WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION

SUBMISSION REGARDING THE

LABOUR RELATIONS LEGISLATION AMENDMENT AND REPEAL BILL 2012

28 February 2013

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1. About WALGA

1.1 WALGA is the voice of Local Government in Western Australia. As the peak industry body WALGA advocates on behalf of the State's 140 Local Governments.

1.2 WALGA is registered as an industrial agent with the Western Australian Industrial Relations Commission for Local Government organisations in Western Australia.

2. Executive Summary and Recommendations

2.1 The *Labour Relations Legislation Amendment and Repeal Bill 2012* (the Bill) proposes a number of amendments to the WA industrial relations system, with the changes principally affecting employers and employees other than the State public sector, including Local Government employers in Western Australia.

2.2 WALGA welcomes the approach of the WA Government to introduce the Bill in an effort to modernise the WA industrial relations system but contends that the State Government has missed an opportunity to clarify the jurisdictional dilemma that plagues the local government industry. WALGA therefore strongly recommends that the State Government refer its residual industrial relations powers with respect to the local government sector to the Commonwealth Government.

2.3 The vast majority of the WA Local Government industry operates in the federal industrial relations system which is underpinned by the federal modern award – the *Local Government Industry Award* 2010. However, the reforms proposed by the Bill will have a significant operational and practical impact on a number of Local Governments.

2.4 The reforms proposed by the Bill will have an operational impact on the small percentage of Local Governments who elect to arrange their workforce and operations in the belief that, on the balance of probability, they fall within the jurisdiction of the State industrial relations system.

2.5 The reforms proposed by the Bill will also have a practical impact on the vast majority of Local Governments even though they operate in the federal industrial relations system. Many of the Local Governments that operate in the federal industrial relations system have had no reliable way of knowing whether they are subject to federal or State industrial relations laws. This is because the question of whether a Local Government is a trading corporation for the purposes of the Australian Constitution depends on the application of an imprecise and unpredictable legal test. As a result, Local Governments are at constant risk of breaching their legal obligations as employers and are constantly faced by claims made by applicants (or their representatives) in whichever jurisdiction is most advantageous to the specifics of their claim. Furthermore, variations to funding arrangement, revenue and the provision and delivery of services can also arguably result in Local Government employers shifting in and out of the State and Federal industrial relations systems depending upon the mix of trading and non-trading activities.

2.6 It is the position of WALGA that the vast majority of WA Local Governments would be covered under the federal industrial relations system based on the activities test applied by the Federal Court in *Bankstown Handicapped Children's Centre Association Inc v Hillman* (2010 FCAFC 1).

2.7 Most WA Local Governments have determined that the risk is lower for them to comply with the activities test applied by the Federal Court and *Local Government Industry Award 2010.* This was due to the fact that many Local Governments had Federal enterprise/workplace agreements in place when the federal industrial relations system was reformed and that the bulk of Local Government employees had their employment conditions underpinned by an assortment of Federal awards.

2.8 The only way that a Local Government can currently determine that they are a trading corporation for the purposes of the Australian Constitution is through a defended action in the WA Industrial Relations Commission or the Federal Court. Taking defended action in such a matter is time consuming, labour intensive and expensive for both Local Government employers and employee applicants.

2.9 WA is currently the only Australian state to maintain a separate industrial relations system that covers Local Government. A single industrial relations system provides a number of benefits to employers and employees including:

a) removing current jurisdictional uncertainty as to which system applies;

b) ensuring a single set of rules for all employers, irrespective of legal structure or activities;

c) removing duplication of services which will achieve cost savings for government;

d) reducing regulatory burdens and 'red tape'.

2.10 With respect to the provisions of the Bill, whilst we recognise that a number of the provisions are beneficial; overall the Bill fails to deliver a modern industrial relation system that recognises the needs of the Local Government employers and employees to whom the State industrial relations system potentially applies.

2.11 The majority of Local Government employers who are potentially regulated by the State industrial relations system are small entities who do not have the resources to employ specialised human resources staff to monitor compliance with their industrial relations obligations.

2.12 The hallmarks of a good industrial relations environment tailored to these Local Governments would be a:

a) simple set of minimum employment standards;

b) an award system that takes into account the need of Local Governments;

c) ability to tailor terms and condition of employment through the use of individual or collective agreements made directly with employees; and

d) a simple and clear unfair dismissal system that is appropriate to the operations of Local Governments.

