INDUSTRIAL RELATIONS LEGISLATION AMENDMENT BILL 2020

Receipt and First Reading

Bill received from the Assembly; and, on motion by **Hon Alannah MacTiernan (Minister for Regional Development)**, read a first time.

Second Reading

HON ALANNAH MacTIERNAN (North Metropolitan — Minister for Regional Development) [5.49 pm]: I move —

> That the bill be now read a second time.

Since its election, the McGowan government has been clear about the importance it places on there being strong protections for workers. At the last election, we committed to the retention of the state industrial relations system, which is tailored to suit the needs of Western Australian employers and employees. However, we also made a commitment that we would review the system to ensure that it is modern, fair and accessible. The bill before the house today represents the culmination of two substantial inquiries commissioned by the government, which examined the state industrial relations system.

In 2017, the Minister for Industrial Relations commissioned the ministerial review of the state industrial relations system, conducted by barrister and former Acting President of the Western Australian Industrial Relations Commission, Mark Ritter, SC, and the member for Forrestfield, Stephen Price, MLA. The final report of the ministerial review, which was tabled in the Legislative Assembly in April 2019, made a suite of recommendations to reform the industrial relations system. This bill implements a significant number of the report's recommendations, each with the overarching objective of delivering an industrial relations system that is modern, fair and accessible.

A vital first change is for our employment laws to extend to all employees not covered by the federal system. It may surprise and disappoint the house to know that currently there are employees in Western Australia who are not entitled to minimum employment entitlements or even protections. This occurs nowhere else in Australia. As a consequence, the commonwealth government has identified this state's antiquated exclusions as a barrier to Australia ratifying the International Labour Organization's Protocol of 2014 to the Forced Labour Convention, 1930. This important protocol aims to support the global fight against forced labour, people trafficking and modern slavery. It requires that coverage and enforcement of legislation concerning forced labour, including labour law as appropriate, applies to all workers and all sectors of the economy. The exclusion of certain categories of workers from the definition of "employee" in the Industrial Relations Act 1979 and Minimum Conditions of Employment Act 1993 was therefore identified as a potential barrier to Western Australia's compliance with the protocol.

Two previous federal industrial relations ministers have written to the Western Australian government about the ratification of the protocol. On 3 November 2017, Senator Hon Michaelia Cash, the then federal Minister for Employment, wrote to the Minister for Industrial Relations stating that the Office of International Law within the commonwealth Attorney-General's Department confirmed that the gap in coverage of industrial relations protections for certain groups of workers in Western Australia results in Australia's noncompliance with Article 2(c)(i) of the protocol. The letter states —

> … this obstacle to compliance with the Protocol could be overcome by Western Australia enacting legislative changes to ensure that the Western Australian industrial relations framework applies to all workers in Western Australia who are not covered by the national industrial relations framework.

On 14 January 2019, Hon Kelly O'Dwyer, MP, the then federal Minister for Jobs and Industrial Relations, wrote to the Minister for Industrial Relations, noting that the ministerial review had been completed. The letter referred to the federal government's commitment to eradicating forced labour and to ratifying the protocol. The letter further stated —

> You may be aware that the Australian Government recently passed legislation to support businesses to respond to issues surrounding modern slavery. Now that we are approaching compliance at the Commonwealth level the gap in industrial relations protections for groups of workers in Western Australia is the only other remaining barrier enable ratification to be progressed.
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> Our officials are continuing to work together, however it would be appreciated if you could consider options to progress the outcomes of your review as they relate to this matter as quickly as possible.

The amendments in this bill will ensure that no category of Western Australian employee is denied employment protections and that our laws are, at long last, compliant with, and, therefore, the commonwealth government is able to ratify, the ILO protocol.

We are also making important amendments to align penalties for contravening state employment laws with the penalties under the federal Fair Work Act 2009 that currently apply to noncompliant national system employers

operating throughout Australia, including Western Australia. At present, failing to pay a state system employee their minimum employment entitlements attracts the paltry maximum penalty of $2 000. In contrast, failing to pay a national system employee their minimum entitlements attracts a maximum penalty of $12 600 for an unincorporated employer in another state or $63 000 for an incorporated employer in Western Australia. There is currently no penalty at all for failing to pay an employee their minimum long-service leave entitlements. It is time to remedy these unjustifiable discrepancies.

