



**THIRTY-NINTH PARLIAMENT**

**REPORT 22**  
**STANDING COMMITTEE ON LEGISLATION**  
**REPORT ON THE**  
***WORKFORCE REFORM BILL 2013***

Presented by Hon Robyn McSweeney MLC (Chairman)

March 2014

## STANDING COMMITTEE ON LEGISLATION

### **Date first appointed:**

**17 August 2005**

### **Terms of Reference:**

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

#### **“4. Legislation Committee**

- 4.1 *A Legislation Committee* is established.
- 4.2 The Committee consists of 5 Members.
- 4.3 The functions of the Committee are to consider and report on any Bill referred by the Council.
- 4.4 Unless otherwise ordered, any amendment recommended by the Committee must be consistent with the policy of a Bill.”

### **Members as at the time of this inquiry:**

Hon Robyn McSweeney MLC (Chairman)      Hon Sally Talbot MLC (Deputy Chairman)

Hon Donna Faragher MLC      Hon Dave Grills MLC

Hon Amber-Jade Sanderson MLC  
(Substituted Member for Hon Lynn  
MacLaren MLC)

### **Staff as at the time of this inquiry:**

Dr Colin Huntly (Clerk Assistant (Committees))      Suzanne Veletta (Advisory Officer (Legal))

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## **Government Response**

This Report is subject to Standing Order 191(1):

*Where a report recommends action by, or seeks a response from, the Government, the responsible Minister or Leader of the House shall provide its response to the Council within not more than 2 months or at the earliest opportunity after that time if the Council is adjourned or in recess.*

The two-month period commences on the date of tabling.



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EXECUTIVE SUMMARY AND RECOMMENDATIONS OF THE

REPORT OF THE STANDING COMMITTEE ON LEGISLATION

IN RELATION TO THE

*WORKFORCE REFORM BILL 2013*

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EXECUTIVE SUMMARY

- 1 On 11 December 2013, the Legislative Council referred the Workforce Reform Bill 2013 (**the Bill**) to the Standing Committee on Legislation (**the Committee**) for its consideration and report by Tuesday, 25 February 2014. An extension of time to report was subsequently granted to the Committee, to report no later than Monday, 10 March 2014.
- 2 The Legislative Council ordered that the Committee have the power to consider the policy of the Bill.
- 3 The Bill amends the *Industrial Relations Act 1979*, *Public Sector Management Act 1994* (**PSM Act**) and *Salaries and Allowances Act 1975* to:
  - Introduce the requirement for the state Industrial Relations Commission and Salaries and Allowances Tribunal to consider specified Government financial matters, including the Government Public Sector Wages Policy Statement, when making decisions; and
  - Introduce a scheme to provide a new statutory power for involuntary severance of public sector employees in certain circumstances. The details of the scheme are not provided for in the Bill, but are to be provided for in Regulations and Commissioner's Instructions.
- 4 Part 2 of the Bill would, if adopted, introduce a number of statutory relevant considerations into the IR Act relating to: the Government's public sector wages policy; the financial strategy of the State; and, the financial position of relevant public sector entities. The Committee has heard evidence from public sector employee representative organisations that their members are concerned that Part 2 of the Bill may have a deleterious effect on the independent judicial discretion of the Western Australian Industrial Relations Commission (**WAIRC**). The Committee has obtained independent expert advice that has confirmed this is not, in fact, the case because the WAIRC is not bound by these provisions.

- 5      However, the Committee has identified potential issues in the drafting of Part 2 of the Bill, in the form of possible unintended consequences. These relate to the possibility of the new statutory relevant considerations being transformed from questions of fact, which is how they are treated at present in the context of Government submissions to the WAIRC, into questions of law, which would be more amenable to appeal to the Supreme Court. The Committee has recommended an amendment to Clause 4 of the Bill that retains the policy objectives of the Bill, while limiting the possibility for the type of unintended consequences identified in this Report. The Committee has made a similar recommendation in relation to Part 4 of the Bill as it applies to the Salaries and Allowances Tribunal.
- 6      A minority of the Committee, while supporting the proposed amendment to Clause 4 of the Bill as drafted, have recommended that, in the alternative, Clause 4 of the Bill be deleted in its entirety. This view was expressed because the minority of the Committee believe that the proposed new statutory relevant considerations in Clause 4 can already be considered by the WAIRC under the current provisions of the IR Act. A minority of the Committee has made a similar recommendation in relation to Part 4 of the Bill as it applies to the Salaries and Allowances Tribunal.
- 7      Part 3 of the Bill proposes amending Part 6 of the PSM Act, dealing with redundancy, retraining and redeployment. The proposed amendments will introduce a new power of involuntary termination into this Part of the PSM Act. The actual mechanisms by which redundancy, retraining, redeployment and involuntary terminations will operate in practice, under the amended Part 6 of the PSM Act, are left largely to regulations that are yet to be drafted.
- 8      The Committee notes rights of appeal by affected public sector employees will be limited in the case of them being involuntarily terminated. This aspect of the Bill generated a significant amount of adverse comment from public sector employee representative organisations appearing before the Committee.
- 9      The Committee understands that the policy intent of Clauses 13 and 14 of the Bill is for involuntary termination to be used as a ‘last resort’. This is based on a combination of the original recommendation of the 2009 Economic Audit Committee which was subsequently endorsed by Government, statements in the Second Reading Speech to the Bill, the Explanatory Memorandum to the Bill, and statements made in evidence to the Committee by the Public Sector Commission.
- 10     A minority of the Committee has recommended that the clause providing for Part 6 of the PSM Act to extend to ‘an employee in a category prescribed by the regulations’ be deleted from the Bill. In the view of a minority of the Committee the potential for this provision to have very broad application in practice is not precluded by the text of the Bill. All the examples provided to the Committee appeared to a minority of the Committee to be adequately addressed by the categories identified at proposed new s94(1A)(a) and (b), together with other existing provisions under the PSM Act.

- 11 The Committee received evidence that the Department of Commerce suggested, during the drafting of the Bill that transitional arrangements were needed in relation to altering existing industrial instruments, agreements and contracts. The Bill does not address this question. The Committee has requested that the Minister advise the Legislative Council on the Government’s position relating to this issue.
- 12 A minority of the Committee is of the view that the absence of transitional provisions is potentially a breach of the common law principles relating to the alteration of employment conditions of public sector employees. This minority of the Committee recommends the Bill be amended to include transitional arrangements relating to altering existing industrial instruments, agreements and contracts.
- 13 The Committee was concerned that, as drafted, Clauses 13 and 14 of the Bill introduce a new category of Commissioner’s Instructions linked to the Part 6 regulation making powers. As Commissioner’s Instructions are largely administrative in nature, and given that adequate provision is already made for Commissioner’s Instructions at s22A of the PSM Act, the Committee has recommended that the references to Commissioner’s instructions at Clauses 13 and 14 of the Bill be deleted. The Public Sector Commission has indicated that this amendment should have no adverse administrative impact.
- 14 The Committee was also concerned that proposed new section 95B(2)(a) of the Bill is in the nature of a Henry VIII clause. That is to say, it provides that Acts of Parliament can be amended by means of subsidiary legislation, in this case, regulations made under Part 6 of the PSM Act. This has insufficient regard for the legislative sovereignty of Parliament and the Committee has recommended that the subparagraph be deleted from the Bill.
- 15 The Committee has also recommended that there be a periodic review of Part 6 of the PSM Act to occur at least once every four years.

**Recommendations**

Recommendations are grouped as they appear in the text at the page number indicated:

Page 4

**Recommendation 1: The Committee recommends that the Public Sector Commissioner consider amending Commissioner’s Circular, 2010-03, ‘Policy for public sector witnesses appearing before parliamentary committees’ at Item 5.7 to reflect the Legislative Council’s advice for public sector witnesses before Committees ‘Public Sector Employees: Liaison with Parliamentary Committees’ at Item 4. The Commissioner should advise the Legislative Council of his decision on this matter within 28 days of this Report being tabled.**

**Recommendation 2: The Committee recommends that the *Workforce Reform Bill 2013* be amended as follows:**

**Clause 4, proposed new *Industrial Relations Act 1979* s26(2A), page 3, line 7:**

**Delete proposed paragraph (2A) as printed, in its entirety.**

**Insert the following:**

**(2A) In making a public sector decision the Commission must take into consideration any submissions made to the Commission on behalf of the State government that is to include such matters as:**

**(a) any *Public Sector Wages Policy Statement* that is applicable in relation to negotiations with the public sector entity;**

**(b) the *financial position and fiscal strategy of the State* as published by the Department of the Treasury in publications including:**

**(i) the most recent Government Financial Strategy Statement released under the *Government Financial Responsibility Act 2000* section 11(1);**

**(ii) the most recent Government Financial Projections Statement released under the *Government Financial Responsibility Act 2000* section 12(1);**

**(iii) the most recent Government Mid-year Financial Projections Statement released under the *Government Financial Responsibility Act 2000* section 13(1); and**

**(iv) any other submissions made to the Commission on behalf of the State Government;**

**(c) the *financial position* of the public sector entity.**

Page 50

**Recommendation 3:** The Committee recommends that the *Workforce Reform Bill 2013* be amended as follows:

**Clause 13, proposed new *Public Sector Management Act 1994* s94(2A)(b), page 8, line 26:**

Delete the words '*or determined in accordance with the Commissioner's instructions*'

**Clause 14, proposed new s95A(4), page 10, line 16:**

Delete the words '*or determined in accordance with the Commissioner's instructions*'

Page 51

**Recommendation 4:** The Committee recommends that the *Workforce Reform Bill 2013* be amended as follows:

**Clause 14, proposed new *Public Sector Management Act 1994* s95B(2), page 10, line 28:**

Delete all text from '—' to line 31 after '(b)', inclusive.

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**Recommendation 5:** The Committee recommends that, during the Second Reading debate on the Bill, that the Minister advise the Legislative Council on the Government's position to the '*suggestion that there needed to be transitional provisions for prospective arrangements*'.

**Recommendation 6: The Committee recommends that the Bill be amended as follows:**

**Page 13 — after line 18 — to insert as follows:**

**96. Review of Part 6 — Redeployment and Redundancy of employees**

- (1) The Minister is to cause a review of the operation and effectiveness of this Part of the Act as soon as is practicable on or before —
  - (a) the fourth anniversary of the commencement of this section; and
  - (b) the expiry of each 4 yearly interval after that anniversary.
- (2) The Minister may advise the Public Sector Commissioner of the findings of any review under subsection (1) above, not more than 28 days prior to tabling a Report under subsection (4) below
- (3) The Minister shall cause a Report of the findings of any review under subsection (1) above, to be tabled in both the Legislative Assembly and the Legislative Council.

***Minority Recommendations***

Recommendations of a minority of the Committee are grouped as they appear in the text at the page number indicated:

Page 34

**Minority Recommendation A**

A minority of the Committee recommends that:

*Workforce Reform Bill 2013*, at page 3, line 4, Part 2, Clause 4 —

Delete the Clause

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**Minority Recommendation B**

A minority of the Committee recommends that:

*Workforce Reform Bill 2013*, at page 15, line 1, Part 4 —

Delete the Part.

**Minority Recommendation C**

A minority of the Committee recommends that:

*Workforce Reform Bill 2013*, at page 8, line 11, subparagraph (b) —

Delete ‘; or’

and

Insert ‘.’

At page 8, line 12, subparagraph (c) —

Delete all of subparagraph (c).

**Minority Recommendation D**

A minority of the Committee recommends that:

The *Workforce Reform Bill 2013* be amended to include transitional arrangements to allow existing instruments, agreements and contracts to expire as per existing terms of such instruments, agreements and contracts unless they are amended by mutual agreement between the parties such as is currently the standard requirement for all employers seeking to amend instruments, agreements and contracts.



## REPORT OF THE STANDING COMMITTEE ON LEGISLATION

### IN RELATION TO THE

### *WORKFORCE REFORM BILL 2013*

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#### **1 REFERENCE AND PROCEDURE**

- 1.1 After being received from the Legislative Council and proceeding to its Second Reading on Thursday, 28 November 2013, the *Workforce Reform Bill 2013* (the **Bill**) was referred to the Committee on Wednesday, 11 December 2013 by the Legislative Council. The reporting date nominated in the order of reference was Tuesday, 25 February 2014. On Tuesday, 25 February 2014 the Committee reported to the Legislative Council, requesting an extension of time to report until Monday, 10 March 2014. The request for an extension of time to report was granted.
- 1.2 The Standing Committee on Legislation (the **Committee**) was referred the power to inquire into and report on the policy of the Bill.
- 1.3 Debate on the Second Reading of the Bill in the Council was forestalled by a procedural discharge to this Committee on motion of Hon Nick Goiran MLC. Accordingly, no part of the policy of the Bill has been debated, or agreed to, by the Legislative Council. In such circumstances, given the anticipation principle, the Committee is prevented from making any authoritative pronouncements on the policy of the Bill as agreed by the House.
- 1.4 From a Reporting perspective, this means that, when referring to '*the policy of the Bill*', the Committee will be referring in this Report to the '*expressed policy of the Bill as First Read*'. In addition, when moving for referral to this Committee, Hon Nick Goiran MLC raised two specific issues, namely:<sup>1</sup>

- *Western Australia is apparently the last jurisdiction in this nation to introduce this mechanism of involuntary severance as a measure of last resort. It seems to me that if that is indeed the case, the chamber would benefit from knowing what the experience has been in those other states and to what extent there have been any difficulties; and*

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<sup>1</sup> Hon Nick Goiran MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, Wednesday, 11 December 2013, p7656.

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- ... it strikes me as odd that there has been a suggestion that the committee would be consulted, because my understanding of the workings of that committee is that it works in a necessarily reactive fashion rather than participating in some consultative fashion in the drafting of the regulations.<sup>2</sup>

- 1.5 The Committee called for submissions, by means of contacting 18 key stakeholders directly; and also by way of an advertisement placed in the general news section of the West Australian on Saturday, 21 December 2013.
- 1.6 Submissions closed on Friday, 17 January 2014, with one submission from a private citizen, 10 submissions received from employee representative organisations,<sup>3</sup> and two submissions received from government agencies.<sup>4</sup> All submissions are available on the Committee website.
- 1.7 At a regularly constituted meeting of the Committee held on Wednesday, 22 January 2014, the Committee resolved, pursuant to SO163(2), to substitute Hon Amber Jade Sanderson MLC, in place of Hon Lynn MacLaren MLC, for the duration of the inquiry into the Bill.
- 1.8 Thirteen public hearings were held, across 5, 6, 7, 12 and 14 February 2014. In addition, two private hearings were held, one on 6 and the other on 14 February 2014.
- 1.9 Details of stakeholders invited to make a submission, submissions received and the hearing of witnesses, are contained in **Appendix 1**. The Committee wishes to thank all those stakeholder groups and Government agencies that invested the time in

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<sup>2</sup> This is indeed the case, as there is no consultation with the Joint Standing Committee on Delegation with respect to disallowable instruments such as regulations. Rather, that Committee only scrutinises disallowable instruments after they have been notified in the Gazette. It is therefore unclear what was intended by the reference in the Second Reading Speech to consultation in the following passage: *'The content of those regulations will in the normal manner of these matters be subject to appropriate consultation and consideration by the Parliament through its Joint Standing Committee on Delegated Legislation.'* (Hon Helen Morton MLC, Minister for Mental Health, *Parliamentary Debates (Hansard)*, Thursday, 28 November 2013, p 6855).

<sup>3</sup> Submission No 1 from CPSU/CSA, *'Submission on the Workforce Reform Bill 2013'* 16 January 2014; Submission No 2 from Unions WA, *'Submission on the Workforce Reform Bill 2013'* 16 January 2014; Submission No 3 from United Firefighters Union of Australia (WA), *'The Workforce Reform Bill 2013'* 16 January 2014; Submission No 4 from WA Police Union, *'Workforce Reform Bill 2013'* 16 January 2014; Submission No 5 from the ASU(WA), *'Submission on Workforce Reform Bill 2013'* 17 January 2014; Submission No 7 from United Voice, *'Submissions to the Standing Committee on Legislation regarding the Workforce Reform Bill 2013'* 17 January 2014; Submission No 8 from WA Prison Officers' Union, *'Submission on the Workforce Reform Bill 2013'* 16 January 2014; Submission No 9 from the ARTBIUE(WA), *'Submissions Re The Workforce Reform Bill 2013'* 17 January 2014; Submission No 10 from HSUWA, *'Submission on Workforce Reform Bill 2013'* 17 January 2014; and, Submission No 12 from SSTUWA, *'SSTUWA Submission on Workforce Reform Bill 2013'* 17 January 2014.

<sup>4</sup> Submission No 11 from Department of Premier and Cabinet, *'The Workforce Reform Bill 2013'* 16 January 2014; and, Submission No 13 from the Public Sector Commission, *'The Workforce Reform Bill 2013'* 21 January 2014.

making submissions on the inquiry. Given the short reporting deadline faced by the Committee, it wishes to thank all witnesses who made themselves available in person at hearings during the inquiry, including some witnesses who appeared on more than one occasion and at very short notice.

- 1.10 The Committee notes that scrutiny of Bills should be viewed as a quality-assurance process, as much as being a core function of the machinery of a sovereign Parliament. Despite the tensions that must exist in a healthy democracy between the Legislature and the Executive, at the end of the day, if legislation is passed by the Parliament, it needs to be clear; workable; as free as possible of unintended consequences; and, not result in unreasonable administrative burdens being created. The Committee notes that this is actually in the interests of all parties. This is quite apart from the basic tenet of democracy, namely; that the people who are bound by laws that are made, have a right to participate in how those laws are made.
- 1.11 In this inquiry, the Committee has been greatly assisted by the willingness of all witnesses to be available at short notice. They provided thoughtful responses to questions arising from the order of reference, and rendered every possible help in gathering relevant evidence in a timely and detailed manner.
- 1.12 The Committee notes that guidelines provided by the Public Sector Commission attempt to clarify the practical issues faced by public sector witnesses before Parliamentary Committees.<sup>5</sup> The Committee also notes that the Legislative Council has provided its own advice to such witnesses.<sup>6</sup> An important point of difference between these documents relates to claims of public interest immunity in response to Committee requests for information. At item 5.7 of the Public Sector Commission Circular, it makes it clear that such claims can only be made with the express consent of the relevant Minister. The Legislative Council Guidelines, at item 4 states as follows:

*Claims that any information should be withheld (for example, on grounds such as public interest immunity, legal professional privilege or commercial-in confidence) should be made by the responsible Minister providing precise details and reasons. The appropriateness of the claim is a matter for the committee, and ultimately the House, to determine.*

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<sup>5</sup> [Commissioner's Circular, 2010-03: Policy for public sector witnesses appearing before parliamentary committees](#) (accessed 10 February 2014).