2.13 Overall, the Bill fails to achieve this and represents a lost opportunity to create an industrial relations environment appropriate to the Local Government employers and employees that it seeks to cover.

2.14 In the absence of referral of its industrial relations powers, WALGA recommends that the Bill be amended to address the following key issues:

a) The current award system is outdated and fails to address the needs of the modern workplace. We therefore support a comprehensive review of the current award system with the view of creating a new award or awards which are reflective of modern work practices removing obsolete or historical provisions.

b) Minimum employment standards should be simple to understand and implement. We support the alignment of the proposed State Employment Standards (SES) with the base entitlement prescribed by the National Employment Standards (NES). However we do not support either an exact duplication of the NES nor the integration of the most beneficial provisions from the *Minimum Conditions of Employment Act* and the NES as is proposed by Bill. We recommend that the core entitlements of the NES are established with a less prescriptive approach as to the application of the entitlements.

c) WALGA broadly supports the proposed changes with respect to the unfair dismissal system. However, we advocate that there is a need for clear requirements to be established for Local Governments as to what constitutes fair dismissal, such as the requirements that are established through the *National Small Business Fair Dismissal Code*.

d) Whilst the Bill attempts to provide greater alignment between the State Wage Case decision and National Annual Wage Review, we recommend that the previous section 51 of the *Industrial Relations Act* be reincorporated into the *Industrial Relations Act* to provide that the state wage order be in line with the national decision (handed down by the Fair Work Commission) unless there is good reason not to.

e) Currently most Local Governments do not have a viable alternative to the award system. Industrial Agreements can only be made with relevant unions and the Employer Employee Agreements (EEAs) have proven to be unworkable. We advocate for the ability for collective agreements to be made directly between employers and its employees and an overhaul of the EEA system to make them a viable alternative for Local Governments.

f) Right of Entry is a concerning issue for Local Government employers, particularly the misuse of right of entry for suspected OSH breaches. The Bill seeks to remedy this by requiring specification of suspected breaches. However, the amendments will still provide substantial opportunity for misuse. WALGA recommends restricting the scope of these provisions in conjunction with the establishment of stronger penalties for unions and union officials who breach these requirements.

g) As a result of the interaction between the *Fair Work Act* 2009 (Commonwealth) and the *Public and Bank Holiday Act* (WA) national system employers are faced with an increase in the number of public holidays recognised where Christmas Day, Boxing Day, New Years Day and Anzac Day fall on a weekend. This means that a business may be required to recognise 14 public holidays in a year rather than the intended 10 days.

2.15 In responding to the Bill, this submission seeks to address the key issues identified by WALGA. This submission does not seek to provide a line by line analysis of the proposed amendments.

2.16 WALGA notes that there has been very little consultation with relevant stakeholders in the creation of the Bill. WALGA recommends that the State Government engage in detailed consultation with key stakeholders regarding the Bill before seeking to progress it further or to make any amendments.

3. Is the WA industrial relations system still relevant?

3.1 Prior to 2006, the majority of employers in Western Australia were regulated by the state industrial relations environment, with a relatively small proportion of employers covered by the national system. Each state also had its own industrial relations system, with the exception of Victoria which had referred its industrial relations powers to the Commonwealth during the 1990s.

3.2 The Local Government industry in WA was in a somewhat unique situation as many Local Governments had Federal enterprise/workplace agreements in place when the federal industrial relations system was reformed and the bulk of Local Government employees had their employment conditions underpinned by an assortment of Federal awards.

3.3 The Howard Liberal Government introduced amendments to the *Workplace Relations Act 1996 (Commonwealth)* which resulted in the bulk of employers being regulated by the Federal industrial relations system. Whilst these changes still resulted in multiple industrial relations systems operating within Australia, for the majority of employers the industrial relations environment was primarily regulated by a single system.

3.4 This shift was further cemented in 2009 with the introduction of the *Fair Work Act* 2009 in which all other state governments referred their industrial relations powers for the private sector to the Commonwealth to create a single national IR system. The exception being Western Australia which still retains an industrial relations system that applies to state public sector employees, non trading entities and unincorporated private sector businesses.

3.5 WALGA's advocacy continues to be for a full referral of industrial relations powers to the federal Government to achieve a single national industrial relations system covering all Local Government employers and employees.