This brings me to the second inquiry, the inquiry into wage theft in Western Australia. The inquiry, as I will come to, found much of concern. To be clear, wage theft is not an inadvertent or one-off underpayment of an employee. Rather, it is the systematic and deliberate underpayment of an employee. Sadly, for some workers, it is a business model used by some unscrupulous employers.

In 2019, the Minister for Industrial Relations commissioned the former chief commissioner of the WAIRC, Tony Beech, to identify the reasons wage theft occurs, the impact wage theft has on employees, employers and the community, and the solutions going forward. The inquiry identified that wage theft in Western Australia took the form of unpaid hours, the non-payment of any wages or allowances for work performed, the underpayment of wages and entitlements, unauthorised or unreasonable deductions and non-payment of superannuation. It also identified restaurants, cafes, contract cleaning, retail and horticulture as industries in which the likelihood of wage theft is highest.

I want to share with the house just one particularly egregious example of wage theft identified by the inquiry. Mr Kandel was a migrant worker who was employed as a chef in a Perth restaurant. He was not paid for 10 months' work at the restaurant. He was not simply underpaid his wages; he was not paid at all. Mr Kandel took legal action with pro bono assistance to try to recover the wages owed to him, which totalled more than $45 000. This court action was successful and the employer was ordered to pay back pay and penalties, but none of the back pay owed to Mr Kandel or the employer's penalties were ever paid. Soon after the judgement was entered, the restaurant closed down. As was the case for Mr Kandel, and for any employee whose wages have been stolen from them, wage theft imposes significant financial hardship. This, in turn, adversely affects the community, because employees have less income to spend in the local economy and taxpayers are left making up the shortfall.

It is also important to recognise that an employer who utilises a wage theft business model gains an unfair competitive advantage over the many employers who comply with their lawful obligations. Every business wishes to maximise its financial returns; this should not, however, be allowed to be on the back of underpaying or, worse still, not paying their employees. The wage theft inquiry made a number of recommendations for legislative reform, which this bill now implements. The house may recall the infamy of 7-Eleven franchisees requiring cashbacks from their employees, many of whom were vulnerable due to their migrant status. This bill includes a prohibition on cashbacks whereby employers require employees to pay back to the employer part of their wage to circumvent minimum employment conditions. There will also be a prohibition on an employer dismissing or otherwise disadvantaging an employee because of the employee's right to inquire into or complain about their employment conditions, a prohibition on sham contracting arrangements and a prohibition on employment being advertised at less than the applicable minimum wage for the position. To complement these reforms, the powers of industrial inspectors, who have a statutory role to ensure compliance with Western Australia's employment laws, will be enhanced. I note the government has budgeted for extra funding for the Department of Mines, Industry Regulation and Safety to employ more industrial inspectors to tackle wage theft.

The bill includes measures to stop workplace bullying. We will provide workers with a quick and inexpensive avenue via the Western Australian Industrial Relations Commission to seek redress from workplace bullying and prevent actual harm to their safety and health. These provisions are based closely on the federal workplace bullying laws, which apply to national system workers in Western Australia. As with the federal laws, these provisions will complement this state's workplace safety and health laws.

The bill will also provide the WAIRC with the jurisdiction to make an equal remuneration order so that employees will receive equal remuneration for work of equal value. We will ensure that all state private sector employees are covered by an award, other than those not traditionally award-covered. In addition, the bill will increase the age at which commissioners must retire to 70 years to reflect tenured judicial positions—all provisions that we say are well overdue in the year 2020.

Lastly, it is the government's view that local governments, as part of the body politic of the state, should be regulated by the state industrial relations system, rather than the federal system. The ministerial review also identified that there is significant legal doubt about whether local governments can be regulated by the corporations power of the commonwealth Constitution, and therefore by the national industrial relations system. Some local governments argue that Western Australian local governments are, in fact, "constitutional corporations". They must, however, fully appreciate the consequence of this position. This could mean that the commonwealth Parliament's constitutional

powers are fully utilised to regulate the affairs of local government—for example, to specify the electoral system that is to be used to elect members of any Western Australian local government.

The McGowan government does not believe it is appropriate to give away our rights to the federal government. Local governments in Western Australia are created by the Parliament of Western Australia. The government is confident that the overwhelming majority of Western Australians agree that it should resist the encroachment of power from Canberra. The government's intention in this bill is nothing more than the exercise of the right of Western Australians to regulate our own political affairs without any interference from Canberra.