<sup>6</sup> [Public Sector Employees: Liaison with Parliamentary Committees](#) (accessed 10 February 2014).

- 1.13 The Committee notes that agencies appearing before this Committee expressly asserted public interest immunity from provision of requested documents on two occasions.<sup>7</sup>
- 1.14 The Committee accepts that the public sector witnesses before the Committee were, in each case, acting in good faith and, in accordance with the Public Sector Commissioner's Circular. Nevertheless, the Legislative Council Guidelines do require such claims of public interest immunity to be made in a particular manner. In making this observation, the Committee is mindful of both the potential disciplinary consequences for public sector employees who fail to materially comply with Commissioner's Circulars and the statutory obligations of Ministers under ss82 and 83 of the *Financial Management Act 2006* with respect to Parliamentary questions.<sup>8</sup>
- 1.15 The Committee therefore **recommends** that:

**Recommendation 1: The Committee recommends that the Public Sector Commissioner consider amending Commissioner's Circular, 2010-03, 'Policy for public sector witnesses appearing before parliamentary committees' at Item 5.7 to reflect the Legislative Council's advice for public sector witnesses before Committees 'Public Sector Employees: Liaison with Parliamentary Committees' at Item 4. The Commissioner should advise the Legislative Council of his decision on this matter within 28 days of this Report being tabled.**

## 2 THE PURPOSE OF THE BILL

- 2.1 In general terms, the Bill amends three Acts - the *Industrial Relations Act 1979 (IR Act)*, *Public Sector Management Act 1994 (PSM Act)*, and the *Salaries and Allowances Act 1975 (SA Act)* to:

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<sup>7</sup> Letter from Mr Mal Wauchope, Commissioner, Public Sector Commission, 'Workforce Reform Bill' 19 February 2014; further Letter from Mr Mal Wauchope, Commissioner, Public Sector Commission, 'Workforce Reform Bill' 20 February 2014, including correspondence with Mr Peter Conran, Director General, Department of Premier and Cabinet; and, Letter from Mr Brian Bradley, Director General, Department of Commerce, 'Re: Request for further and better particulars – Workforce Reform Bill' 18 February 2014.

<sup>8</sup> *Financial Management Act 2006* s82 provides that:

- 1) *If the Minister decides that it is reasonable and appropriate not to provide to Parliament certain information concerning any conduct or operation of an agency, then within 14 days after making the decision the Minister is to cause written notice of the decision —*
- a) *to be laid before each House of Parliament or dealt with under section 83; and*
  - b) *to be given to the Auditor General.*

- a) provide a new statutory involuntary severance power (with appeal restrictions); and
- b) require certain wage-determining bodies - the Western Australian Industrial Relations Commission (**WAIRC**) and the Salaries and Allowances Tribunal— to consider the Government’s public sector wages policy, the State’s financial position when performing certain functions. In addition, the WAIRC is required to consider the ‘*financial position*’ of any public sector agency when making certain determinations, including wage-related decisions.
- 2.2 The purpose of the Bill is described in the *Workforce Reform Bill 2013 Explanatory Memorandum* as follows (emphasis added):<sup>9</sup>

***Involuntary severance power.***

*to provide the capacity to implement enhanced and more flexible redeployment arrangements that may ultimately end with the involuntary severance of employees that are surplus to an agency’s requirements or whose post, office of position has been abolished and cannot effectively be redeployed.*

***Wage determining bodies to consider the State’s financial position when performing certain functions.***

*[to] ensure that decisions made by the WAIRC and the SAT have appropriate regard to the Public Sector Wages Policy Statement, the State’s financial position and fiscal strategy, and in relation to the WAIRC, the financial position of the relevant public sector agency.*

**3 CONTEXT— THE BILL IS PART OF A PUBLIC SECTOR WORKFORCE REFORM PROGRAM**

- 3.1 The Bill ‘*forms part of a package of public sector workforce savings and reform initiatives that reflect the Government’s firm commitment to address those challenges*’.<sup>10</sup>
- 3.2 As previously noted, the Committee was referred the power to inquire into the policy of the Bill. This task presented a number of procedural challenges. The Legislative Council has yet to agree to the Second Reading of the Bill. In the normal course of

<sup>9</sup> [Workforce Reform Bill 2013 Explanatory Memorandum](#) p1 (Accessed 10 February 2014).

<sup>10</sup> Hon Helen Morton MLC, Minister for Mental Health, *Parliamentary Debates (Hansard)*, Thursday, 28 November 2013, p6854.

such referrals, the Minister in charge of the Bill would have had an opportunity to address policy-related issues raised during the Second Reading Debate.

3.3 In the absence of a Second Reading Debate, it is problematic for Committees to direct questions relating to Policy to public sector witnesses. In general terms, by convention, Committees may ask public sector witnesses to explain Government policy, particularly at an implementation level. However, as this Committee has been reminded,<sup>11</sup> without either an express Ministerial direction, or approval, public sector witnesses are not free to discuss policy development issues.

3.4 Given the tightness of the reporting deadline given to this Committee, it has not been possible to engage in lengthy deliberations over questions of policy development. Accordingly, the Committee has had to rely on the following sources of policy information in order to assess the extent to which the policy of the Bill as first read gives form and effect to relevant Government policy:

- Recommendation 39 of the October 2009 Economic Audit Committee Final Report (the **2009 EAC Report**):<sup>12</sup>
- An answer, provided by the then Treasurer, to a question on notice, seeking an indication of which recommendations of the 2009 EAC Report had been adopted as Government policy.<sup>13</sup>
- The Minister's Second Reading Speech to the Bill.<sup>14</sup>
- The Explanatory Memorandum to the Bill.<sup>15</sup>
- The *Workforce Reform Bill 2013*.
- A limited number of public and private documents tabled in response to questions.

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<sup>11</sup> Mr Mal Wauchope, Commissioner, Public Sector Commission, *Transcript of Evidence*, Wednesday, 5 February 2014, p6; Ms Sandra Newby, Manager – Public Sector Labour Relations, Department of Commerce, *Transcript of Evidence*, Wednesday, 5 February 2014, p2; Mr Brian Bradley, Director General, Department of Commerce, Email Correspondence, Friday, 14 February 2014; and, Mr Mal Wauchope, Commissioner, Public Sector Commission, *Transcript of Evidence*, Friday, 14 February 2014, p6.

<sup>12</sup> Economic Audit Committee Inquiry. Final Report - [Putting the Public First: Partnering with the Community and Business to Deliver Outcomes](#) October 2009 at p159 (accessed 10 February 2014).

<sup>13</sup> Answer to Question on Notice 5923 asked in the Legislative Assembly by Hon. John Kobelke and answered by Hon Christian Porter (Treasurer and Attorney-General), *Parliamentary Debates (Hansard)*, 17 May 2011, p 3509. (Legislative Assembly [Tabled Paper No. 3319](#). Tabled on 17-May-2011, p17 (Accessed 10 February 2014)).

<sup>14</sup> Hon Helen Morton MLC, Minister for Mental Health, *Parliamentary Debates (Hansard)*, Thursday, 28 November 2013, p6854.

<sup>15</sup> [Workforce Reform Bill 2013 Explanatory Memorandum](#) (Accessed 10 February 2014).

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## 4 THE STRUCTURE OF THE BILL IN SUMMARY

4.1 Part 1 of the Bill contains preliminary clauses.

4.2 Part 2 of the Bill amends the IR Act to provide:

- a) Certain matters the WAIRC must consider when making a '*public sector decision*'. Clause 4 proposes inserting new subsections into section 26 of the IR Act, detailing the new '*statutory relevant considerations*',<sup>16</sup> for this purpose.
- b) Appeal and jurisdictional restrictions, requiring that the Arbitrator and Board of the WAIRC shall not have jurisdiction to deal with involuntary termination decisions under the proposed sections 94 and 95A, and section 97(1)(a) of the PSM Act (Clauses 5 to 7 of the Bill). In such circumstances, there is to be a limited power of the WAIRC to review the calculation of termination benefits only.

4.3 Part 3 of the Bill amends the PSM Act. Clauses 8 to 17 of Part 3 of the Bill provide:

- a) An expanded regulation-making power, specifically with respect to involuntary terminations. Clause 13 proposes that section 94 be amended for this purpose.
- b) A new involuntary termination power. Clause 14 would insert a new section 95A (Termination of employment of registered employees); and a new section 95B (Inconsistent provisions, instruments and contracts).
- c) Appeal restrictions. When considering appeals against involuntary terminations, the Bill would provide that the WAIRC be confined to considering whether the '*public sector decisions*' have fairly applied the relevant regulations. The WAIRC is to be prevented from exercising any further appeal jurisdiction with respect to involuntary terminations. Clause 15 would delete current section 95 of the IR Act (Deputy Registrar matters) and proposes to insert section 96A (jurisdictional restrictions relating to involuntary termination decisions).
- d) Other related amendments.

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<sup>16</sup> A failure to take due cognisance of express statutory considerations can give rise to a Supreme Court Action for judicial review (*Rules of the Supreme Court 1971* O56, r1), for either an error of law on the face of the record (*R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 at 32-35; *Collector of Customs (Cth) v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287; *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 395), or where the resulting decision is so unreasonable as to be perverse (*Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374 at 410). The content of individual submissions, in the absence of a statutory relevant consideration, is generally regarded as a question of fact, and not of law.

4.4 Part 4 of the Bill, comprising Clauses 18 and 19, proposes amending the SA Act to provide that:

- a) Certain statutory relevant considerations must be considered by the Salaries and Allowances Tribunal but that:<sup>17</sup>

*Having regard for the proper separation of powers, the tribunal will not be bound to apply this consideration with respect to determinations or recommendations covering officers and members of the Parliament, the Clerks of the Legislative Assembly and Legislative Council, the Governor or the judiciary. It also will not apply to local government chief executive officers or councillors.; and,*

- b) A new section 10A be inserted into the SA Act (Clause 19 of the Bill). The statutory relevant considerations are identical to those that will apply to the WAIRC under clause 4 of the Bill, though the Committee notes the exclusion of reference to the *'financial position of the public sector entity'*, which is not replicated in the SA Act amendments.

## 5 SKELETAL NATURE OF THE BILL

5.1 Legislation can be described as *'skeletal'* where it covers major policy matters and principles in the barest terms, and leaves detailed, substantive matters, to be set out in regulations. These regulations are typically made by the Executive government, sometime after the legislation has been passed by the Parliament. Legislation that is skeletal in nature interferes with the generally accepted fundamental legislative principle that Parliament is the principal legislative body in the State; and, adversely impacts on the ability of Parliament to scrutinise Executive government. This has been documented in numerous publications and reports.<sup>18</sup>

5.2 The main issues that have been identified with skeletal legislation, are as follows:

<sup>17</sup> Hon Helen Morton MLC, Minister for Mental Health, Parliamentary Debates (Hansard), Thursday, 28 November 2013, p6855.

<sup>18</sup> See: *'Bones Without Flesh – The Issues with Skeletal Legislation'*, paper delivered by the Hon Adele Farina MLC to the Australia-New Zealand Scrutiny of Legislation Conference, Brisbane, 26-28 July 2011 (accessed 17 February 2014); *'Some Accountability Issues in Scrutinising Subsidiary Legislation made under Skeletal Acts'*, paper delivered by Mr Joe Francis, MLA at the Scrutiny of Legislation Conference, Canberra, 8 July 2009, p1-2 (accessed 17 February 2014); *'Leaving it to the Regs – The pros and cons of dealing with issues in subordinate legislation'*, a paper delivered by Mr Stephen Argument at the Australia-New Zealand Scrutiny of Legislation Conference, Brisbane, 26-28 July 2011, pp8-9; and, Western Australia, Legislative Council, Standing Committee in Uniform Legislation and Statutes Review, Report 61, *Occupational Licensing National Law (WA) Bill 2010*, 14 April 2011, p20.

- a) Regulations '*fill in the detail*' of the legislative framework, rather than having such detail clearly articulated in primary legislation.
- b) The scant detail set out in primary legislation gives Parliament inadequate information about what the regulations will eventually contain, thereby undermining the scrutiny function of the Parliament.
- c) Members of Parliament, as representatives of the people of Western Australia, are denied the ability to clarify, contest, challenge and defend the policy behind relevant legislation. This has an incalculable effect in diminishing Parliamentary sovereignty within the system of government.
- d) The empowering provisions contained within skeletal legislation can be so widely drafted, as to authorise regulations that will rarely, if ever, be capable of being characterised as '*beyond power*'. This can have the practical effect of negating any effective post-legislative scrutiny by the Joint Standing Committee on Delegated Legislation.<sup>19</sup>
- e) Regulations are usually only subject to parliamentary scrutiny after they have come into force. As such, the more substantive detail regulations contain, the greater potential for them to impact the rights of citizens, both before such legislative instruments have been scrutinised by Parliament, and without the policy behind such impacts being tested by the democratic representatives of the people.
- f) An increased incidence of '*Henry VIII*' clauses, authorising regulations that override the provisions of Acts and other primary legislation.

5.3 Arguments raised in support of skeletal legislation include:<sup>20</sup>

- a) there being a total flexibility to cater for changing circumstances;
- b) avoiding parliamentary overload, given the sheer volume of legislation parliaments are asked to pass; and
- c) dealing with complex or novel subject matters which are perceived to be beyond the capacity of parliaments to deal with.

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<sup>19</sup> As noted by Hon Nick Goiran MLC, there is no precedent which suggests that consultation with the Joint Standing Committee on Delegated Legislation relating to the drafting of regulations might occur. Indeed, such regulations are only noted by this Committee once they have been published in the Gazette or tabled in the House. (Hon Nick Goiran MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, Wednesday, 11 December 2013, p7656.)

<sup>20</sup> '*Bones Without Flesh – The Issues with Skeletal Legislation*', paper delivered by the Hon Adele Farina MLC to the Australia-New Zealand Scrutiny of Legislation Conference, Brisbane, 26-28 July 2011 (accessed 17 February 2014) p17.

5.4 As will be discussed in this Report, the Committee is of the view that there are a number of features of this Bill that qualifies it as skeletal.

**6 NEW STATUTORY RELEVANT CONSIDERATIONS INTRODUCED FOR THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION AND SALARIES AND ALLOWANCES TRIBUNAL.**

**The scope of clause 4 – the WAIRC making a ‘public sector decision’**

6.1 At present, the WAIRC’s jurisdiction requires it to have ‘*cognizance of and authority to enquire into and deal with any industrial matters*’, including salaries, wages or other remuneration or other conditions of employment.<sup>21</sup> Also at present, the WAIRC may make an order that the dismissal of an employee was harsh, oppressive or unfair.<sup>22</sup> The Committee notes in particular that the IR Act at s26(1) already requires that the WAIRC:

- a) *shall act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms; and*
- b) *shall not be bound by any rules of evidence, but may inform itself on any matter in such a way as it thinks just; and*
- c) *shall have regard for the interests of the persons immediately concerned whether directly affected or not and, where appropriate, for the interests of the community as a whole; and*
- d) *shall take into consideration to the extent that it is relevant —*
  - (i) *the state of the national economy;*
  - (ii) *the state of the economy of Western Australia;*
  - (iii) *the capacity of employers as a whole or of an individual employer to pay wages, salaries, allowances or other remuneration and to bear the cost of improved or additional conditions of employment;*

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<sup>21</sup> *Industrial Relations Act 1979* s23.

<sup>22</sup> *Ibid* at s23A.

- (iv) *the likely effects of its decision on the economies referred to in subparagraphs (i) and (ii) and, in particular, on the level of employment and on inflation;*
- (v) *any changes in productivity that have occurred or are likely to occur;*
- (vi) *the need to facilitate the efficient organisation and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises;*
- (vii) *the need to encourage employers, employees and organisations to reach agreements appropriate to the needs of enterprises and the employees in those enterprises.*

6.2 Clause 4 of the Bill proposes that a new section 26(2B) be introduced into the IR Act, following the above provision, listing certain matters the WAIRC must consider when making a ‘*public sector decision*’.

6.2.1 A ‘*public sector decision*’ is defined in the Bill to include any of the following:

- a) *an order made under section 42G that will be included in an agreement that will extend to and bind a public sector entity or its employing authority (as defined in the Public Sector Management Act 1994 section 5);*
- b) *an enterprise order that will extend to and bind a public sector entity or its employing authority (as defined in the Public Sector Management Act 1994 section 5);*
- c) *if the matters set out in subsection (2A)(a), (b) and (c) are relevant to the decision, any other decision that will extend to and bind a public sector entity or its employing authority (as defined in the Public Sector Management Act 1994 section 5);*

6.2.2 It will be appreciated that proposed new IR Act s26(2B)(c) above applies to a broad range of possible WAIRC decisions.<sup>23</sup>

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<sup>23</sup> Submission No 2 from UnionsWA, ‘*Submission on Workforce Reform Bill 2013*’ 16 January 2014, p2; and, Submission No 7 from United Voice, ‘*Submissions to the Standing Committee on Legislation regarding the Workforce Reform Bill 2013*’ 17 January 2014, p8.

