the extent of the disadvantage. The current practice of assessing agreements against the relevant award prior to registration simply invites clever drafting of agreements that subsequently enable the award provision to be avoided.

Agreements should be limited to 3 year terms and cease to operate at the end of that period unless replaced or re-approved by a majority of employees prior to expiry. The registration process should be simplified.

Bargaining for agreements should follow the practice envisioned under the *Fair Work Act 2009*.

Division 2C –Compulsory Conferences

This should be retained with such modifications as required to accommodate references of disputes by individuals regardless of their status (ie not being limited to unions or employers) and with stronger powers for resolving disputes about rights.

Division 2D – Miscellaneous provisions

Applications for interpretations of awards or agreements or contracts or statutory provisions should be available to any party bound by or subject to the instrument. Boards of reference should be abolished. Dispute settlement procedures with far more prescriptive provisions than is common should be compulsory and taken to be a minimum condition of employment and an implied term in any contract for services. Superannuation should cease to be a provision in awards but remain available for agreements.

Division 2E – Appeals

There should be several levels of appellate jurisdiction. At the top should remain the Industrial Appeal Court with appeals being available (by leave) from decisions of the President for errors of jurisdiction and errors of fact and law. The current limitations were designed to prevent appeals being taken on discretionary decisions based on interest rather than rights and are far too restrictive.

The President should be a part time position filled only for appeals and occupied as and when required by a Supreme Court justice.

Appeals to the President should be available from decisions of the Commission in Court Session which itself should be an intermediate appellate jurisdiction for dealing with appeals from decisions of Commissioners.

Division 2F – keeping employment records

This should be contained in the *Minimum Conditions of Employment Act 1993* or its replacement.

Division 2F – Right of Entry

The right of entry provisions should be retained but with the Commission having to be satisfied the person getting a permit is a fit and proper person (ie any objections to the permit being issued are not upheld).

Division 3 - General Orders

See submission in relation to making modern awards

Division 3A – MCE Act functions

See submission in relation to making modern awards

Division 3B - Collective Agreements

See submission in relation to making agreements

Division 4 – Industrial Organizations

The provisions should be repealed and replaced with provisions comparable to those in the RAO Schedule to the *Workplace Relations Act 1996*, but only in respect of organizations that are not federally registered organizations or branches of them. There should be no separate registration of branches of federal organizations: they can be granted representation rights without requiring them to be registered⁸ Disputes between members and their organizations would be dealt with by a Commissioner or the industrial magistrate depending on the nature of the dispute.

Breaches of provisions relating to elections should be civil penalty provisions and not offences.

Part IIA – Constituent Authorities

There should be a public service disciplinary tribunal constituted by a legally qualified Commissioner with jurisdiction to make findings of serious breaches of discipline under the *Public Sector Management Act 1994* and impose penalties. The tribunal would also act as an appellate tribunal against findings of and penalties imposed for minor breaches of discipline. The current provisions in the PSMA are an abomination as are the provisions for appeals against decisions by employing authorities.

The disciplinary provisions in the PSMA should be codified⁹ to enable proper charges to be formulated against public service officers and others subject to the Act and proper procedures put in place for the carrying out of investigations and institution of charges. The current disciplinary provisions are open to abuse by authorities and the investigation and determination of breaches of discipline is widely regarded as a joke.

There should be a public sector arbitrator with jurisdiction and appropriate powers to enforce public sector standards, to deal with disputes referred by employees (the right to refer not being limited to the relevant union) and to deal with breaches of the PSMA by employing authorities, including imposing penalties on individuals and orders for prohibition or mandamus and compensation for affected individuals.

Part IIC

This should be retained in appropriate form.

⁸ See South Australian legislation for an example

⁹ Eg similar to ss. 13 -15 *Public Service Act 1999* (Cwth)

Part III – Enforcement of Act awards etc

The industrial magistrates court was established in 1992 because enforcement proceedings for breach of federal awards were and are required to be heard by a court rather than a magistrate.