3.6 Failure to refer industrial relations powers to create a single national system will result in a further perpetuation of two distinct industrial relations systems with different minimum standards, rights and obligations.

3.7 Referral of industrial relations powers to create a single national system would have the important benefit of creating certainty for Local Government employers and employees.

3.8 In addition, at a time when the State Government is investigating ways in which it can reduce recurrent spending, the referral of these powers would remove the need to fund the duplication of services for what amounts to a relatively small group of employees and employers.

3.9 Numerous arguments can be advanced in favour of a referral of industrial relations powers to create a single national system. The key arguments are summarised below:

a) The removal of the current jurisdictional uncertainty that plagues the Local Government industry in Western Australia.

b) A single industrial relations system covering all employers and employees in Australia ensures there is a fair, efficient, universally acceptable and consistently applied regulatory framework.

c) A single industrial relations system creates a level playing field across Australia by removing differing state laws and thereby promotes business efficiency and competition.

d) Removing duplication will achieve cost savings for the State Government as it may lead to the potential abolition of a number of State Government authorities including the WA Industrial Relations Commission and the Industrial Magistrates Court.

e) The rationalisation and simplification of IR and related legislation will remove unnecessary regulatory burdens and promotes improvements in understanding, awareness and compliance.

4. Amendments to Awards

4.1 WALGA supports the concept of the State awards being reviewed to establish a system of modern State awards which are relevant to the Local Government employers and employees who may remain within the State industrial relations system because of operational and practical circumstances.

4.2 However it needs to be recognised that the vast majority of employers in the Local Government industry operate in the federal industrial relations system. Furthermore, the logical outcome of potential Local Government structural reform in Western Australia will be to increase the size and scope of existing local government entities which is likely to lead to increased trading activities being undertaken by these new or amalgamated entities. Therefore, WALGA maintains that there will potentially be very few, if any, employees who would remain in the State system.

4.3 WALGA has concerns with the proposed subsection 37P(1)(b) to be inserted into the *Industrial Relations Act*. This subsection provides that the Commission must "make such modern State award or awards as it thinks necessary or expedient so that every pre-modern State award is replaced by one or more modern State awards."

4.4 The practical effect of this provision is to essentially guarantee that the scope of the State award system as a whole will only expand. Given the reduced application of the State industrial relations system, we believe that there is little logic in creating modern awards which would have minimal or no application to the overwhelming majority of Local Government employees.

4.5 In the event that modernisation of the current interim State awards that are stated to cover local governments is undertaken, WALGA submits it is imperative that any new award or awards that are created must reflect the terms of the federal *Local Government Industry Award 2010* as far as is practicable.

4.6 If any new award or awards that are created out of the modernisation of the current interim State awards do not substantially reflect the terms of the federal *Local Government Industry Award 2010*, it would have a number of adverse effects on Local Governments from an operational and practical perspective. These adverse effects would include:

a) Exacerbating the effects of the current jurisdictional uncertainty as to which system applies to Local Government employers (and subsequently which minimum award terms and conditions apply to Local Government employees);

b) Rendering the new award(s) an unfair, inefficient and inconsistent regulatory framework;

c) Promoting different a sets of rules for all Local Government employers (and subsequently Local Government employees), depending on the legal structure, activities or operational approach of each particular Local Government;

d) Maintaining confusion amongst employees as to the minimum employment terms and conditions that underpin employment in the Local Government industry;

e) Leaving Local Government employers vulnerable to industrial claims made by applicants (or their representatives) in whichever jurisdiction is most advantageous to the specifics of their claim; and

f) Increasing regulatory burdens and uncertainty.

4.7 WALGA believes that Local Governments may consider resorting to their own measures to try and achieve a certain and consistent industrial relations regulatory framework. These may include corporatizing parts of their workforce or negotiating clauses in federal enterprise agreements that seek to bar the WA Industrial Relations Commission from hearing any industrial matter.

4.8 WALGA submits that the WA Industrial Relations Commission must be given an appropriate period to undertake the review. It is our opinion that the 12 months proposed is insufficient and will negatively affect the quality of any new awards. We recommend that the WAIRC be provided with 24 months to complete the process with the opportunity for the Minister to extend this by a further 6 month on request of the Chief Commissioner.