6.3 The Bill, at Part 2, Clause 4, proposed s26(2A), stipulates three matters, or ‘*statutory relevant considerations*’, that the WAIRC must consider, when making a ‘*public sector decision*’. By way of explanation, it should be noted that, within administrative law, ‘*relevant considerations*’ are defined as being:<sup>24</sup>

*Considerations that a decision-maker must take into account when exercising discretionary power. Failure to take into account a relevant consideration or taking into account an irrelevant consideration is a ground for judicial review at general law.*

6.4 The three statutory relevant considerations proposed in the Bill, for insertion at IR Act s26(2A), are as follows:

- a) any **Government Public Sector Wages Policy Statement** that is applicable in relation to negotiations with the public sector entity;
- b) the **financial position and fiscal strategy of the State** as set out in:
  - (i) the most recent Government Financial Strategy Statement released under the Government Financial Responsibility Act 2000 section 11(1);
  - (ii) the most recent Government Financial Projections Statement released under the Government Financial Responsibility Act 2000 section 12(1);
  - (iii) any submissions made to the Commission on behalf of the State government.
- c) the **financial position** of the public sector entity.

6.5 Part 4 of the Bill also proposes to introduce a new section 10A into the SA Act, in identical terms to those above, but with no equivalent to subclause ‘c)’ above, relating to ‘*the financial position of the relevant public sector entity*’.<sup>25</sup>

6.6 These matters are discussed further below, at paragraphs 6.34 to 6.57.

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<sup>24</sup> Butterworths Australian Legal Dictionary.

<sup>25</sup> *Salaries and Allowances Act 1975* ss6(1)(a), (ab), (d) and (e).

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*New South Wales and Queensland equivalent provisions*

- 6.7 The Committee has considered the equivalent provisions in the New South Wales and Queensland legislation. That is to say, similar provisions, introducing statutory relevant considerations which are applicable to the Industrial Commission in those jurisdictions.
- 6.8 In New South Wales, the equivalent provision of the *Industrial Relations Act 1996* (NSW) (**NSW IR Act**) states:

**146C Commission to give effect to certain aspects of government policy on public sector employment**

- 1) *The Commission must, when making or varying any award or order, give effect to any policy on conditions of employment of public sector employees:*
  - (a) *that is declared by the regulations to be an aspect of government policy that is required to be given effect to by the Commission, and*
  - (b) *that applies to the matter to which the award or order relates.*
- 2) *Any such regulation may declare a policy by setting out the policy in the regulation or by adopting a policy set out in a relevant document referred to in the regulation.*

- 6.9 At this point, the Committee draws attention to the use of the mandatory term ‘*must*’ in the New South Wales equivalent legislation. In this instance the provision states that the New South Wales Industrial Relations Commission (**NSWIRC**) ‘*must give effect*’ to policies on employment conditions. The Committee also draws attention to the fact that the applicable government policy in that State is issued by way of disallowable regulation.
- 6.10 In Queensland, the equivalent provision of the *Industrial Relations Act 1999* (Qld) (**Queensland IR Act**) states:

**149D Issues full bench must consider**

- (1) *In determining a matter by arbitration under this subdivision, the full bench—*

- (a) *must limit its consideration to the issues identified in the conciliation report for the matter; and*
- (b) *in considering the issues, must consider at least the following—*
- (iv) *the public interest.*
- (2) *In considering the public interest under subsection (1)(b)(iv), the full bench must consider—*
- (f) *for a matter involving a public sector entity—*
- (i) *the State’s financial position and fiscal strategy; and*
- (ii) *the financial position of the public sector entity; and*
- (iii) *the likely effect of the proposed arbitration determination on the matters mentioned in subparagraphs (i) and (ii); and*

6.11 However, the above Queensland provision needs to be read in conjunction with s339AA of the Queensland IR Act, which provides as follows:

***Government briefing about State’s financial position etc.***

1. *The treasury chief executive may, at any time, give the members of the commission a briefing about the State’s financial position and fiscal strategy, and related matters.*

*Note—*

*The briefing is for information purposes only.*

2. *The briefing must be given in an open hearing or otherwise made available to the public.*

6.12 Once again, the Committee draws attention to the use of the mandatory term ‘*must*’ in the equivalent Queensland provision. In the Queensland IR Act, however, the terminology is more akin to that used in the WA Bill, namely; the full bench ‘*must consider*’ the statutory relevant considerations. The Committee also notes that, while the Queensland provision does not define the term ‘*financial position*’, section 339AA of the Queensland IR Act provides that the Secretary to the Treasury will provide briefings to the Queensland Industrial Relations Commission (**QIRC**) about this consideration, the State’s fiscal strategy, and related matters.

6.13 A close reading of the relevant clauses above in each jurisdiction indicates that, while there are certain similarities to the WA Bill, there are, in fact, qualitative differences to

those proposed in the WA Bill. The Committee notes that the Western Australian Department of Treasury, in particular, was initially interested in importing a model into the Western Australian Industrial Relations system that would have been similar to that in place in New South Wales.<sup>26</sup>

- 6.14 The Committee also notes that, in New South Wales, the relevant Government policy on conditions of employment is required to be issued by regulation.<sup>27</sup> This means that it is a disallowable instrument. This aspect of the NSW IR Act was specifically referred to, with approval, by the Parliamentary Committee responsible for scrutinising the relevant Bill in the New South Wales Parliament, in the following terms [emphasis taken from the NSW Report as it appears therein]:<sup>28</sup>

*'13. The Committee also notes that the regulation containing government policy is subject to a form of Parliamentary scrutiny, i.e., disallowance.*

*The Committee refers to Parliament whether provision for the declaration of the government's policy in regulation constitutes an inappropriate delegation of legislative power.'*

*The Western Australian Bill differs from the legislation in NSW and Queensland in important ways.*

- 6.15 As discussed above at paragraph 6.9, the equivalent provision in New South Wales states that the NSWIRC 'must give effect' to that State's public sector policy on conditions of employment. This is not equivalent to the position adopted in Part 2, clause 4 of the Bill, in its proposed amendments to s26 of the IR Act.
- 6.16 The policy expressed in the Bill requires the WAIRC to 'consider' the State's public sector wages policy. The requirement to 'consider' is much less intrusive on judicial discretion. Further, the narrower application of the Western Australian policy to 'wages', as opposed to the much broader term 'conditions of employment', as used in the NSW IR Act, is a significant point of difference. There is nothing in the Bill mandating how the WAIRC must exercise its judicial discretion, beyond considering certain matters, as per paragraph 6.4 above. In this respect, the Bill more closely resembles the approach taken at s149D of the Queensland IR Act.

<sup>26</sup> Mr Michael Barnes, Deputy Under Treasurer, Department of Treasury, *Transcript of Evidence*, Thursday, 6 February 2014, pp2-3.

<sup>27</sup> *Industrial Relations Act (NSW) s149C and Industrial Relations (Public Sector Conditions of Employment) Regulation 2011.*

<sup>28</sup> New South Wales Parliament, *Joint Statutory Committee on Legislation Review*. Digest of Bills, 1/55 – 8 August 2011 at p61.

- 6.17 However, the Bill also differs in important respects from the Queensland legislation. The Queensland IR Act makes no specific reference to the State's public sector wages policy, or the '*financial position*' of public sector entities. The WA Bill refers to both these matters. In Queensland, the Secretary to the Treasury has the power to brief the QIRC on the State's financial position and financial strategy. This gives the Secretary to the Treasury an important statutory role in assisting the QIRC to form a view of what these terms mean, and what information content they seek to provide from time to time.
- 6.18 The Committee has received testimony and private documentary evidence that demonstrates to the Committee's satisfaction that the adoption of a discretionary requirement in the Bill, with respect to the WAIRC, was a deliberate policy decision of Government.<sup>29</sup> Indeed, the Committee is satisfied that the New South Wales mandatory approach was expressly rejected by a deliberate policy decision of Government. This policy decision was confirmed by the Department of Treasury in evidence before the Committee.<sup>30</sup>

*The Bill prevents the WAIRC from considering the matters at proposed Clause 4, s26.*

- 6.19 Clause 4 of the Bill also includes transitional provisions, indicating that the WAIRC must not consider the three State finance matters, identified at paragraph 6.4 above, for:<sup>31</sup>
- a) *an order made under section 42G relating to an agreement with a nominal expiry date earlier than 1 November 2013;*
  - b) *an enterprise order made in substitution for an enterprise order providing for an expiry date earlier than 1 November 2013;*
  - c) *State wage order decisions made under section 50A of the Act (relating to the minimum wage).*

- 6.20 The above provisions introduce a certain amount of protection against retrospectivity, regarding the proposed changes contained in the Bill.

### **New Statutory Relevant Considerations in practice**

- 6.21 Taken at face value, the above proposed amendments may appear to be unremarkable, given that the Government currently has the option of raising any, or all, of the above

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<sup>29</sup> Public Sector Commission, *Private Document*, 13 February 2014, final two pages.

<sup>30</sup> Department of Treasury, *Private Document*, 28 August 2013, pp2-3.

<sup>31</sup> Clause 4, proposed new *Industrial Relations Act 1979* ss26(2D) and (2E).

matters in submissions made to the WAIRC. However, some aspects of the proposed inclusion in the IR Act of the three specific ‘*statutory relevant considerations*’ at Clause 4 of the Bill, proposed s26(2A), and reproduced at paragraph 6.4 above, are worthy of comment.<sup>32</sup>

*What effect (if any) will the proposed Statutory Relevant Considerations have on WAIRC independence?*

- 6.22 Evidence to this Committee from employee representative organisations suggested that the proposed clauses of the Bill would have a detrimental effect on the independent discretion of the WAIRC, with respect to public sector decisions.<sup>33</sup> Indeed, employee representative organisations expressed a commonality of concern about the intended effect of the proposed amendment to IR Act s26.<sup>34</sup>
- 6.23 By way of example, the Committee received the following evidence from two employee representative organisations:

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<sup>32</sup> *Industrial Relations Act 1979 s26(2A).*

<sup>33</sup> Submission No 1 from the CPSU/CSA, ‘*Submission on Workforce Reform Bill 2013*’ 16 January 2014, pp2 and 3; Ms Toni Walkington, General Secretary, CPSU/CSA, *Transcript of Evidence*, Thursday, 6 February 2014, p2.; Submission No 7 from United Voice, ‘*Submissions to the Standing Committee on Legislation regarding the Workforce Reform Bill 2013*’ 17 January 2014, p9; Mr Michael Amati, Industrial Advocate, SSTUWA, *Transcript of Evidence*, Thursday, 6 February 2014, p1; Ms Meredith Hammat, Secretary, Unions WA, *Transcript of Evidence*, Thursday, 6 February 2014, p2; Submission No 2 from UnionsWA, ‘*Submission on Workforce Reform Bill 2013*’ 16 January 2014, pp1 and 3; Mr John Welch, Secretary, WAPOU, *Transcript of Evidence*, Thursday, 6 February 2014, p5; Submission No 3 from United Firefighters Union of Australia (WA), ‘*The Workforce Reform Bill 2013*’ 16 January 2014, p2; Ms Lea Anderson, Assistant Secretary, United Firefighters Union of Australia (WA), *Transcript of Evidence*, Friday, 7 February 2014, p9; Submission No 10 from HSUWA, ‘*Submission on Workforce Reform Bill 2013*’ 17 January 2014, p1; Mr Dan Hill, Secretary, HSUWA, *Transcript of Evidence*, Friday, 7 February 2014, p5; Submission No 5 from the ASU(WA), ‘*Submission on Workforce Reform Bill 2013*’ 17 January 2014, p1; Submission No 9 from the ARTBIUE(WA), ‘*Submissions Re The Workforce Reform Bill 2013*’ 17 January 2014, pp1-2; and, Submission No 7 from United Voice, ‘*Submissions to the Standing Committee on Legislation regarding the Workforce Reform Bill 2013*’ 17 January 2014, p9.

<sup>34</sup> Submission No 1 from the CPSU/CSA, ‘*Submission on Workforce Reform Bill 2013*’ 16 January 2014, pp2 and 3; Submission No 7 from United Voice, ‘*Submissions to the Standing Committee on Legislation regarding the Workforce Reform Bill 2013*’ 17 January 2014, p9; Mr Michael Amati, Industrial Advocate, SSTU, *Transcript of Evidence*, Thursday, 6 February 2014, p1; Ms Meredith Hammat, Secretary, Unions WA, *Transcript of Evidence*, Thursday, 6 February 2014, p2; Mr John Welch, Secretary, WAPOU, *Transcript of Evidence*, Thursday, 6 February 2014, p5; Submission No 3 from United Firefighters Union of Australia (WA), ‘*The Workforce Reform Bill 2013*’ 16 January 2014, p2; Ms Lea Anderson, Assistant Secretary, United Firefighters Union of Australia (WA), *Transcript of Evidence*, Friday, 7 February 2014, p9; Submission No 10 from HSUWA, ‘*Submission on Workforce Reform Bill 2013*’ 17 January 2014, p1; HSUWA, *Transcript of Evidence*, Friday, 7 February 2014, p5; Submission No 5 from the ASU(WA), ‘*Submission on Workforce Reform Bill 2013*’ 17 January 2014, p1; and, Submission No 9 from the ARTBIUE(WA), ‘*Submissions Re The Workforce Reform Bill 2013*’ 17 January 2014, p2.

*You try to say to the commission what you should do is look at the view of the employer and consider that before you actually come to consider the circumstances of the case.*<sup>35</sup>

*We believe that considerations of employee and employer concerns will no longer be balanced equitably and fairly in terms of wages policy if the provisions of this bill become law. The considerations will be heavily weighted in favour of the government's fiscal strategy, and the consideration of productivity improvements by workers will no longer have any bearing on decisions determining wage outcomes.*<sup>36</sup>

6.24 The Committee sought advice on this matter.<sup>37</sup> The following extract of testimony from Ms Maria Saraceni, practicing Barrister, was of particular assurance to the Committee in this regard:<sup>38</sup>

*When the commission has a discretion, okay, it has to take all these things into account, but it exercises that discretion with a view to what its objects are, what the purpose of the commission is—the jurisdiction of the commission and then the objects. This is what it is all about. So, factoring all those things into account, what the commission is currently looking at as matters of discretion under 26(1)(d) is not overly different to what is in the proposed new section 4. I can see where the problem would arise—a concern, I guess, that the policy of the government, whichever government is in power at any time, might be dictating to the commission: this is what you have to do.*

*Now, at first blush, it might look like that, but when you look at the act and the interpretation of the act and how the commission deals with it, I would suggest that is not appropriate because already the commission needs to factor in whether the employer can afford to pay. Under 26(1)(d)(iii), it already needs to factor in the national economy and the economy of WA, so it is already factoring in all these factors.*

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<sup>35</sup> Mr John Welch, Secretary, WAPOU, *Transcript of Evidence*, Thursday, 6 February 2014, p5.

<sup>36</sup> Ms Toni Walkington, General Secretary, CPSU/CSA, *Transcript of Evidence*, Thursday, 6 February 2014, p2.

<sup>37</sup> ‘The fact that [the Commission] has to consider does not mean the weight of them or how much. It might reject it—consider it and say it is not relevant.’ Ms Maria Saraceni, Barrister, *Transcript of Evidence*, Thursday, 13 February 2014, p2.

<sup>38</sup> *Ibid*, p3.

- 6.25 These views accord with the following comments during the Second Reading Speech in the Legislative Council:<sup>39</sup>

*Under the existing Industrial Relations Act, the Industrial Relations Commission is not specifically required to consider the government's public sector wages policy. It is important to note, however, that the proposed changes will not bind the commission; rather, their purpose is to more clearly articulate the government's policy position and to ensure that the commission gives due consideration to [this].*

- 6.26 In addition, the submission received from the Public Sector Commission makes the following observations:<sup>40</sup>

*The WAIRC is not presently specifically required to consider the Government's Public Sector Wages Policy. WA Public Sector wage and salary negotiations are undertaken by public sector agencies in accordance with the current Public Sector Wages Policy. However for the WAIRC in the exercise of its conciliatory and arbitral powers, the Wages Policy is not an overt or mandated consideration.*

*The proposed amendments will require the WAIRC to inform itself about, and to address, the fiscal circumstances and policies of the Government. These economic policies and strategies do not bind the WAIRC but would require it to demonstrate and detail a proper basis for any decisions that do not accord with the Wages Policy.*

*The purpose of the amendments is to more clearly articulate the Government's policy position and to ensure that the WAIRC give due consideration to this position in determining wage outcomes.*

- 6.27 On this basis, the Committee is of the view that the inclusion in the IR Act of a requirement for the WAIRC to exercise a particular discretion will not 'ensure' any particular outcome. In addition, should the WAIRC fail to have appropriate regard to matters lawfully raised in submissions before it, the current appeal provisions in the IR Act only permit unsuccessful parties to appeal on the basis of an error of law. It is

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<sup>39</sup> Hon Helen Morton MLC, Minister for Mental Health, *Parliamentary Debates (Hansard)*, Thursday, 28 November 2013, p6854.

<sup>40</sup> Submission No 13 from the Public Sector Commission, 21 January 2014, p4.

very difficult to prove an error of law, however, when the content of submissions are essentially matters of fact.<sup>41</sup>

- 6.28 This precise point was raised by a number of employee representative organisations in evidence before the Committee. The clearest articulation was in a submission received from United Voice:<sup>42</sup>

*The Premier has indicated that the purpose of these changes is to clearly articulate the Government's position and ensure the Commission gives due consideration to that position in exercising its functions under the IR Act. However, these are matters that are more appropriately dealt with by way of submissions to the Commission during the hearing of a matter. The Government has provided no evidence that the Commission is not giving due consideration to the submissions of agencies and departments and as such, it does not appear to be an issue that requires action. In the unlikely event the Commission does fail to consider submissions, the appropriate recourse is the appeal mechanism set out in the IR Act rather than legislative change.*

- 6.29 Submissions made to the Committee by employee representative organisations expressed the view that they and their members were concerned about whether or not, in practice, the position of the Government may be advantaged before the WAIRC, when terms such as ‘to ensure that decisions’ are used in the Explanatory Memorandum and Second Reading Speech.<sup>43</sup> Similarly, some of the terminology used by the Department of Treasury before the Committee, indicating a desire to give the Bill ‘more teeth’ or ‘more bite’,<sup>44</sup> especially with direct reference to the New South Wales legislation, may have given rise to anxiety amongst public sector employees.