The court should be abolished and the jurisdiction it currently exercises should be transferred to the existing civil and criminal magistrate's courts. The industrial magistrate should continue to sit in the Commission and operate through the existing Registry. There can continue to be special rules applying to proceedings involving what is the industrial magistrate's "general jurisdiction." If the separate court is retained it should have conferred upon it an associated jurisdiction¹⁰ to deal with matters related to its primary role.

The provisions relating to civil penalties for breaches of the Act and awards etc should be repealed. They are a legacy of the historical enforcement provisions which made breaches of an award an offence triable under the *Justice Act 1902* and which required a separate charge to be made and determined and a separate penalty imposed for each "offence". Comparable provisions exist in the *Fair Work Act 2009* as a result of the insertion of bans clauses in federal awards in the 1960s and the courts ruling that each breach of a bans clause (eg by a strike lasting more than one day) was separate offence¹¹.

If comparable provisions to the current industrial laws existed in relation to offences under the Road Traffic Act for example, a motor vehicle accident that saw one person break an arm, a rib and a leg in the accident would result in 3 separate charges of causing injury by dangerous driving.

A proper enforcement regime should reflect that complying with an award is a single obligation and largely does not encompass separate discrete obligations. An employer generally has a single obligation to pay a wage each week. If the wage due for the week-comprising amounts due in respect of ordinary hours worked, for overtime, for sick leave taken, for public holidays not worked, for meal allowances and the like – is less than the amount calculated in accordance with the award, there is a single breach of the award, not a separate breach in respect of each clause.¹² There also should not be a separate breach each week where underpayments of entitlements occur over a period of time¹³.

The maximum penalty for breaches should be brought into line with the federal provisions. The costs provisions should be the same as those in the *Fair Work Act 2009* plus the ability to award costs against a representative.

Breaches of the Act should be civil penalty provisions and enforceable before the Commission in Court Session

Part IV – Industrial Appeal Court

See submission on appeals

¹⁰ See for example section 18 *Federal Magistrates Act 1999*

¹¹ See for example the discussion in Mills & Sorrell *Federal Industrial Law* Butterworths 1976

¹² See for example the obiter comments of Olney J in *Silberschneider –v- MRSA Earthmoving* (1987) 68

WAIG 1004

¹³ See for example s 719(2) *Workplace Relations Act 1996* and *Ingamells –v- Petroff* (1934) 50 CLR 451

Part V Registrar and Other Officers

Retain substantially as is in relation to powers

Part VIA – Freedom of Association

These should be made comparable with the provisions in the federal Act and be civil penalty provisions with substantially higher penalties

Part VID – Employer – Employee Agreements

These should be retained in simpler form only for employees with disabilities who are unable to perform to the usual standard of work of most employees.

Part VII – Miscellaneous

Industrial inspectors should be appointed by the Commission rather than the relevant department controlling them and remain independent of direction in the performance of their duties and the right to commence proceedings.

Industrial Agents should continue to be required to be registered if they are going to appear in the Commission and charge fees or otherwise carry out work for reward which would amount to engaging in legal practice. The right to appear should be subject to the Commission issuing an annual certificate. The certificate should be personal rather than corporate and the agent should be subject to a disciplinary regime whereby the Registrar can commence proceedings before the Commission in Court Session to revoke the certificate for proper cause.

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Graham McCorry is a former industrial inspector and senior legislation officer with the State Government's Department of Productivity & Labour Relations (now part of Department of Commerce) during the 1980's and 1990s. He was involved in the development of the Liberal Coalition government's "waves" of industrial relations legislation in the 1990s and developed and wrote most of the Department's submission to the Fielding Review of the WA Industrial Relations System. He has been a private industrial relations consultant since 1999, representing employers and employees and provided the Commonwealth Government with the full spectrum of industrial relations services for the Indian Ocean Territories for 4 years. He has provided advice on proposed industrial legislation to both State Government and Opposition since 2000.