I would draw the house's attention to section 7A of the Salaries and Allowances Act 1975, which provides that the regulation of employment for chief executive officers of local governments is determined by the Salaries and Allowances Tribunal. This provision was inserted into the act in 2012 by the former Barnett Liberal–National government, with the full support of the Western Australian Local Government Association. If the previous government, with WALGA's support, recognised that the Parliament of Western Australia is the appropriate place to pass laws to regulate the employment conditions of chief executives of every single local government in Western Australia, it is not justifiable that other employees of precisely the same organisations should be regulated by laws of the Parliament of the commonwealth. Although it is true that the commonwealth Parliament's laws currently purport to regulate some local government employment entitlements, this does not mean that these employment arrangements are valid. I recognise that, as identified in the "Ministerial Review of the State Industrial Relations System: Interim Report", the majority of local governments in Western Australia have traditionally operated in the federal industrial relations system. The interim report states —

> Prior to the introduction of Work Choices, two Federal awards—the *Local Government Officers (Western Australia) Award 1999* and the *Municipal Employees (Western Australia) Award 1999*— covered almost all local government authorities in Western Australia. Most local governments were operating in the Federal industrial relations system well before 1999, as they had been "roped in" to earlier Federal awards."

At this time, it should be noted that the coverage within the federal industrial relations system was based on the concept of "interstated-ness" of the dispute—in simple terms, that there was a dispute between a union and an employer in more than one state. It was not until the commencement of the Howard government's WorkChoices legislation in 2006 that incorporated businesses could be regulated only under the federal industrial relations system. Additionally, we note that there are local governments that utilise state awards and continue to register agreements in the WAIRC. I note, for example, the following agreements: Shire of Harvey (Meat Inspectors) Union Collective Agreement 2017; Shire of Harvey Leschenault Leisure Centre Enterprise Agreement 2017; Shire of Waroona Outside Staff Collective Enterprise Agreement 2018; City of Kalamunda Operational Workforce Agreement 2019; Shire of Murray (Administrative Staff) Enterprise Bargaining Agreement 2020; Shire of Murray (Outside Workforce) Enterprise Bargaining Agreement 2020; and Shire of Yalgoo Employees Enterprise Agreement 2018–2021.

The Minister for Industrial Relations has sought to work cooperatively with WALGA to ensure that there will be a smooth transition of all industrial relations instruments as we remove the confusion that currently exists in respect of local government industrial relations. The minister has stated his commitment to ensuring that the transition will be conducted as smoothly as possible. It is intended that there will be minimal change to the employment arrangements for local government employers and employees during the transition. Further, following the transition, industrial relations for local government employees will be managed by Western Australians for the benefit of Western Australians, instead of by Canberra.

I would also point out the COVID-19 situation has been an important reminder of the need to move local government employment arrangements to the state industrial relations system. I note that a number of local governments have acted in respect of their employment arrangements at this time, in contradiction to the industrial relations policy objectives of the Western Australian government, but the minister had no right to seek to be heard on these issues under the Fair Work Act. If local governments had industrial instruments created in accordance with the Industrial Relations Act, the minister would be able to seek the leave of the WAIRC to be heard in proceedings involving local governments in which the state has an interest. Finally, I would point out that local governments in Queensland, New South Wales and South Australia are regulated by their state industrial relations system. The bill takes an important first step to moving all local governments to the state industrial relations system and, in the process, ending jurisdictional uncertainty for local government employers and employees.

In conclusion, the government's objectives with this bill are clear, unequivocal and ambitious. We seek to protect vulnerable workers, tackle the scourge of wage theft, bring Western Australia's employment laws into the twenty-first century, and provide a level playing field for employers in this state.

Pursuant to standing order 126(1), I advise that this bill is not a uniform legislation bill. It does not ratify or give effect to an intergovernmental or multilateral agreement to which the government or state is a party; nor does this bill, by reason of its subject matter, introduce a uniform scheme or uniform laws throughout the commonwealth.

I commend the bill to the house and table the explanatory memorandum.

[See paper 4145.]

Debate adjourned, pursuant to standing orders.

House adjourned at 6.07 pm