<sup>41</sup> *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 286, per Neaves, French and Cooper JJ; ‘The limits within which the jurisdiction is conferred require that it be exercised with restraint. Only in exceptional circumstances should the decision of the tribunal not be the final decision’ *Blackwood Hodge (Australia) Pty Ltd v Collector of Customs* (1980) 47 FLR 131 at 145 (Fisher J); *FCT v Cainero* 88 ATC 4427 (Foster J). *Repatriation Commission v Thompson* (1988) 82 ALR 352 at 357 per the Court:

*‘the nature of the task of this court is clear. It is to leave to the tribunal of fact decisions as to the facts and to interfere only when the identified error is one of law.’*

<sup>42</sup> Submission No 7 from United Voice, 17 January 2014, p8.

<sup>43</sup> [Workforce Reform Bill 2013 Explanatory Memorandum](#) (Accessed 10 February 2014) p1.

<sup>44</sup> Mr Michael Barnes, Deputy Under Treasurer, Department of Treasury, *Transcript of Evidence*, Thursday, 6 February 2014, p3.

*Unique concerns of the Western Australian Police Union*

- 6.30 The Committee wishes to point out that the Western Australian Police Union (WAPU) were sufficiently concerned about the prospect of the Commission being required to consider the statutory relevant considerations with respect to its members, as to propose a statutory amendment to expressly exclude them from the operation of proposed s26(2A)-(2E).<sup>45</sup>
- 6.31 According to its submission, the peculiar employment circumstances; current restricted WAIRC access rights; and, general statutory conditions of employment for sworn officers, all serve to make the position of Police Officers, Police Auxiliary Officers, Aboriginal Police Liaison Officers or Special Constables, unique.<sup>46</sup>

*We seek an amendment to the proposed Workforce Reform Bill to make changes to the Industrial Relations Act in recognition of the unique working conditions and industrial rights of police officers when compared with other public sector workers. Our working conditions are unique and different to every other public sector employee, including other emergency services, in the following areas. Police officers are the only group that has restricted access to the Western Australian Industrial Relations Commission*

*Police officers who are employed under the Police Act and not the Public Sector Management Act are not only required to uphold the law at all times, but also are not afforded one of the basic means of defending their occupational interests, being the right to strike. For these reasons, police officers should not be subjected to the public sector wages policy and provisions need to be made in the event the Workforce Reform Bill is enacted. As the bill seeks to make amendments to the act, we propose that police are excluded from the bill or one of the two amendments referenced in our submission are included to reflect the unique and distinctive employment conditions of WA police officers.*

- 6.32 The WAPU suggested solution is to either: bring Police completely within the ambit of the WAIRC and the PSM Act; or, exempt them from the operation of Clause 4 of the Bill relating to the Government Wages Policy, financial strategy of the State and financial position of their employing authority.<sup>47</sup>

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<sup>45</sup> Submission No 4 from WA Police Union, 'Workforce Reform Bill 2013' 16 January 2014, pp3, 12 and 13.

<sup>46</sup> Mr George Tillbury, President, WA Police Union, *Transcript of Evidence*, Thursday, 6 February 2014, pp1-2.

<sup>47</sup> Submission No 4 from WA Police Union, 'Workforce Reform Bill 2013' 16 January 2014, p12-13.

6.33 The Committee appreciates that the particular concern of WAPU in this instance relates primarily to the question of the Government wages policy salary cap provisions. The Committee believes that these concerns have been addressed in the evidence, referred to at paragraph 6.24, received from Ms Saracini.

### **Overview of the practical impact of proposed Statutory Relevant Considerations**

6.34 The proposal in the Bill to include new statutory relevant considerations within the IR Act, as a means *'to more clearly articulate the government's policy position'*,<sup>48</sup> raises a number of matters that are worthy of some careful consideration. These are addressed in the following paragraphs.

*Could the proposed Statutory Relevant Considerations have unintended consequences?*

6.35 It will be recalled that the statutory relevant considerations when making a *'public sector decision'* proposed for inclusion in the IR Act at new s26(2A) are as follows:

a) *any **Government Public Sector Wages Policy Statement** that is applicable in relation to negotiations with the public sector entity;*

b) *the **financial position and fiscal strategy of the State** as set out in:*

*(i) the most recent Government Financial Strategy Statement released under the Government Financial Responsibility Act 2000 section 11(1);*

*(ii) the most recent Government Financial Projections Statement released under the Government Financial Responsibility Act 2000 section 12(1);*

*(iii) any submissions made to the Commission on behalf of the State government.*

c) *the **financial position** of the relevant public sector entity.*

6.36 As previously noted, currently, there is nothing in the IR Act preventing the Government from raising the proposed statutory relevant considerations (to the extent that they might be relevant to the Government's case) in any submission made to the WAIRC.<sup>49</sup>

6.37 The terms *'Government Public Sector Wages Policy Statement'*, *'financial position and fiscal strategy of the State'* and *'financial position'* of an entity, as defined at

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<sup>48</sup> Hon Helen Morton MLC, Minister for Mental Health, *Parliamentary Debates (Hansard)*, Thursday, 28 November 2013, p6854.

<sup>49</sup> *Industrial Relations Act 1979* s26(1).

proposed s26(2A) above, are in each case, a mix of technical and common use terms.<sup>50</sup> That is not actually problematic when they are used in a submission to the WAIRC currently. In the average submission, such terms can mean whatever the parties agree to them meaning. Legally, they are currently what was referred to in paragraph 6.27 above as ‘*questions of fact*’. As indicated there, it is very difficult to launch a legal appeal against a decision that is based on questions of fact.

- 6.38 Difficulties can, however, arise where statutory relevant considerations with mixed characteristics (terms of mixed technical and common use) are placed into a Statute. This could be a potential risk where the Act in question is largely concerned with disputation. How a tribunal deals with statutory relevant considerations that are a mix of technical and common use terms, whether construing the meaning of that kind of term—even its definition—is a question of law.<sup>51</sup> It is, of course, comparatively straightforward to appeal against a decision based on a question of law.<sup>52</sup>
- 6.39 As will be discussed below, Clause 4 of the Bill contains several key terms that each involve a mix of technical and common use terms. The effect of placing such terms in a statute needs to be carefully considered, to avoid possible unintended consequences.

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<sup>50</sup> Mr Michael Barnes, Deputy Under Treasurer, Department of Treasury, *Transcript of Evidence*, Wednesday, 12 February 2014, pp5-6.

<sup>51</sup> An example of just such a situation of mixed common language and technical statutory terminology can be found in the judgements of all Justices in *Minister for Industry & Commerce v Zyfert* (1983) 77 FLR 471.

<sup>52</sup> *Collector of Customs v Pozzolanac Enterprises Pty Ltd* (1993) 43 FCR 280 at 287, *Collector of Customs v Pozzolanac Enterprises Pty Ltd* (1993) 43 FCR 280 at 287, per Neaves, French and Cooper JJ who suggested five typical situations that can arise from the application of statutory relevant considerations:

- (1) *The question whether a word or phrase in a statute is to be given its ordinary meaning or some technical or other meaning is a question of law: Jedko Game Co Pty Ltd v Collector of Customs(NSW)* (1987) 12 ALD 491; *Brutus v Cozens* [1973] AC 854.
- (2) *The ordinary meaning of a word or its non-legal technical meaning is a question of fact: Jedko Game Co Pty Ltd v Collector of Customs (NSW); NSW Associated Blue-Metal Quarries Ltd v FCT* (1956) 94 CLR 509 at 512; *Life Insurance Co of Australia Ltd v Phillips* (1925) 36 CLR 60 at 78; *Neal v Secretary, Department of Transport* (1980) 29 ALR 350 at 361–2.
- (3) *The meaning of a technical legal term is a question of law: Australian Gas Light Co v Valuer-General* (1940) 40 SR (NSW) 126 at 137–8; *Lombardo v FCT* (1979) 28 ALR 574 at 581.
- (4) *The effect or construction of a term whose meaning or interpretation is established is a question of law: Life Insurance Co of Australia Ltd v Phillips* (1925) 36 CLR 60 at 79.
- (5) *The question whether facts fully found fall within the provision of a statutory enactment properly construed is generally a question of law: Hope v Bathurst City Council* (1980) 144 CLR 1 at 7 per Mason J with whom Gibbs, Stephen, Murphy and Aickin JJ agreed; *Australian National Railways Commission v Collector of Customs (SA), Australian National Railways Commission v. Collector of Customs, SA* (1985) 8 FCR 264 at 379 per Sheppard and Burchett JJ.’

- 6.40 By way of example, some witnesses questioned whether or not, by requiring the WAIRC to consider the Public Sector Wages Policy Statement in connection with any public sector decision, the system might well become unworkable.<sup>53</sup>
- 6.41 As far as the Committee is aware, the legislative intention of the IR Act is not to see the Supreme Court of the State routinely being drawn into routine industrial matters.
- 6.42 The Committee sought evidence from all Departmental and Public Sector Commission witnesses about the extent to which this potential unintended consequence of the Bill had been the subject of discussion or advice. All relevant witnesses confirmed that none of those agencies sought legal advice on the question.<sup>54</sup>
- 6.43 It could be argued that, if the Bill is adopted as drafted, it will introduce much greater complexity with respect to the factors that must be considered by the WAIRC than is presently the case. In addition to the submissions of the parties before it, the WAIRC will be required to give careful consideration to how those submissions might affect ‘*any other decision that will extend to and bind a public sector entity*’.<sup>55</sup> As a result, Government submissions to the WAIRC will have to consider the implications of the matter in question for ‘*any other decision that will extend to and bind a public sector entity*’.
- 6.44 The Committee would have expected as a matter of course that advice would have been provided to Government about this potential unintended consequence. Given the potential for the Bill as drafted to have unintended consequences, the Committee is of the view that the section should be amended and this is discussed further at paragraph 6.59 below.

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<sup>53</sup> Ms Toni Walkington, General Secretary, CPSU/CSA, *Transcript of Evidence*, Thursday, 6 February 2014, p2.

*‘We believe this bill will place such greater onus, regard and consideration of those particular elements on the industrial commission as to make the system almost unworkable; and, indeed, it will go against the objectives of the current system, which is a speedy resolution for disputes between employees and employers or the union as employee representatives.’*

<sup>54</sup> Public Sector Commission, *Transcript of Evidence*, Wednesday, 5 February 2014, pp4-5; Department of Commerce, *Transcript of Evidence*, Wednesday, 5 February 2014, p2; and, Mr Michael Barnes, Deputy Under Treasurer, Department of Treasury, *Transcript of Evidence*, Wednesday, 12 February 2014, pp4-6.

<sup>55</sup> As per proposed new *Industrial Relations Act 1979* s26(2B). Ms Lea Anderson, Assistant Secretary, United Firefighters Union of Australia (WA), *Transcript of Evidence*, Friday, 7 February 2014, p8.

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### The three Statutory Relevant Considerations examined

#### *Status and effect of the Public Sector Wages Policy Statement*

- 6.45 The Committee notes the following statement made in the Explanatory Memorandum to the Bill regarding the reference to the Public Sector Wages Policy Statement, made in proposed new IR Act s26(2B):<sup>56</sup>

*Confirms the application of the Public Sector Wages Policy Statement 2014 to industrial agreements expiring after 1 November 2013 and that the Statement can be replaced and re-issued.*

- 6.46 The actual proposed statutory definition of ‘*Public Sector Wages Policy Statement*’, at proposed new IR Act s26(2B), reads as follows:

***Public Sector Wages Policy Statement* means —**

*(a) the Public Sector Wages Policy Statement 2014 issued by the State government that applies to industrial agreements expiring after 1 November 2013; or*

*(b) if any Public Sector Wages Policy Statement is issued in substitution for that statement, the later statement.*

- 6.47 The Public Sector Wages Policy Statement issued by the Minister for Commerce,<sup>57</sup> currently has no legislative status. It derives its authority by reference to a Premier’s Circular.<sup>58</sup> This means that the policy is binding on Government wage negotiators and Employing Authorities in the sense that to fail to materially comply with a Premier’s Circular, is potentially a disciplinary matter. Both the Public Sector Wages Policy Statement and the relevant Premier’s Circular are not disallowable instruments and not, therefore, subject to direct Parliamentary scrutiny.<sup>59</sup>
- 6.48 The Committee is satisfied that inclusion in the IR Act, in the terms proposed at Clause 4 of the Bill does not materially change the legal status of the Public Sector Wages Policy Statement.<sup>60</sup> In other words, the Public Sector Wages Policy Statement

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<sup>56</sup> [Workforce Reform Bill 2013 Explanatory Memorandum](#) (Accessed 10 February 2014), p2.

<sup>57</sup> See Appendix 3.

<sup>58</sup> Premier’s Circular No. 2013/03 *Coordination and Governance of Public Sector Labour Relations*.

<sup>59</sup> Submission No 10 from HSUWA, ‘*Submission on Workforce Reform Bill 2013*’, 21 January 2014, p2. See also Submission No 3 from United Firefighters Union of Australia (WA), ‘*The Workforce Reform Bill 2013*’ 16 January 2014, p2.

<sup>60</sup> ‘[T]hat is presuming that the government, by doing this, is telling the commission what to do with its policy or what to do with the national economy figures or what to do with the state economy figures, and it is not..’ Ms Maria Saraceni, Barrister, *Transcript of Evidence*, Thursday, 13 February 2014, p9.

is currently one of policy, and not of law. However, as has been discussed, by including it as a statutory relevant consideration in the IR Act, as the Bill proposes, the Public Sector Wages Policy Statement, including its actual definition, will become a question of law, and potentially subject to judicial review.

*CPI As a wage inflator*

6.49 The Committee accepts that the actual choice of a wage inflator, in a Government Public Sector Wages Policy Statement is essentially a policy choice. The specific reference to the Perth CPI figure as the basis of the Government public sector wages policy was criticised by almost all employee representative groups.<sup>61</sup> There were a range of reasons given by these groups as to why they believed the particular CPI figure was inappropriate.<sup>62</sup>

<sup>61</sup> Submission No 1 from the CPSU/CSA, ‘Submission on Workforce Reform Bill 2013’ 16 January 2014, p3; Ms Toni Walkington, General Secretary, CPSU/CSA, *Transcript of Evidence*, Thursday, 6 February 2014, pp2-3; Submission No 2 from Unions WA, ‘Submission on the Workforce Reform Bill 2013’ 16 January 2014, p3; Ms Meredith Hammat, Secretary, Unions WA, *Transcript of Evidence*, Thursday, 6 February 2014, p9; Submission No 5 from the ASU(WA), ‘Submission on Workforce Reform Bill 2013’ 17 January 2014, p1; Mrs Jill Hugo, Assistant Branch Secretary, ASU(WA), *Transcript of Evidence*, Friday, 7 February 2014, p3; Submission No 7 from United Voice, ‘Submissions to the Standing Committee on Legislation regarding the Workforce Reform Bill 2013’ 17 January 2014, p8; Ms Carolyn Smith, Secretary, United Voice, *Transcript of Evidence*, Thursday, 6 February 2014, p7; Submission No 9 from the ARTBIUE(WA), ‘Submissions Re The Workforce Reform Bill 2013’ 17 January 2014, p2; Submission No 10 from HSUWA, ‘Submission on Workforce Reform Bill 2013’ 17 January 2014, p2; Mr Dan Hill, Secretary, HSUWA, *Transcript of Evidence*, Thursday, 6 February 2014, pp5-6; Ms Lea Anderson, Assistant Secretary, United Firefighters Union of Australia (WA), *Transcript of Evidence*, Friday, 7 February 2014, p8; and, Mr Paul Hunt, Secretary, WA Police Union, *Transcript of Evidence*, Thursday, 6 February 2014, p4.

<sup>62</sup> The Committee notes the following data from the Public Sector Commission’s ‘[State of the Sector Statistical Bulletin 2013](#)’, p11 (accessed 10 February 2014):

**Table 1.3 Salary - mean, median, bands**

Public sector entities with 30 or more employees.  
Data as at 30 June 2013. Source HRMOIR.

Entity	Salary		PSGOGA equivalent salary bands									
	Mean	Median	Level 1 and below	Level 2	Level 3	Level 4	Level 5	Level 6	Level 7	Level 8	Level 9	Class 1 and above
WA public sector	77 190	74 845	19.3%	11.8%	9.8%	13.7%	17.3%	15.9%	6.1%	3.3%	0.9%	1.8%

The above summary indicates that approximately 60% (or 3 out of every 5) of the State Public Sector’s employees earn at, or below the public sector average salary. Approximately 1 in every 5 State public sector employees earn the lowest rate of pay on the scale. According to the ‘*Public Service and Government Officers General, Agreement 2011*’, the salaries of Level 1 Officers commence at a rate of \$42,935; Level 5 Officers commence at a rate of \$78,782; and, Class 1 Officers commence at a rate of \$158,811. In terms of workforce diversity on the basis of gender, the Public Sector Commission’s Director of Equal Opportunity in Public Employment ‘[Annual Report 2013](#)’, p22 (accessed 10 February 2014):

**Table 1: Public sector entity representation from 2009–2013**

Diversity group	Representation (%)				
	2009	2010	2011	2012	2013
Women in management					
- Senior executive service	25.1	26.7	26.4	27.6	29.2

- 6.49.1 The actual CPI figure used, and its manner of calculation is not made public by the Department of Treasury. In addition, some submissions questioned why cost of living was a relevant wage inflator, when wage costs are a cost of production of goods and services, and numerous wage cost inflators, and production cost inflators could equally be used. It was argued by some, including Unions WA that, while CPI is a reasonable inflator for the price charged to consumers for public sector goods and services, it bears no connection to the cost of production and can disproportionately affect lower paid and regional and remote workers in the public sector:<sup>63</sup>

*Ms Hammat: ... Our concern is that this bill will allow the government's wages policy, which only allows for a CPI-type increase, to exacerbate the pay gap in Western Australia. With large numbers of women in the public sector concentrated in the lower levels, it will effectively legislate to ensure that the wages policy is privileged and it is likely to make to make the gender pay gap in Western Australia much worse than it currently is and not better. Arguably, that is contrary to the objectives of the Industrial Relations Act, which seeks to promote equal remuneration for men and women.*

- 6.49.2 The Committee notes, however, that a number of public sector employees living and working in regional areas currently receive regional-based allowances in recognition for living in regional and remote areas. For example, the issue of regionality was raised by the WA Prison Officer's Union as follows:<sup>64</sup>

*Mr Welch: Yes. We have a series of incentive allowances that are paid to people who work in a series of our regional centres, so those officers who work in Kalgoorlie, Albany, Geraldton, Derby, Broome, West Kimberley—that is Derby—and Roebourne are all in receipt of specific allowances as a consequence of the prisons within which they work. There are other clauses as well that deal with their ability to have extra travel for things like medical needs and things of that sort. To deal with the very spread out nature of the WA prison system and the need for staff to be generically skilled and to move between facilities, we have to have the ability to not just move people against their wishes, but to incentivise them to want to move to what are really harder to fill facilities. I am sure that*

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<sup>63</sup> Ms Meredith Hammat, Secretary, Unions WA, *Transcript of Evidence*, Thursday, 6 February 2014, p3.