4.9 WALGA seeks the opportunity to submit an exposure draft of a proposed State award to cover the Local Government industry before the proposed award modernisation process commences, as well having the opportunity to make further submissions on any working draft that the WA Industrial Relations Commission adopts.

4.10 The Government also needs to recognise that the bulk of the membership of WA based unions and employer associations are in the federal industrial relations system. This will have a significant impact upon the resources that these parties are able to provide to help undertake this task. Therefore it will be incumbent upon the Government to provide the WA Industrial Relations Commission with additional resources to undertake the award modernisation process.

4.11 WALGA also supports the concept that the modern awards be reviewed on a regular basis after their creation. However, the Government also needs to be prepared to provide additional resources to help undertake this task. We would also recommend that the review be staggered so that there is not a requirement to review all of the awards in a single 12 month period.

5. General Orders

5.1 There currently exists in WA two minimum rates of pay.

a) the first, which is set by the WA Industrial Relations Commission, is currently $627.70 per week.

b) the second, which is set by the Fair Work Commission, is currently $606.40.

5.2 There are also competing minimum rates of pay in the Local Government industry borne about by varying increases that have been applied to the federal *Local Government Industry Award* 2010 and the interim State awards that are stated to apply in the local government industry. Similarly to the minimum rates of pay, the minimum award rates set down the interim State awards are generally higher than those provided for under the federal *Local Government Industry Award* 2010.

5.3 Whilst we acknowledge the amendments proposed by the Bill seek to provide a greater rationalisation between the State and National minimum rates of pay we do not believe the proposed provisions will achieve this outcome.

5.4 The divergence between the State and National minimum wage and the minimum award wages is a relatively recent occurrence. Prior to 2006, section 51 of the *Industrial Relations Act* provided that the WA Industrial Relations Commission was to consider the National Wage Decision and, unless there was good reason not to; issue an order in line with the National decision (See Schedule A).

5.5 The amendments to the *Industrial Relations Act* arose out of the *Labour Relations Legislation Amendment Bill* 2006. The changes were made as a result of the WorkChoices legislation which transferred the role of establishing a National minimum wage from the then Australia Industrial Relations Commission (the predecessor to the Fair Work Commission) to a new body called the Australia Fair Pay Commission (AFPC). The explanatory memorandum for the aforementioned Amendment Bill[1] highlights the different criteria for assessing wage review compared to the previous model as the basis for establishing an independent review of the State minimum wage.

5.6 However with the introduction of the *Fair Work Act* 2009, the Fair Work Commission now has the responsibility for adjusting minimum award wages taking into account a range of factors[2], including:

a) performance and competitiveness of the national economy;

b) promoting social inclusions through increased workforce participation;

c) relative living standards and the needs of the low paid;

d) providing a comprehensive range of minimum wages to juniors, apprentices and trainees, and employees with a disability.

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[1] *Labour Relations Legislation Amendment Bill 2006 Explanatory Memorandum, p 8*

[2] *Fair Work Act 2009, s 284(1)*

5.7 The re-establishment of the National minimum wage setting functions to the Fair Work Commission should resolve any misgivings held with respect to the transfer of power to the AFPC. Consequently, WALGA proposes the insertion of provisions that have the same effect as the previous section 51.

5.8 An insertion of provisions that have the same effect as the previous section 51 would also allow for the WA minimum rate of pay to commence on the same day as the National decision. Given the shortened requirement for consideration and the reduced need for extensive hearings proposed by the Bill, there should be no need to delay the implementation date.

6. Unfair Dismissal

6.1 WALGA broadly supports the proposed amendments to harmonise the State unfair dismissal system with the national system.

6.2 However, we believe that the prescribed amount of salary needs to be amended to reflect that currently operating in the National system. As of 1 July 2013 the high income threshold for national system employees not covered by an industrial instrument is $123,300 per annum, whereas currently it is $140,400 per annum in the State system. In both the systems the amount is indexed each year. In our opinion there is no valid reason for the difference.

6.3 It should also be noted that the prescribed limit in the State system is based on the employee's salary[3], whereas s 382(b)(iii) of the *Fair Work Act* 2009 is premised on the persons annual rate of earnings. This allows for the consideration of non monetary benefits provided to the employee for which a monetary amount can be determined. We recommend that this definition be adopted within the State legislation as it recognises that employees can be renumerated through a number of benefits in addition to monetary consideration, and that such options are more prevalent with high income earners.