<sup>64</sup> Mr John Welch, Secretary, WAPOU, *Transcript of Evidence*, Thursday, 6 February 2014, p7.

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*is replicated in other parts of the public sector, but we very much believe that that is a critical part of the way in which we employ staff in the Department of Corrective Services.*

6.49.3 The question of the choice of CPI as a wage inflator in the Government public sector wages policy was put to each of the agencies appearing before the Committee. The Public Sector Commission advised that it was a decision of Cabinet, and that advice would have been provided on this matter from the Departments of Treasury and Commerce.<sup>65</sup> The evidence provided by the Department of Commerce was that they were instructed to utilise the CPI inflator as set by the Department of Treasury.<sup>66</sup> When the Committee sought advice from Treasury, the advice received was as follows:<sup>67</sup>

**Hon AMBER-JADE SANDERSON:** *Why would you not consider, for example, NGHSS, which is the same indexation that is given to the not-for-profit sector?*

**Mr Barnes:** *CPI was chosen because it approximates most closely with the wages policies in most of the other states, which are generally around the 2.5 to three per cent mark. We did not want to put a specific number on the wages policy, which is what most of the other states do; they limit it at a number—2.5 or three per cent. We wanted to base it on projected CPI so that employees' real wages are being maintained over time and so that as the economy and as price pressures in the economy change over time, therefore the CPI will change and therefore real wages will still be maintained even with those changes in the economy and price pressures. So in terms of that index, firstly, because it was comparable with other states' wages policies; and, secondly, because it gives more flexibility than a specific number.*

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<sup>65</sup> Mr Mal Wauchope, Commissioner, Public Sector Commission, *Transcript of Evidence*, Wednesday, 5 February 2014, p4.

<sup>66</sup> Ms Sandra Newby, Manager Public Sector Labour Relations, Department of Commerce, *Transcript of Evidence*, Wednesday, 5 February 2014, p2.

<sup>67</sup> Mr Michael Barnes, Deputy Under Treasurer, Department of Treasury, *Transcript of Evidence*, Wednesday, 12 February 2014, p6.

*Does the Public Sector Wages Policy Statement 'apply' to 'negotiations and industrial agreements'?*

- 6.50 The proposed definition of '*public sector wages policy statement*' poses the most fundamental of questions, namely; on what basis can any Public Sector Wages Policy Statement be said to '*apply to industrial agreements*' or '*in relation to negotiations*'?
- 6.51 The Committee notes that this question was answered very clearly in New South Wales where they have required the equivalent policy to be issued by way of regulations made under the NSW IR Act. Accordingly, there is no doubt in NSW that the relevant Government policy '*applies*' to negotiations and agreements because they take the form of subsidiary legislation.

*Status and effect of the 'financial position and fiscal strategy of the State'*

- 6.52 The stated objective behind this statutory relevant consideration is to 'more clearly articulate the Government's policy position and to ensure that the WAIRC give due consideration to this position in determining wage outcomes.'<sup>68</sup> In this regard, the proposed new s26(2A) of the IR Act does appear to be entirely clear in its terms. However, it should be noted that including this phrase in the IR Act will change the status of the phrase from a question of fact before the WAIRC contained in submissions, into a question of law. As indicated above, questions of law are capable of being the subject of judicial review. The Committee is unable, on the basis of evidence before it, to advise the Legislative Council how this phrase may be interpreted by a Court, should it become the subject of an action for judicial review.

*No definition of 'financial position of the public sector entity'*

- 6.53 Proposed new IR Act section 26(2A)(c) would, if passed, require the WAIRC to take into consideration the '*financial position of the public sector entity*'. This technical term, proposed to be inserted into the IR Act, is given no technical definition. This was confirmed by the Departments of Commerce and Treasury.<sup>69</sup> The Committee notes that while the term '*financial position of the public sector entity*' does have an ordinary meaning, it is a generally accepted fundamental legislative principle that any Bill should be unambiguous in its terms and drafted in a sufficiently clear and precise way. This means that technical legislative requirements should be clearly defined in any legislation. The Committee does note, however, that other terms currently in the

<sup>68</sup> Submission No 13 from the Public Sector Commission, '*Inquiry into Workforce Reform Bill 2013*' 21 January 2014, p4.

<sup>69</sup> Ms Sandra Newby, Manager, Public Sector Labour Relations, Department of Commerce, *Transcript of Evidence*, Wednesday, 5 February 2014, p4; and, Mr Michael Barnes, Deputy Under Treasurer, Department of Treasury, *Transcript of Evidence*, Wednesday, 12 February 2014, p5.

IR Act such as those at s26(d)(ii) and d(iii) also lack a technical definition but have developed a settled meaning over time.

- 6.54 Further, the Committee does note that the term has an accepted meaning to Chief Financial Officers of public sector agencies. This meaning is derived from the ‘*Statement of Financial Position*’, described in Australian Accounting Standards Board’s, Standard 101.<sup>70</sup> In former times, this was known as a ‘*Balance Sheet*’. The Committee questions whether the term proposed to be inserted by clause 4 of the Bill was intended to be defined in such narrow terms. According to evidence from the Department of Treasury before the Committee:<sup>71</sup>

*It is getting at the capacity of the agency to pay, so in a similar way that the current Industrial Relations Act refers to the capacity of the employer to pay, this is getting at a similar thing with respect to a public sector agency. There is the potential—this has been flagged with us—to define that term by reference to “financial statements” as defined or referred to in the Financial Management Act.*

*Personally, I do not think that is necessary. I believe the term “financial position of the public sector entity” is reasonably well understood in its ordinary meaning. But my other concern with referencing that term back to the Financial Management Act is that the Financial Management Act refers to financial statements of an agency, which is fine, but it refers to the financial statements in the context of the previous year’s annual report. If there is a reference to the Financial Management Act, it is a backward-looking reference: The financial position of the relevant public sector agency needs to consider not only its immediate past financial position, as per its most recent annual report, but also its projected financial position moving forward over the next one to three years, given that the term of EBAs we are generally looking at is two to three years. There needs to be a forward-looking component, not only a backward-looking component.*

- 6.55 The absence of a technical definition, and its likely consequences, was also raised in evidence by the Committee with the Public Sector Commission. The Commissioner stated that ‘*I understand that the Department of Commerce instructed parliamentary counsel in relation to that element of the bill.*’<sup>72</sup> Accordingly, the Committee

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<sup>70</sup> [http://www.aasb.gov.au/admin/file/content105/c9/AASB101\\_09-07\\_COMPsep11\\_07-12.pdf](http://www.aasb.gov.au/admin/file/content105/c9/AASB101_09-07_COMPsep11_07-12.pdf) (Accessed 10 February 2014).

<sup>71</sup> Mr Michael Barnes, Deputy Under Treasurer, Department of Treasury, *Transcript of Evidence*, Wednesday, 12 February 2014, p5.

<sup>72</sup> Mr Mal Wauchope, Commissioner, Public Sector Commission, *Transcript of Evidence*, Wednesday, 5 February 2014, p3.

addressed this matter to witnesses representing the Department of Commerce. The response received was as follows:<sup>73</sup>

*It is not defined. It is certainly not a defined term within the IR act. As I said, we were not consulted. Those provisions were a requirement of cabinet, in those terms. What we would think is that those terms would develop meaning as the WAIRC considers matters that come before it, and I understand that there are other acts that may assist it in doing that. But in terms of specific definition, other than my broad understanding about how the government is capping salary expenses now and managing agency finances, I do not have any specific knowledge.*

- 6.56 As previously noted by the Committee at paragraph 6.38 above, drafting legislation in this manner can give rise to unforeseen consequences.
- 6.57 A number of witnesses also questioned whether this provision of the Bill was necessary, arguing that s26(1)(d)(iii) already provides adequate direction to the WAIRC to consider the financial position of the public sector agency, because it must consider the ‘*capacity of employers... to pay*’ in exercising its jurisdiction.<sup>74</sup>

#### Aspects of Clause 4 of the Bill

- 6.58 Given the above paragraphs, the Committee accepted the argument that Clause 4 of the Bill, as currently drafted, may lead to unintended consequences and therefore may not actually achieve the policy intention of the Bill that was expressed in the Second Reading Speech.<sup>75</sup>

<sup>73</sup> Ms Sandra Newby, Manager, Public Sector Labour Relations, Department of Commerce, *Transcript of Evidence*, Wednesday, 5 February 2014, p4.

<sup>74</sup> Mr Dan Hill, Secretary, HSUWA, *Transcript of Evidence*, Friday, 7 February 2014, p6; Submission No 7 from United Voice, ‘*Submissions to the Standing Committee on Legislation regarding the Workforce Reform Bill 2013*’ 17 January 2014, p8; Ms Carolyn Smith, Secretary, United Voice, *Transcript of Evidence*, Thursday, 6 February 2014, p7; Submission No 3 from United Firefighters Union of Australia (WA), ‘*The Workforce Reform Bill 2013*’ 16 January 2014, p2; United Firefighters Union of Australia (WA), *Transcript of Evidence*, Friday, 7 February 2014, pp7-8; Submission No 2 from Unions WA, ‘*Submission on the Workforce Reform Bill 2013*’ 16 January 2014, p2; Ms Meredith Hammat, Secretary, Unions WA, *Transcript of Evidence*, Thursday, 6 February 2014, p6; Ms Toni Walkington, General Secretary, CPSU/CSA, *Transcript of Evidence*, Thursday, 6 February 2014, p2; and, Submission No 1 from CPSU/CSA, ‘*Submission on the Workforce Reform Bill 2013*’ 16 January 2014, p3.

<sup>75</sup> The Committee has heard evidence that there were no systematic interdepartmental work group meetings regarding the drafting of the Bill (Mr Michael Barnes, Deputy Under Treasurer, Department of Treasury, *Transcript of Evidence*, Wednesday, 12 February 2014, p2; Ms Sandra Newby, Manager – Public Sector Labour Relations, Department of Commerce, *Transcript of Evidence*, Wednesday, 5 February 2014, pp1 and 2; and, Mr Peter Conran, Director General, Department of Premier and Cabinet, *Transcript of Evidence*, Wednesday, 5 February 2014, p3). The Committee has been provided with the minutes of only one interdepartmental meeting relating to the drafting of the Bill which suggests that these issues were not discussed at departmental level (Public Sector Commission, *Private Correspondence*, 13 January 2014, final two pages.)

6.59 To deal with this, the Committee has considered a drafting alternative which has the advantage of avoiding the possibility of the statutory relevant considerations becoming questions of law rather than remaining, as they are at present, questions of fact for adjudication by the WAIRC.<sup>76</sup> This should resolve the problem of unintended consequences discussed above. It will also ensure that there is an obligation on Treasury to provide the WAIRC with appropriate advice in any submission relating to public sector decisions.

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<sup>76</sup> Note that the Committee's recommendation includes reference to *Government Financial Responsibility Act 2000* s13(1) (relating to the Mid-year Financial Review). This inclusion was made at the suggestion of Mr Michael Barnes, Deputy Under Treasurer in evidence to the Committee. (Mr Michael Barnes, Deputy Under Treasurer, Department of Treasury, *Transcript of Evidence*, Wednesday, 12 February 2014, p11).

6.60 Accordingly, the Committee **recommends** that:

**Recommendation 2: The Committee recommends that the *Workforce Reform Bill 2013* be amended as follows:**

**Clause 4, proposed new *Industrial Relations Act 1979* s26(2A), page 3, line 7:**

**Delete proposed paragraph (2A) as printed, in its entirety.**

**Insert the following:**

**(2A) In making a public sector decision the Commission must take into consideration any submissions made to the Commission on behalf of the State government that is to include such matters as:**

**(d) any *Public Sector Wages Policy Statement* that is applicable in relation to negotiations with the public sector entity;**

**(e) the *financial position and fiscal strategy of the State* as published by the Department of the Treasury in publications including:**

**(v) the most recent Government Financial Strategy Statement released under the *Government Financial Responsibility Act 2000* section 11(1);**

**(vi) the most recent Government Financial Projections Statement released under the *Government Financial Responsibility Act 2000* section 12(1);**

**(vii) the most recent Government Mid-year Financial Projections Statement released under the *Government Financial Responsibility Act 2000* section 13(1); and**

**(viii) any other submissions made to the Commission on behalf of the State Government;**

**(f) the *financial position* of the public sector entity.**

6.61 A minority of the Committee, while agreeing that Clause 4 as drafted would be improved by the amendment recommended above, is of the view that, because s26 IR Act currently prescribes high level obligations on the Commission when exercising its general powers with respect to industrial matters, proposed new s26(2A) is not

necessary. This is because the Government's public sector wages policy, the financial position of the State and the employing agency are either already required to be considered, or can be clearly articulated in the Government's employer submission to the Commission.<sup>77</sup> In light of the foregoing, a minority of the Committee therefore recommends as follows:

**Minority Recommendation A**

A minority of the Committee recommends that:

*Workforce Reform Bill 2013*, at page 3, line 4, Part 2, Clause 4 —

Delete the Clause

**Part 4 of the Bill – Salaries and Allowances Tribunal determinations under section 6(1)(a), (ab), (d) or (e)**

6.62 Part 4 of the Bill requires the Salaries and Allowances Tribunal to consider the three proposed matters when making a remuneration determination under section 6(1)(a), (ab), (d) or (e), namely:

- (a) *Ministers of the Crown and the Parliamentary Secretary of the Cabinet;*
- (ab) *subject to section 44A(4) and (5) of the Constitution Acts Amendment Act 1899, a Parliamentary Secretary appointed under section 44A(1) of that Act;*
- (d) *officers of the Public Sector holding offices included in the Special Division of the Public Service; and*
- (e) *a person holding any other office of a full time nature, created or established under a law of the State, that is prescribed for the purposes of this section, but not being an office the remuneration for which is determined by or under any industrial award or agreement made or in force under any other law of the State.*

6.63 The following statutory relevant considerations, discussed above in the context of the PSM Act, must also be considered by the Salaries and Allowances Tribunal in connection with its remuneration determinations referred to in the preceding paragraph:

<sup>77</sup> *Industrial Relations Act 1979* s26.

a) *the Public Sector Wages Policy Statement; and*

b) *the State's financial position and fiscal strategy.*

6.64 As is the case for the WAIRC, the requirement introduced by Part 4 of the Bill is not directive—while the Tribunal must consider the stated matters, the Bill is silent as to how the Tribunal is to apply its normal discretion to this task, in the context of particular determinations.

*The Committee's concerns about the drafting of Clause 4 of the Bill above, apply equally to Part 4 of the Bill*

6.65 It will be appreciated that most of the concerns raised by the Committee with respect to the drafting and proper construction of Part 2, Clause 4 of the Bill above, may be equally applicable to Part 4, Clause 19 of the Bill. Accordingly, the Committee requests the Minister consider the construction of Clause 19 of the Bill in light of the Recommendation made at paragraph 6.60 above.

6.66 A minority of the Committee, while agreeing that Clause 19 as drafted would be improved by the amendment recommended above, is of the view that the Government's public sector wages policy and the financial position of the State can be clearly articulated in the Government's employer submission to the Tribunal.<sup>78</sup> In light of the foregoing, a minority of the Committee therefore recommends as follows

**Minority Recommendation B**

A minority of the Committee recommends that:

*Workforce Reform Bill 2013, at page 15, line 1, Part 4 —*

Delete the Part.

**7 INVOLUNTARY TERMINATION**

**Permanency of employment and the public sector—status quo**

7.1 As currently configured, the wider public sector, to which the PSM Act has application, comprises some 139,000 Western Australians. The community benefits directly from the important work of public sector employees every day. The Committee notes that the Bill has the potential to affect the employment conditions of these employees.

<sup>78</sup> *Industrial Relations Act 1979* s26.

- 7.2 Given the above, the Committee has carefully considered both the expressed policy of the Bill, and the extent to which the Bill gives form and effect to that policy.

*Permanency of Employment and the Public Sector – Pros and Cons*

- 7.3 The Committee has heard evidence that the terms of the Bill relating to involuntary termination have caused anxiety to public sector employees.<sup>79</sup> A number of witnesses before this Committee emphasised the importance of permanence as an element of Public Sector employment. Some witnesses have stressed the potential lost investment and corporate knowledge that accompanies the loss of public sector specialist employees through redundancy and termination.<sup>80</sup> It has been suggested that tenure of employment permits public sector employees to more readily provide frank and fearless advice relating to public administration and the implementation of policy.<sup>81</sup> It was also submitted that job security is conducive to performance improvement and innovation.<sup>82</sup>
- 7.4 Other witnesses before this Committee gave evidence that tenure of employment is, to some extent, a trade-off for lower rates of pay and conditions of employment, compared to those available in the private sector.<sup>83</sup>
- 7.5 However, other evidence before this Committee has suggested that public sector tenure can lead to a public sector culture that is resistant to change, discourages innovation, and lacks operational flexibility.<sup>84</sup>

<sup>79</sup> Ms Carolyn Smith, Secretary, United Voice, *Transcript of Evidence*, Thursday, 6 February 2014, pp1 and 5; Submission No 7 from United Voice, ‘*Submissions to the Standing Committee on Legislation regarding the Workforce Reform Bill 2013*’ 17 January 2014, pp1, 7 and 10; Submission No 7 from United Voice, ‘*Submissions from United Voice Members: Workforce Reform Bill 2013*’ 24 January 2014; Ms Toni Walkington, General Secretary, CPSU/CSA, *Transcript of Evidence*, Thursday, 6 February 2014, p4; Submission No 1 from CPSU/CSA, ‘*Submission on the Workforce Reform Bill 2013*’ 16 January 2014, p5; Submission No 12 from SSTUWA, ‘*Submission on Workforce Reform Bill 2013*’ 17 January 2014, p2; Mr John Welch, Secretary, WAPOU, *Transcript of Evidence*, Thursday, 6 February 2014, p3; Submission No 8 from WA Prison Officers’ Union, ‘*Submission on the Workforce Reform Bill 2013*’ 16 January 2014, p5; Ms Lea Anderson, Assistant Secretary, United Firefighters Union of Australia (WA), *Transcript of Evidence*, Friday, 7 February 2014, p6; Submission No 3 from United Firefighters Union of Australia (WA), ‘*The Workforce Reform Bill 2013*’ 16 January 2014, p2; Mr Dan Hill, Secretary, HSUWA, *Transcript of Evidence*, Friday, 7 February 2014, p2; Submission No 10 from HSUWA, ‘*Submission on Workforce Reform Bill 2013*’ 17 January 2014, p1; Mrs Jill Hugo, Assistant Branch Secretary, ASU(WA), *Transcript of Evidence*, Friday, 7 February 2014, pp3-5; and, Submission No 5 from the ASU(WA), ‘*Submission on Workforce Reform Bill 2013*’ 17 January 2014, p1.

<sup>80</sup> Ms Lea Anderson, Assistant Secretary, United Firefighters Union of Australia (WA), *Transcript of Evidence*, Friday, 7 February 2014, p6; and, Mr Dan Hill, Secretary, HSUWA, *Transcript of Evidence*, Friday, 7 February 2014, p4.

<sup>81</sup> Ms Toni Walkington, General Secretary, CPSU/CSA, *Transcript of Evidence*, Thursday, 6 February 2014, p7.

<sup>82</sup> *Ibid*, p6.

<sup>83</sup> *Ibid*, p5.

7.6 In addition, the Committee has also received evidence from witnesses, including the Public Sector Commission, that there are inflexibilities in the current regulatory system that effectively create redeployment cul-de-sacs for a relatively small number of people, leaving the employee and the employer in a long-term impasse.<sup>85</sup> The Committee accepts that this situation is not in the interest of any of the parties involved. According to the submission from the Public Sector Commission received by the Committee:<sup>86</sup>

*Under current redeployment and redundancy arrangements, difficulties are encountered with long term registered employees who have little or no prospect for suitable alternative employment, owing to:*

- *the availability of alternative employment options being limited due to them having very specialised skills, belonging to a highly specialised occupational group, or location; or*
- *the employee not being able or willing to fully and actively engage with the redeployment process.*

*Involuntary severance is a necessary option in properly managing these circumstances.*

*As an option of last resort, involuntary redundancy will bring finality to some cases that otherwise would not be able to be resolved through retraining, redeployment or voluntary severance initiatives, with resultant cost savings.*

*A number of agencies have indicated in the past that involuntary severance would be an appropriate action for application to a small number of redeployees who are not able to be placed despite every effort having been made over a significant period of time, and who opt not to accept voluntary departure options.*

7.7 According to the Public Sector Commission, between 600 and 900 public sector employees in the wider Public Sector are routinely referred for redeployment

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<sup>84</sup> Department of Housing (2008) Submission to the Economic Audit Committee Inquiry. Final Report - [\*Putting the Public First: Partnering with the Community and Business to Deliver Outcomes\*](#). October 2009 at p158 (accessed 10 February 2014). According to that Report, in the same place:

*The introduction of involuntary separation would remove an employee's guarantee and sense of entitlement to continued employment. As a result, employees would have more incentive to accept redeployment or voluntary severance if they were offered.*

<sup>85</sup> Submission No 13 from the Public Sector Commission, 21 January 2014, p2.

<sup>86</sup> Id.

consideration each month.<sup>87</sup> The vast majority of these are processed as intra-agency redeployees. Despite these monthly figures, the existing processes of retraining, redeployment, voluntary severances, targeted severances and resignations mean that only 70 or so public sector employees are currently being managed by the Public Sector Commission as a relatively longer term proposition. Evidence provided to the Committee by the Public Sector Commission indicates that it is this remaining cohort of registered public sector employees that would be most likely to experience the effect of the proposed involuntary termination power proposed by the Bill as drafted.<sup>88</sup>

*ABS national workforce comparisons: Public Sector Employment vs Private Sector Employment*

7.8 The Committee notes that nationally, according to ABS figures, public sector employees comprise around 20% of the workforce and earn, on average, \$250.00 per week more than private sector employees. Around 90% of all public sector employees have their employment terms and conditions set by collective agreement, with fewer than 7% of public sector employees relying solely on award terms and conditions. Non-managerial full-time public sector employees on average work 5% fewer weekly hours than full-time private sector employees. Hourly rates of pay for non-managerial public sector employees are, on average, approximately 16% higher than those in the private sector.<sup>89</sup>

*Is public sector employment 'permanence' currently absolute?*

7.9 The Committee notes that currently public sector employees employed on a 'permanent' basis are subject to the Public Sector standards of conduct and performance, together with the ordinary common law relating to employment, as varied by statute. A material breach of these standards and legal requirements renders a public sector employee liable to dismissal. As for private sector employees, such dismissals are, under the IR Act, subject to the review of the WAIRC for unfairness or unreasonableness in terms of due process.

7.10 In the ordinary course of institutional change, public sector employees may find their positions declared redundant. Depending on the terms of the relevant collective agreement, this may make the employee eligible for a redundancy termination payment, or for retraining and redeployment within the agency.<sup>90</sup>

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<sup>87</sup> Source, Public Sector Commission Annual Reports.

<sup>88</sup> Source: Australian Bureau of Statistics (2013) [6306.0 - Employee Earnings and Hours, Australia, May 2012](#) (Accessed 10 February 2014).

<sup>89</sup> Id.

<sup>90</sup> *Public Sector Management (Redeployment and Redundancy Regulations) 1994*.

7.11 As a fall-back position, the PSM Act, Part 6, provides that public sector employees who find that their position has been declared redundant may be eligible for redeployment within the broader public sector.<sup>91</sup> According to the Public Sector Commission submission to the Committee, an informal practice has been adopted within the public sector to avoid resorting to the power of direction with respect to registered redeployees. The submission addresses this matter in the following terms:<sup>92</sup>

*A power of direction is currently available - both in the sense of directing a redeployee to accept an offer of a position and in directing an employer to take a redeployee for a vacant position. However, since 1994 the application of these powers has been rare. In general it has been considered less than ideal to mandate an employment arrangement that is not supported by an employer, employee or both. It is also to be noted that invoking the power of direction potentially moves the employee into a disciplinary outcome where no payments in addition to entitlements are available.*

7.12 Under the IR Act, full access to the review jurisdiction of the WAIRC is currently open to the affected public sector employees in cases of redundancy, redeployment and retraining.<sup>93</sup>

7.13 Occasionally, funds are made available within the public sector for voluntary redundancy payments over and above award level payment calculations. These voluntary redundancies may be targeted, or open for application. These arrangements are consistent with existing legislative provisions.<sup>94</sup>

7.14 Against this background, the Committee notes that currently the concept of public sector employment tenure or ‘*permanence*’ is not entirely inflexible but is a conditional status.

### **The Intended Scope of the Proposed Termination Power**

#### *First public confirmation of the policy preference— 2009*

7.15 The policy of the Bill with respect to involuntary termination of public sector employees can be traced back to the 2009 Final Report of the Economic Audit

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<sup>91</sup> Existing *Public Sector Management Act 1994* s94.

<sup>92</sup> Submission No 13 from the Public Sector Commission, 21 January 2014, p2.

<sup>93</sup> Existing *Public Sector Management Act 1994* s95.

<sup>94</sup> *Ibid*, s94(3)(e).

Committee (the **2009 EAC Report**). Recommendation 39 in that Report reads as follows:<sup>95</sup>

**Recommendation 39:** *Provide for involuntary separation in the public sector as an option of last resort by further amendments to the Public Sector Management Act 1994 and relevant subsidiary instruments.*

**Responsibility:** *Public Sector Commission*

**Deadline:** *December 2010*

**Milestones**

- *Draft legislative amendments and revised subsidiary instruments to enable involuntary separation [December 2010].*

7.16 The Committee notes that the 2009 EAC Report was the culmination of an extensive process of inquiry and consultation. Stakeholders were identified and requested to make submissions. This included the Community and Public Sector Union.<sup>96</sup> In addition, a general call for submissions was placed by the Economic Audit Committee in July 2009, with submissions due by 31 August 2009. The Committee notes that the only public sector employee representative organisations to make submissions to the Economic Audit Committee inquiry were the CPSU/CSA and the WA Police Union.<sup>97</sup>

7.17 In its submission, the CPSU/CSA made the following observation:<sup>98</sup>

*It is our experience that the legislation ensures that the principles of natural justice and the value of fairness are provided for in the processes of dealing with employees. It is imperative that these are not lost through any changes made to legislation and practices. We believe the processes established to manage surplus staff are appropriate and effective.*

7.18 The Committee notes that, according to the 2009 EAC Report, ‘*involuntary severance powers would rarely need to be exercised*’. In addition, the Committee notes that the

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<sup>95</sup> Economic Audit Committee Inquiry. Final Report - [Putting the Public First: Partnering with the Community and Business to Deliver Outcomes](#) October 2009 at p159 (accessed 10 February 2014).

<sup>96</sup> Ibid at 172 (accessed 10 February 2014).

<sup>97</sup> Ibid at 170 (accessed 10 February 2014).

<sup>98</sup> CPSU/CSA, ‘*Submission to the Economic Audit Committee Western Australia*’ August 2009, p13.

original statement of policy in the 2009 EAC Report, made it clear that the type of power under consideration was intended to be ‘*an option of last resort*’.<sup>99</sup>

*Treasurer’s confirmation that the Public Sector Commission is implementing the policy—2011.*

7.19 On 17 May 2011, the then Treasurer answered a question on notice in the Legislative Assembly regarding the progress and status of recommendations in the 2009 EAC Report. According to a schedule tabled in response to the question, Recommendation 39 had the following status:<sup>100</sup>

<i>EAC RECOMMENDATION</i>	<i>LEAD AGENCY/S</i>	<i>STATUS</i>	<i>COST</i>
39. <i>Provide for involuntary separation in the public sector as an option of last resort by further amendments to the Public Sector Management Act 1994 and relevant subsidiary instruments.</i>	<i>Public Sector Commission</i>	<i>Amendment to the Public Sector Management Act 1994 is being considered by Public Sector Commission in 2011.</i>	<i>No</i>

7.20 The Committee notes that, once again, the Government’s policy regarding involuntary termination was described as being ‘*an option of last resort*’.

### **Policy development and legislative drafting phase.**

7.21 The Committee held public hearings relating to the Bill with nine public sector employee representative organisations, on 6 and 7 February 2014. As indicated above, seven out of the nine public sector employee representative organisations, appearing before the Committee, had elected not to make submissions to the original Economic Audit Committee inquiry in 2009.

7.22 The Committee also asked each of the nine public sector employee representative organisations in attendance on 6 and 7 February 2014, whether or not they requested a

<sup>99</sup> Economic Audit Committee Inquiry. Final Report - [Putting the Public First: Partnering with the Community and Business to Deliver Outcomes](#) October 2009 at p159 (accessed 10 February 2014).

<sup>100</sup> Answer to Question on Notice 5923 asked in the Legislative Assembly by Hon John Kobelke and answered by Hon Christian Porter (Treasurer and Attorney-General), *Parliamentary Debates (Hansard)*, 17 May 2011, p 3509. Legislative Assembly [Tabled Paper No. 3319](#). Tabled on 17 May 2011, p17 (Accessed 10 February 2014).

late opportunity to make submissions to the Public Sector Commission. No employee representative organisations sought, at that stage to make a late submission on the policy announcement regarding involuntary termination.

- 7.23 At a public hearing on 5 February 2014, the Committee asked the Public Sector Commissioner if the Public Sector Commission had consulted with stakeholder groups affected by the Bill during the drafting stage. In response, the Commissioner replied; *'No, not at this stage. The consultation will be extensive once we get to the regulation stage.'*<sup>101</sup>

### **Policy intent of the Bill.**

- 7.24 In the Second Reading Speech on the Bill in the Legislative Council the Minister reiterated that; *'the government, through this bill, puts forward amendments to the Public Sector Management Act to allow the application of involuntary severance as a means of last resort.'*<sup>102</sup> As discussed at paragraph 1.3 above, the Bill was referred to the Committee before the Second Reading debate had been conducted. The policy of the Bill was also referred to the Committee, but the Legislative Council has yet to settle its own views on the policy of the Bill. As a result, it is the policy of the Bill as first read that the Committee has been considering.
- 7.25 The Committee requested details from the Public Sector Commission about the current number of public sector employees who are listed or registered for redeployment within the public sector. The Committee was provided with evidence by a Public Sector Commission witness to the effect that; *'36 people on that list, or 40 per cent, have been on redeployment between one and four years; and nine people, or 13 per cent, have been on redeployment for over four years.'*<sup>103</sup>
- 7.26 The Committee understands that public sector employees are placed on the redeployment register for a range of reasons. For those employees covered by existing agreements, this requires that any suitable retraining opportunity has been extended to the employee as provided for in those agreements.
- 7.27 Only when such redeployment and retraining opportunities have been exhausted and the employee is still facing little prospect of redeployment within the public sector are they placed on the central register. Under the current PSM Act, the Committee notes that it is at this point that the employing authority has the power to direct an employee

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<sup>101</sup> Mr Mal Wauchope, Commissioner, Public Sector Commission, *Transcript of Evidence*, Wednesday, 5 February 2014, p2.

<sup>102</sup> Hon Helen Morton MLC, Minister for Mental Health, Parliamentary Debates (Hansard), Thursday, 28 November 2013, p6854.

<sup>103</sup> Mr Paul Wilding, Director: Management and Practice, Public Sector Commission, *Transcript of Evidence*, Wednesday, 5 February 2014, p12.

to accept a redeployment position as a mandatory requirement. This was discussed at paragraph 7.11 above. Should an employee refuse such a direction, the disciplinary processes under the PSM Act become active, with the potential for involuntary termination.

- 7.28 In its submission to the Committee, the Public Sector Commission also made the following statements:

*It is anticipated that the proposed changes will only affect a very small number of public sector employees.*<sup>104</sup>

*Current arrangements for the management of surplus employees focus on retraining and redeployment initiatives. The case management of these employees is and will continue to be undertaken directly by agencies.*<sup>105</sup>

- 7.29 On this evidence, it would appear that the proposed new termination power would, indeed, be ‘an option of last resort’,<sup>106</sup> ‘that would rarely need to be exercised’.<sup>107</sup>

- 7.30 The Committee does note, however, that there appears to be differing views about the policy intention and scope of the involuntary termination provisions of the Bill.

- 7.31 In the Second Reading Speech on the Bill, the Minister made the following remarks, which, if read widely, might suggest the possibility of the involuntary termination power proposed in the Bill being used for ‘structural’ as well as ‘remedial’ purposes.<sup>108</sup>

*On the one hand, government must respect the interests of all employees concerned and treat their situation with fairness and due process and, on the other, meet its responsibility to the broader community to manage the public sector workforce in the most efficient and cost-effective manner.*

<sup>104</sup> Submission No 13 from the Public Sector Commission, 21 January 2014, p1.

<sup>105</sup> Ibid at p2.

<sup>106</sup> Economic Audit Committee Inquiry. Final Report - [Putting the Public First: Partnering with the Community and Business to Deliver Outcomes](#) October 2009 at p159 (accessed 10 February 2014); Answer to Question on Notice 5923 asked in the Legislative Assembly by Hon. John Kobelke and answered by Hon Christian Porter (Treasurer and Attorney-General), *Parliamentary Debates (Hansard)*, 17 May 2011, p350; Hon Helen Morton MLC, Minister for Mental Health, *Parliamentary Debates (Hansard)*, Thursday, 28 November 2013, p6854; Submission No 13 from the Public Sector Commission, 21 January 2014, p2; Mr Mal Wauchope, Commissioner, Public Sector Commission, *Transcript of Evidence*, Wednesday, 5 February 2014, p2.

<sup>107</sup> Economic Audit Committee Inquiry. Final Report - [Putting the Public First: Partnering with the Community and Business to Deliver Outcomes](#) October 2009 at p158.

<sup>108</sup> Hon Helen Morton MLC, Minister for Mental Health, *Parliamentary Debates (Hansard)*, Thursday, 28 November 2013, p6854.

7.32 The Committee also notes that the following passage from the Explanatory Memorandum is equally capable of an expansive interpretation:<sup>109</sup>

*a) to provide the capacity to implement enhanced and more flexible redeployment arrangements that may ultimately end with the involuntary severance of employees that are surplus to an agency's requirements or whose post, office or position has been abolished and cannot effectively be redeployed.*

7.33 Testimony at a public hearing before this Committee by one Public Sector Commission witness was also capable of expansive application. According to this witness; *'it is possible that where there is structural change and people cannot be found work, then they could be registrable and then potentially registered.'*<sup>110</sup>

7.34 In addition, the Committee notes the following passage of evidence from the Committee's hearing with the Department of Treasury:<sup>111</sup>

**Hon SALLY TALBOT:** *So [these] are pretty wide ranging measures?*

**Mr Barnes:** *I believe they are significant and very important measures.*

**Hon SALLY TALBOT:** *Can you rank those specific measures in order of their significance? You have talked specifically about the CPI stipulation on the IRC.*

**Mr Barnes:** *Well, the IRC being required to take into account the state government's wages policy is hard for me to rank, but that and the ability for agencies to involuntarily sever employees who cannot be effectively redeployed elsewhere in the public sector—those two things side by side—are critically and equally important. My concern with the current redeployment arrangements is that they are open-ended. Potentially, they never end; they just go on and on and on. They are clearly not effective. In a workforce of 110 000 people across the public sector, there are only around 70 people on the redeployment list. To me, that is an indication that the current redeployment system is not working and needs some changes.*

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<sup>109</sup> [Workforce Reform Bill 2013 Explanatory Memorandum](#) (Accessed 10 February 2014) p1.

<sup>110</sup> Mr Lindsay Warner, Director: Policy and Reform, Public Sector Commission, *Transcript of Evidence*, Wednesday, 5 February 2014, p15.

<sup>111</sup> Mr Michael Barnes, Deputy Under Treasurer, Department of Treasury, *Transcript of Evidence*, Wednesday, 12 February 2014, p10.

**Hon SALLY TALBOT:** *I see, so we are not just looking at the people on the list; we are saying that the list is not capturing everybody who ought to be redeployed?*

**Mr Barnes:** *That is my view.*

**Hon SALLY TALBOT:** *Do you have a ballpark figure for what the level is?*

**Mr Barnes:** *No, I do not; but 70-odd people out of a workforce of 110 000 seems extraordinarily low to me.*

7.35 The views expressed in the above exchange created some uncertainty for the Committee. As a result, the Committee sought clarity from the Public Sector Commissioner directly, about the actual policy intent of the proposed amendments as follows:<sup>112</sup>

**Hon SALLY TALBOT:** *... So [Treasury] gave us the impression that we are looking at some pretty broad measures and also not just remedial but structural change. Mr Wauchope, you said when you appeared before us last week what the bill does is actually reset the employment relationship.*

**Mr Wauchope:** *Yes.*

**Hon SALLY TALBOT:** *Which sounds like more of a structural change measure than a remedial measure.*

**Mr Wauchope:** *Maybe I should explain that more clearly, Madam Chair. What I see happening from this amendment, should it proceed, is that it would put more onus on both the employee and the employer to be proactive in managing the employment relationship. The current arrangements do not bring that to bear, in my view, and so at the moment I think people can sit in a particular status for a long, long time and not be responsible for doing anything about it. And I am not necessarily saying this is the employee; it is the employer as well. I believe what this will do is require both the employer and the employee to rework that relationship much earlier.*

**Hon DONNA FARAGHER:** *Just so that we are clear, my understanding from your evidence that you provided at the first hearing and the advice that has been provided by government through*

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<sup>112</sup> Mr Mal Wauchope, Commissioner, Public Sector Commission, *Transcript of Evidence*, Friday, 14 February 2014, p9.

*the second reading speech is that this bill is clearly designed to deal with those employees where it has come to a position of last resort.*

**Mr Wauchope:** *Last resort.*

**Hon DONNA FARAGHER:** *We keep on hearing the term “last resort”. Clearly there are different views that have been expressed, and that is obviously now being canvassed by Hon Sally Talbot, but from your perspective you still maintain that that is the policy objective: to deal with those employees where it comes to a position of last resort after going through the other processes which we are going to go through shortly.*

**Mr Wauchope:** *That is correct, and I think that is a position the Premier may have publicly stated as well. So, as I said, that is my position and that is the explanation in relation to resetting the employment relationship. The proposed termination power in the Bill goes further than merely providing for involuntary separation in the public sector as an option of last resort.*

- 7.36 While the Public Sector Commissioner confirmed that the policy intention is to deal with involuntary terminations as an option of “*last resort*”, the Committee notes his additional evidence that the proposed termination power set out in the text of the Bill does go further as outlined above.
- 7.37 The Committee notes that the new regulation making powers, proposed at clauses 13 and 14 of the Bill for inclusion in the IR Act, with respect to ‘*registrable employees*’ and ‘*registered employees*’<sup>113</sup> are broadly drafted.
- 7.38 Consider the proposed definition of ‘*registrable employees*’, which is the first stage in the process relating to redeployment, retraining and redundancy:

***registrable employee means —***

- a) an employee who is surplus to the requirements of a department or organisation; or*
- b) an employee whose office, post or position has been abolished; or*
- c) an employee in a category prescribed by the regulations.*

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<sup>113</sup> Defined at Clause 13 of the Bill, in proposed new section 94(1A).

- 7.39 Given that drafting of the proposed regulations has not commenced, it is impossible to speculate how broad, or narrow, an accurate construction of a provision such as; ‘*an employee in a category prescribed by the regulations*’ might be in practice, over time.<sup>114</sup> The Committee attempted to obtain some guidance on this point from the Public Sector Commission. In response, the Commissioner made the reasonable observation that regulations would be disallowable instruments and, therefore, subject to parliamentary scrutiny.<sup>115</sup> However, the challenge to Parliamentary scrutiny posed by skeletal legislation and the associated regulations has been noted from paragraph 5.1 above.
- 7.40 The Committee asked witnesses to provide it with some examples of special categories of employees who might come within the scope of proposed new s94(1A)(c) ‘*an employee in a category prescribed by regulations*’. A majority of the committee was satisfied that the examples provided were appropriately dealt with under subparagraph (c) for individual cases and did not relate to groups of workers.<sup>116</sup>
- 7.41 A minority of the Committee were of the view that all the examples provided appeared to be adequately addressed by the categories identified at proposed new s94(1A)(a) and (b) together with other existing provisions under the PSM Act. A minority of the Committee therefore recommends as follows:

#### **Minority Recommendation C**

A minority of the Committee recommends that:

*Workforce Reform Bill 2013*, at page 8, line 11, subparagraph (b) —

Delete ‘; or’

and

Insert ‘.’

At page 8, line 12, subparagraph (c) —

Delete all of subparagraph (c).

<sup>114</sup> Mr Lindsay Warner, Director: Policy and Reform, Public Sector Commission, *Transcript of Evidence*, Wednesday, 5 February 2014, pp14 and 15, in response to direct questioning on this point.

<sup>115</sup> Mr Mal Wauchope, Commissioner, Public Sector Commission, *Transcript of Evidence*, Friday, 14 February 2014, p12.

<sup>116</sup> Mr Lindsay Warner, Director, Policy and Reform, Public Sector Commission, *Transcript of Evidence*, Friday, 14 February 2014, pp8-9.

**The Public Sector Commission has yet to commence the process of drafting regulations to the Bill.**

- 7.42 The Government advised in 2009 that it had tasked the Public Sector Commission to; “*Provide for involuntary separation in the public sector as an option of last resort by further amendments to the Public Sector Management Act 1994 and relevant subsidiary instruments*” (underlining added).<sup>117</sup> At that point in time, the Public Sector Commission was given the deadline of December 2010 to complete this task. In May 2011, the Treasurer advised that the Public Sector Commission’s task, articulated in the 2009 EAC Report to be completed by December 2010, would be considered by the Public Sector Commission in 2011.
- 7.43 In October 2013, the Bill was tabled in Parliament, and in February 2014 the Committee was advised that the Public Sector Commission still has not commenced drafting the ‘*relevant subsidiary instruments*’.<sup>118</sup> The response received on this point is that Parliamentary Counsel “*are reluctant to commence drafting regulations until they are confident of the passage of the bill through Parliament.*”<sup>119</sup>
- 7.44 At face value this proposition seems reasonable enough. It is common practice for legislation to be proposed without draft regulations having been prepared for simultaneous consideration by the Parliament. However, this Bill can only be described as skeletal, as much of the relevant functional detail surrounding the ‘*enhanced*’ redundancy, retraining, redeployment and termination system is left to regulations.
- 7.45 In such circumstances it would have been beneficial for the Committee to have been given a draft copy of the regulations to assist it in its deliberations and to inform Members generally about the potential impact of the Bill.

*Special regulation-making powers in the Bill*

- 7.46 As drafted, the Bill could allow regulations and, arguably, non-disallowable Commissioner’s Instructions, to override the *Public Sector Management Act 1994*, industrial instruments including Awards, and contracts of employment with respect to redundancy, retraining, redeployment and involuntary terminations.

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<sup>117</sup> Economic Audit Committee Inquiry. Final Report - [Putting the Public First: Partnering with the Community and Business to Deliver Outcomes](#) October 2009 at p159 (accessed 10 February 2014).

<sup>118</sup> Mr Mal Wauchope, Commissioner, Public Sector Commission, *Transcript of Evidence*, Wednesday, 5 February 2014, p2.

<sup>119</sup> Mr Lindsay Warner, Director: Policy and Reform, Public Sector Commission, *Transcript of Evidence*, Wednesday, 5 February 2014, p2.

- 7.47 The Bill proposes introducing a specific regulation-making power at new section 94(1) and (2A) applicable to; ‘*arrangements for registrable employees in relation to redeployment, retraining and redundancy.*’ The Bill also proposes introducing a separate class of regulation-making power, at proposed new s95A(2), with specific application to; ‘*the termination of employment of a registered employee,*’ and ‘*the terms and conditions (including remuneration)*’, applicable to registered employees so terminated.
- 7.48 The Committee notes that the existing general regulation-making power in the PSM Act at s108 must be exercised in a manner that is consistent with the Act. However, the proposed new regulation-making powers referred to in proposed new s95B, do not have this express limitation:
- (2) *The provisions of this Part and regulations referred to in sections 94 and 95A prevail, to the extent of any inconsistency, over —*
    - a) *any other provision of this Act other than section 7, 8 or 9; and*
    - b) *any industrial instrument.*
  - (3) *Regulations referred to in section 94 or 95A prevail, to the extent of any inconsistency, over the terms and conditions applying to an employee’s employment under a contract of employment, whether entered into or renewed before, on or after the commencement of the Workforce Reform Act 2013 section 14.*
- 7.49 As is evident from the above provisions, the Bill does not require the relevant regulations to be consistent with the PSM Act generally. There is also an express provision at proposed new PSM Act s95B(2) and (3) providing that, if such regulations are inconsistent with either: the Act (with the express exception of ss7, 8 and 9); an award; an industrial agreement; an order of the WAIRC; or a contract of employment, the regulation will prevail.
- 7.50 In other words, the application of all of the above (including the PSM Act itself) can be over-ridden by regulations made under Part 6 of the PSM Act. In addition, as drafted, regulations can also specify that certain matters subject to regulation, can be determined by Commissioner’s Instruction. Arguably, such Commissioners Instructions, if made under Part 6 of the PSM Act would, because of the nature of this Part of the PSM Act, constitute a new category of Commissioner’s Instructions.

7.51 Accordingly, the Bill proposes creating a new category of regulations, which propose granting the regulation-maker the power to over-ride the enabling Act itself. Further, the Bill, as drafted empowers the regulation-maker to over-ride the existing industrial agreements relating to redeployment, retraining, redundancy and termination.

*Clauses 13 and 14 may have the effect of creating a new class of Commissioner's Instruction under Part 6 of the PSM Act.*

7.52 The Committee notes that, as currently drafted, the Bill at Clause 13, proposed new s94(2A)(b) and Clause 14, proposed new s95A(4) links regulations made under Part 6 of the PSM Act to Commissioner's Instructions. The Committee has concerns about the potential for Part 6 of the PSM Act to be open to a construction that gives rise to an entirely different category of Commissioner's Instructions. This category of Commissioner's Instructions would have the capacity to override both the PSM Act and its regulations, despite the Commissioner's Instructions being non-disallowable instruments.

7.53 This concern was raised with the Public Sector Commission at a hearing.<sup>120</sup> The response received from the Commission was to the effect that, provided Clause 9 of the Bill was retained, the Commission had no objection to having the proposed reference to Commissioner's Instructions at Clause 13, proposed new s94(2A)(b) and Clause 14, proposed new s95A(4) deleted from the Bill. Accordingly, the Committee **recommends** as follows:

**Recommendation 3: The Committee recommends that the *Workforce Reform Bill 2013* be amended as follows:**

**Clause 13, proposed new *Public Sector Management Act 1994* s94(2A)(b), page 8, line 26:**

**Delete the words '*or determined in accordance with the Commissioner's instructions*'**

**Clause 14, proposed new s95A(4), page 10, line 16:**

**Delete the words '*or determined in accordance with the Commissioner's instructions*'**

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<sup>120</sup> Mr Mal Wauchope, Commissioner, Public Sector Commission, *Transcript of Evidence*, Friday, 14 February 2014, pp3-4.

- 7.54 This leaves the ‘*inconsistent provisions, instruments and contracts*’ aspect of the regulation making powers contained within Clause 14, proposed PSM Act s95B(2)(a), (b) and (3).
- 7.55 First, the Committee believes that proposed PSM Act s95B(2)(a) constitutes a Henry VIII clause, because it effectively delivers the power to amend the application of primary law to an Executive agency by means of subsidiary legislative instruments. This is inconsistent with an important generally accepted fundamental legislative principle, namely: ‘*Does the Bill allow or authorise the amendment of an Act only by another Act?*’<sup>121</sup>
- 7.56 Accordingly, the Committee **recommends** that:

**Recommendation 4: The Committee recommends that the *Workforce Reform Bill 2013* be amended as follows:**

**Clause 14, proposed new *Public Sector Management Act 1994* s95B(2), page 10, line 28:**

**Delete all text from ‘—’ to line 31 after ‘(b)’, inclusive.**

- 7.57 Second, the Committee notes that Clause 14 of the Bill, proposed new s95B(2)(b) and (3), provide for regulations made under Part 6 of the PSM Act, ‘*Redeployment and Redundancy of Employees*’, to override inconsistent industrial instruments, or contracts of employment. The Committee notes that these provisions represent the policy position of Government.
- 7.58 The Committee also notes that the policy position that is given legislative expression at Clause 14 of the Bill, proposed new s95B(2)(b) and (3), is contested in strong terms by all employee representative organisations before the Committee.<sup>122</sup> The Committee notes that this aspect of Government policy was not announced prior to the tabling of the Bill.

<sup>121</sup> Western Australia, Legislative Council, Standing Committee on Legislation, Report 19, *Revenue Laws Amendment Bill 2012*, 12 September 2012, p2.

<sup>122</sup> Submission No 7 from United Voice, ‘*Submissions to the Standing Committee on Legislation regarding the Workforce Reform Bill 2013*’ 17 January 2014, pp3-4; Ms Carolyn Smith, Secretary, United Voice, *Transcript of Evidence*, Thursday, 6 February 2014, pp9-10; Mr Michael Amati, Industrial Advocate, SSTUWA, *Transcript of Evidence*, Thursday, 6 February 2014, p8; Ms Meredith Hammat, Secretary, Unions WA, *Transcript of Evidence*, Thursday, 6 February 2014, p7; Submission No 2 from UnionsWA, ‘*Submission on Workforce Reform Bill 2013*’ 16 January 2014, pp1 and 6; Mr John Welch, Secretary, WAPOU, *Transcript of Evidence*, Thursday, 6 February 2014, p9; Submission No 3 from United Firefighters Union of Australia (WA), ‘*The Workforce Reform Bill 2013*’ 16 January 2014, p2; and, Mrs Jill Hugo, Assistant Branch Secretary, ASU(WA), *Transcript of Evidence*, Friday, 7 February 2014, pp4-5.

### Relevant legal principles relating to the statutory variation of terms and conditions of employment.

7.59 The Committee notes that there are three common law principles which are relevant to this section:

7.59.1 Rights and relationships that are created by statute, unless they are entrenched, are always susceptible to statutory amendment.<sup>123</sup> This reflects the view that the Parliament retains the power to undo anything which the Parliament has done. Further, the general principle is that a later Parliament should not be bound by a former Parliament.<sup>124</sup> This is not the case with respect to contracts reached between parties.<sup>125</sup>

7.59.2 There is a common law principle that where a right or property interest is varied or abrogated by statute, just compensation should be available;<sup>126</sup> and,

7.59.3 There is a common law principle that decisions made by public sector decision makers should be subject to some form of administrative review.<sup>127</sup>

7.60 The Committee notes that the power to override existing employment agreements and industrial instruments with respect to redundancy, retraining, redeployment and termination is highly contentious. Almost all employee representative organisations before the Committee expressly opposed such measures as being fundamentally unfair, contrary to the spirit of enterprise bargaining and having the potential to erode

<sup>123</sup> *Health Insurance Commission v Peverill* (1994) 179 CLR 226.

<sup>124</sup> *Building Construction Employees' & Builders' Labourers' Federation (NSW) v Minister for Industrial Relations (BLF Case)* (1986) 7 NSWLR 372; and, *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1; *Workcover Corp (Century Products (SA) Pty Ltd) v Hojski* (1993) 61 SASR 290 (FC) at 294 per King CJ (Perry and Duggan JJ agreeing); *Minister for Natural Resources v New South Wales Aboriginal Land Council* (1987) 9 NSWLR 154 at 156 per Kirby P; *Victoria v Robertson* [2000] VSCA 113 at [20] per Batt JA (Callaway and Buchanan JJA agreeing); *Attorney-General (Qld) v Fardon* [2003] QCA 416 at [20] per de Jersey CJ; and, *Bellemore v Tasmania* [2006] TASSC 111 (FC) at [87] per Slicer J.

<sup>125</sup> *Cleaver v Mutual Reserve Fund Life Assn* [1892] 1 QB 147; *Re Engelbach's Estate*; *Tibbetts v Engelbach* [1924] 2 Ch 348; *Re Clay's Policy of Assurance*; *Clay v Earnshaw* [1937] 2 All ER 548; and, *Re Sinclair's Life Policy* [1938] Ch 799.

<sup>126</sup> See: *Benning v Wong* (1969) 122 CLR 249. This is concept is based on numerous legal principles, including conversation (*Fletcher v Ashburner* (1779) 1 Bro CC 497; 28 ER 1259); unconscionability (*Anson v Anson* (2004) 12 BPR 22,303); and restitution (*Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221). But note *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399.

<sup>127</sup> *Council of Civil Service Unions v Minister for the Civil Service (GCHQ Case)* [1985] AC 374; *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274; and, *Stewart v Ronalds* [2009] NSWCA 277.

conditions of employment to which the Government has given prior consent.<sup>128</sup> By contrast, employer representatives before the Committee stressed the economic and structural efficiency benefits to the State, by harmonising arrangements surrounding redundancy, retraining, redeployment and termination across the sector.

7.61 The Department of Commerce provided evidence that:<sup>129</sup>

*What I can say about that is that our understanding—and we support this—is that the government is looking to establish the same arrangements across the sector for all employees. This clause delivers that; however, I can say that we did make suggestions that perhaps there needed to be transitional provisions for prospective arrangements.*

7.62 Given the suggestion ‘*that perhaps there needed to be transitional provisions for prospective arrangements*’ under the Bill, the Committee **recommends** as follows:

**Recommendation 5: The Committee recommends that, during the Second Reading debate on the Bill, that the Minister advise the Legislative Council on the Government’s position to the ‘*suggestion that there needed to be transitional provisions for prospective arrangements*’.**

7.62.1 A minority of the Committee noted that the range of instruments, agreements and contracts likely to be affected by regulations proposed at Clauses 13 and 14 of the Bill, to cite examples provided by the Public Sector Commission, include the Public Sector General Agreement, certain employees of GESB United Voice Health Support Workers Agreement and the Government Services (Miscellaneous) General Agreement. This appears to cover the employment conditions of the majority of public sector employees.

7.62.2 A minority of the Committee considers that the proposition to unilaterally vary existing negotiated employment conditions is not one that is open to any other employer in Western Australia and potentially breaches the common

<sup>128</sup> Submission No 7 from United Voice, ‘*Submissions to the Standing Committee on Legislation regarding the Workforce Reform Bill 2013*’ 17 January 2014, pp3-4; Ms Carolyn Smith, Secretary, United Voice, *Transcript of Evidence*, Thursday, 6 February 2014, pp9-10; Mr Michael Amati, Industrial Advocate, SSTUWA, *Transcript of Evidence*, Thursday, 6 February 2014, p8; Ms Meredith Hammat, Secretary, Unions WA, *Transcript of Evidence*, Thursday, 6 February 2014, p7; Submission No 2 from UnionsWA, ‘*Submission on Workforce Reform Bill 2013*’ 16 January 2014, pp1 and 6; Mr John Welch, Secretary, WAPOU, *Transcript of Evidence*, Thursday, 6 February 2014, p9; Submission No 3 from United Firefighters Union of Australia (WA), ‘*The Workforce Reform Bill 2013*’ 16 January 2014, p2; and, Mrs Jill Hugo, Assistant Branch Secretary, ASU(WA), *Transcript of Evidence*, Friday, 7 February 2014, pp4-5.

<sup>129</sup> Ms Sandra Newby, Manager – Public Sector Labour Relations, Department of Commerce, *Transcript of Evidence*, Wednesday, 5 February 2014, p4.

law principles relating to the involuntary severance of public servants cited at paragraph 7.59 above. Accordingly, a minority of the Committee recommends as follows:

**Minority Recommendation D**

A minority of the Committee recommends that:

The *Workforce Reform Bill 2013* be amended to include transitional arrangements to allow existing instruments, agreements and contracts to expire as per existing terms of such instruments, agreements and contracts unless they are amended by mutual agreement between the parties such as is currently the standard requirement for all employers seeking to amend instruments, agreements and contracts.

*Joint Standing Committee on Delegated Legislation Scrutiny*

- 7.63 On one construction, the regulation-making powers at Part 6 of the PSM Act are broader, with respect to Part 6 matters, than the standard regulations made under s108 of the PSM Act. As noted at paragraph 7.48 above, unlike the standard regulation making powers at PSM Act s108, there is no express requirement for regulations made under Part 6 of the PSM Act to be consistent with the PSM Act generally. This is apparent when one considers the reference to Part 6 of the PSM Act in proposed s95B in Clause 14 of the Bill.
- 7.64 Given that the regulation making head of power proposed by Clauses 13 and 14 of the Bill as new PSM Act ss94(1) and (2A), s95A(2); together with ss95B(2) and (3) is broad, the Joint Standing Committee on Delegated Legislation could, in practice not be able to find that regulations made under the relevant are not ‘*beyond power*’.<sup>130</sup> It will, of course, be open for any Member to move a disallowance motion on such regulations.

*Rights of appeal and review by the WAIRC.*

- 7.65 The existing rights of appeal to, and review by, the WAIRC with respect to redundancy, retraining and redeployment are retained under the Bill at Clause 15.
- 7.66 Clause 15 also establishes limited rights of appeal within specified time limits to the WAIRC for employees affected by the involuntary severance decisions.

<sup>130</sup>

See Joint Standing Committee on Delegated Legislation: [Functions and Powers](#), item 10.6(a).

- 7.67 The WAIRC will not have the jurisdiction to compensate or reinstate employees of the involuntary severance decision. However, there is a power at proposed s95(5) for the WAIRC to ensure that the Regulations have been '*fairly applied*' and that the compensation has been appropriately calculated.
- 7.68 Clause 16 of the Bill amends the PSM Act at s101 to permit the payment of higher termination benefits than are otherwise permitted under the IR Act.
- 7.69 The Committee notes that, prior to the tabling of the Bill, the policy intention demonstrated in the terms of the Bill to afford specially restricted rights of review by the WAIRC in cases of involuntary termination was not announced by Government. None of the employee representative organisations supported this aspect of the Bill.<sup>131</sup>

### **Will the Bill achieve the Government's stated policy intention?**

- 7.70 The Committee notes that the provisions in Part 3 of the Bill, amending Part 6 of the PSM Act, as drafted, is capable of either a very narrow or very broad application in practice.
- 7.71 The Committee notes that, based on a fair reading of the statements made by the Minister and the Public Sector Commission, the amendments relating to involuntary termination are intended to be used as a last resort, and only after the existing redundancy, retraining and redeployment systems have been exhausted. According to these sources, this can reasonably be expected to affect a small number of public sector employees. If this is indeed the scale of the involuntary terminations instigated under the proposed legislation, the assurances of Government will have been realised.
- 7.72 However, a minority of the Committee remains concerned about the import, if any, of the statement made in evidence by the Deputy Under Treasurer that '*if the redeployment system was made more effective, then there would be more people on the list – how many more, I have no idea.*'<sup>132</sup>

<sup>131</sup> Submission No 1 from CPSU/CSA, '*Submission on the Workforce Reform Bill 2013*' 16 January 2014, p6; Ms Toni Walkington, General Secretary, CPSU/CSA, *Transcript of Evidence*, Thursday, 6 February 2014, pp9-10; Submission No 7 from United Voice, '*Submissions to the Standing Committee on Legislation regarding the Workforce Reform Bill 2013*' 17 January 2014, pp1 and 7; Ms Stephanie Hanrahan, Industrial Officer, United Voice, *Transcript of Evidence*, Thursday, 6 February 2014, p8; Mr Michael Amati, Industrial Advocate, SSTUWA, *Transcript of Evidence*, Thursday, 6 February 2014, p5; Dr Tim Dymond, Organising and Strategic Research Officer, Unions WA, *Transcript of Evidence*, Thursday, 6 February 2014, p6; Submission No 2 from UnionsWA, '*Submission on Workforce Reform Bill 2013*' 16 January 2014, p7; Mr John Welch, Secretary, WAPOU, *Transcript of Evidence*, Thursday, 6 February 2014, p8; Mr Dan Hill, Secretary, HSUWA, *Transcript of Evidence*, Thursday, 6 February 2014, p6; Ms Lea Anderson, Assistant Secretary, United Firefighters Union of Australia (WA), *Transcript of Evidence*, Friday, 7 February 2014, p9; Mrs Jill Hugo, Assistant Branch Secretary, ASU(WA), *Transcript of Evidence*, Friday, 7 February 2014, pp4-5; and, Submission No 5 from the ASU(WA), '*Submission on Workforce Reform Bill 2013*' 17 January 2014, p1.

<sup>132</sup> Mr Michael Barnes, Deputy Under Treasurer, Department of Treasury, *Transcript of Evidence*, Wednesday, 12 February 2014, p10.

7.73 The Committee has formed the view that the efficacy of Part 6 of the IR Act, as amended, should be subject to a periodic review at least every four years.

7.74 Accordingly, the Committee recommends as follows:

**Recommendation 6: The Committee recommends that the Bill be amended as follows:**

**Page 13 — after line 18 — to insert as follows:**

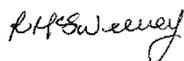
**96. Review of Part 6 — Redeployment and Redundancy of employees**

- (1) The Minister is to cause a review of the operation and effectiveness of this Part of the Act as soon as is practicable on or before —
  - (a) the fourth anniversary of the commencement of this section; and
  - (b) the expiry of each 4 yearly interval after that anniversary.
- (2) The Minister may advise the Public Sector Commissioner of the findings of any review under subsection (1) above, not more than 28 days prior to tabling a Report under subsection (4) below
- (3) The Minister shall cause a Report of the findings of any review under subsection (1) above, to be tabled in both the Legislative Assembly and the Legislative Council.

**8 CONCLUSION**

8.1 In the foregoing sections of this Report, the Committee has identified a number of issues relating to the drafting of the Bill. It is hoped that the Government and the Public Sector Commission, will respond to the concerns of the Committee during the Second Reading debate.

8.2 The Committee appreciates that a number of the policy aspects of the Bill are contentious. Where the Committee has identified such contention, it has endeavoured to give equal weight to those competing perspectives that have been raised with the Committee in direct evidence, and through the submissions received. Policy questions are matters about which reasonable minds may differ. It is hoped that this Report will assist all honourable Members by informing the remaining Second Reading debate about the range of views within the public sector concerning the Bill.



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**Hon Robyn McSweeney MLC**  
**Chairman**

**10 March 2014**

# **APPENDIX 1**

## **STAKEHOLDERS INVITED TO PROVIDE A SUBMISSION, SUBMISSIONS RECEIVED, PUBLIC HEARINGS**

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### **Stakeholders invited to make a submission**

1. Department of the Premier and Cabinet
2. Public Sector Commission
3. Department of Commerce
4. Department of Treasury
5. Community and Public Sector Union / Civil Service Association of WA
6. UnionsWA
7. United Voice
8. Australian Nursing Federation
9. State School Teachers' Union of Western Australia
10. WA Police Union of Workers
11. United Firefighters Union of Australia, Western Australian Branch
12. Western Australian Prison Officers' Union
13. Transport Workers' Union
14. Professor William Ford, Dean, UWA Law School
15. Chamber of Commerce and Industry
16. Law Society of Western Australia
17. Western Australian Bar Association
18. Industrial Relations Society of Western Australia

### **Submissions received**

1. Community and Public Sector Union / Civil Service Association of WA
2. UnionsWA
3. United Firefighters Union of Australia, Western Australian Branch
4. WA Police Union of Workers
5. Australian Services Union, Western Australian Branch
6. Private Citizen
7. United Voice
8. Western Australian Prison Officers' Union
9. The Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch.
10. The Health Services Union of Western Australia
11. Department of the Premier and Cabinet

12. State School Teachers' Union of Western Australia
13. Public Sector Commission

### **Public hearings**

The Committee held public hearings with the following witnesses from departments, entities and unions on 5, 6, 7, 12 and 14 February 2014. Transcripts of the public hearings are available at the Committee's website at [www.parliament.wa.gov.au/leg](http://www.parliament.wa.gov.au/leg)

1. Public Sector Commission
  - Mr Malcolm Wauchope, Commissioner
  - Mr Paul Wilding, Director, Management and Practice
  - Mr Lindsay Warner, Director, Policy and Reform
  - Mr John Lightowlers, General Counsel
2. Department of the Premier and Cabinet
  - Mr Peter Conran, Director General
  - Mr Robert Kennedy, Director, Office of the Director General
3. Department of Commerce
  - Mr Brian Bradley, Director General
  - Ms Sandra Newby, Manager, Public Sector Labour Relations
4. United Voice
  - Ms Carolyn Smith, Secretary\
  - Ms Stephanie Hanrahan, Industrial Officer
  - Ms Kerry Banting, Union Delegate
  - Mrs Susan Joslin, Union Delegate
  - Mr Mark Wayward, Union Delegate
5. UnionsWA
  - Ms Meredith Hammat, Secretary
  - Mr Tim Dymond, Organising and Strategic Research Officer
6. Community and Public Sector Union / Civil Service Association of WA
  - Ms Toni Walkington, General Secretary
  - Mr Mark Finnegan, Coordinator, Member Services
  - Ms Catherine Corbitt, Union Delegate

7. State School Teachers' Union of Western Australia
  - Mr Michel Amati, Industrial Advocate
  
8. WA Police Union of Workers
  - Mr George Tilbury, President
  - Mr Paul Hunt, Secretary
  - Ms Jane Baker, Research Officer
  
9. United Firefighters Union of Australia, Western Australian Branch
  - Mr Frank Martinelli, President
  - Mr Kevin Jolly, Secretary
  - Ms Lea Anderson, Assistant Secretary
  
10. Western Australian Prison Officers' Union
  - Mr John Welch, Secretary
  - Ms Rebeka Marton, Industrial Officer
  
11. The Health Services Union of Western Australia
  - Ms Cheryl Hamill, President
  - Mr Dan Hill, Secretary
  - Mr Richard Parlow, Lead Organiser
  
12. Australian Services Union, Western Australian Branch
  - Ms Jill Hugo, Assistant Secretary
  - Mr Warren de Prazer, Union Delegate
  
13. Department of Treasury
  - Mr Michael Barnes, Deputy Under Treasurer
  - Mr Michael Court, Executive Director, Economic
  
14. Ms Maria Saraceni

**Private hearings**

In addition to the foregoing public hearings, the Committee held two Private Hearings. One Private Hearing was held on 6 February 2014 with United Voice, and the second Private Hearing was held on 14 February 2014 with the Public Sector Commission.



## APPENDIX 2

### FUNDAMENTAL LEGISLATIVE PRINCIPLES

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<b>Does the Bill have sufficient regard to the rights and liberties of individuals?</b>
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1. Are rights, freedoms or obligations, dependent on administrative power only if sufficiently defined and subject to appropriate review?
2. Is the Bill consistent with principles of natural justice?
3. Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons?
4. Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?
5. Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?
6. Does the Bill provide appropriate protection against self-incrimination?
7. Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?
8. Does the Bill confer immunity from proceeding or prosecution without adequate justification?
9. Does the Bill provide for the compulsory acquisition of property only with fair compensation?
10. Does the Bill have sufficient regard to Aboriginal tradition and Island custom?
11. Is the Bill unambiguous and drafted in a sufficiently clear and precise way?

<b>Does the Bill have sufficient regard to the institution of Parliament?</b>
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12. Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?
13. Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?
14. Does the Bill allow or authorise the amendment of an Act only by another Act?
15. Does the Bill affect parliamentary privilege in any manner?
16. In relation to uniform legislation where the interaction between state and federal powers is concerned: Does the scheme provide for the conduct of Commonwealth and State reviews and, if so, are they tabled in State Parliament?

*Western Australian legislation committees have used FLPs as a framework for scrutinising bills since 2004 when the Uniform Legislation and General Purposes Committee (which scrutinised uniform and other bills) considered these principles. During the 37<sup>th</sup> and 38<sup>th</sup> Parliaments, the Standing Committee on Legislation and Standing Committee on Uniform Legislation and Statutes Review (established in 2005) continued the practice of considering whether a bill abrogated or curtailed FLPs.*



# APPENDIX 3

## PUBLIC SECTOR WAGES POLICY STATEMENT 2014

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### ATTORNEY GENERAL; MINISTER FOR COMMERCE

Our Ref: 44- 07261

Enquiries: Agency Labour Relations Adviser

CIRCULAR TO DEPARTMENTS AND AUTHORITIES NO. 8 OF 2013

#### **PUBLIC SECTOR WAGES POLICY STATEMENT 2014**

Cabinet has endorsed the *Public Sector Wages Policy Statement 2014* (the Statement).

The Statement is to be read in conjunction with the Premier's Circular regarding the Coordination and Governance Framework for Public Sector Labour Relations and applies to all public sector industrial agreements that expire after 1 November 2013.

A copy of the Statement is attached and can also be found online at the Department of Commerce Labour Relations Division's website.

Please contact your Labour Relations Adviser if you have any queries regarding the Statement.

A handwritten signature in black ink, appearing to read 'Michael Mischin'.

Hon. Michael Mischin MLC  
**ATTORNEY GENERAL; MINISTER FOR COMMERCE**

Government of Western Australia

## Public Sector Wages Policy Statement 2014

1. This Wages Policy Statement applies to all industrial agreements expiring after 1 November 2013 and remains in force until replaced.
2. This Wages Policy Statement is to be read in conjunction with the Premier's Circular regarding the Coordination and Governance of Public Sector Labour Relations.
3. The Government of Western Australia requires that increases in wages and associated conditions for all industrial agreements be capped at the projected growth in the Perth Consumer Price Index, as published from time to time by the Department of Treasury.
4. Negotiated outcomes must achieve improved administrative arrangements and/or flexibilities where practicable.
5. Retrospective wage increases are not to be offered or included within industrial agreements. The provisions of a new industrial agreement will apply from the date of:
  - a. the expiry of the previous industrial agreement (if any); or
  - b. the in-principle agreement being reached for a new or replacement industrial agreement (providing it is subsequently registered);whichever is the latter.
6. New or replacement industrial agreements will not apply to employees who leave their employment prior to the agreement being registered with the Western Australian Industrial Relations Commission.