6.4 The proposed insertion of section 37F establishing the criteria for determining whether a dismissal is unfair is welcomed as it provides clearer guidance for employers as to what constitutes unfairness.

6.5 However the criteria are still subjective, which will continue to prove problematic for small Local Governments. We believe that it is necessary for the legislation to provide for a clear set of guidelines for small Local Governments as to what constitutes a fair termination of employment. In the National system this has occurred through the Small Business Fair Dismissal Code. WALGA believes that a similar system should be incorporated into the WA legislation. Not only will this ensure harmony with the National system, it will also aid small Local Governments in complying with the unfair dismissal requirements.

[3] s29AA(3)(b) of the *Industrial Relations Act* 1979

6.6 The definition of small business also needs to be considered. The Amendola report recommended that the definition of small business be based on 20 employees[4]. This also correlates to the definition of small business established by the Australia Bureau of Statistics.

6.7 We also believe that the definition of small business should be based on the full time equivalent rather than by headcount. Local Government employers engage a significant proportion of part time employees and regular and systematic casual employees. Given these employment arrangements, a Local Government that is a genuinely small business will frequently exceed the prescribed number given the need to engage a larger number of employees to staff their operation during ordinary business hours. A calculation based on full time equivalent would remove the disadvantage established through the engagement of part time staff employees and regular and systematic casual employees.

6.8 A significant problem for Local Government employers is the number of applications, particularly with respect to unfair dismissal, which are made in the incorrect jurisdiction. Jurisdictional hearings can often be a costly and time consuming process for the parties. We recommend that the proposed s27(3), which provides for matters to be determined without a hearing , be amended to allow for a matter to be dealt with without a hearing where it is deemed appropriate by the Commission, either at the request of a party or of its own motion. This will result in reduced costs to both the parties and the taxpayer.

6.9 We also recommend that where there is a question as to jurisdiction, that these matters are dealt with prior to any conciliation conference unless the respondent otherwise agrees.

6.10 Unmeritorious and speculative applications are also of significant concern. The current cost structure establishes a very high bar which means that there is very little risk associated with an Applicant making an unfair dismissal or other claim under the *Industrial Relations Act*. This encourages "give it a go" claims. The proposed insertion of section 28A is unlikely to have any effect on these claims as it continues to establish a high bar. The recent amendment to the *Fair Work Act* 2009 arising as a result of the Fair Work Act Review are an attempt to provide greater ability for costs to be awarded where a party has caused another party to incur costs by an unreasonable act or omission in connection with the conduct or continuation of the matter[5] and should be adopted. WALGA would also encourage the Government to initiate consultations with WALGA and other relevant parties to discuss options to reduce the number of "give it a go" claims whilst allowing for valid applications to proceed.

[4] Amendola, S (2009) Review of Western Australian Industrial Relations System, p215.

[5] *Fair Work ct 2009, s400A.*

6.11 The proposed insertion of section 37G establishing that an applicant must make an unfair dismissal claim within 21 days after the dismissal took effect is welcomed. However, we are concerned at the vague and subjective wording of the proposed clause 37G(3), which deals with allowing an application to be made out of time. We recommend that the wording used in section 394(3) of the *Fair Work Act* 2009 is inserted into the Bill to establish a clear set of guidelines for Local Governments to assess whether an objection that an application has been made outside the statutory time limit would be appropriate in the circumstances.

7. Right of Entry

7.1 WALGA broadly supports the proposed changes to right of entry. However whilst the amendments are a positive step in addressing some of the problems arising from this right, we are concerned that it does not go far enough to prevent the misuse of right of entry, particularly with respect to investigations for suspected occupational safety and health breaches.

7.2 Currently right of entry for OSH investigation is not subject to minimum notice requirements and there is no obligation on the union official to particularise the nature of the suspected breach. The speed by which right of entry can be accessed and the lack of accountability in having to justify why entry is sought has resulted in a number of union officials misusing this right as a means to deal with industrial relations issues.

7.3 For right of entry for a suspected breach, the Bill seeks to establish a burden of proof on the permit holder to reasonably suspect that a contravention has or is occurring[6]. Section 209 of the Bill further reinforces this by requiring the entry notice to specify the particulars of the suspected breach. It is our opinion that the current wording of section 209 will still allow permit holders to provide vague reasoning as to the suspected breach and hence the misuse of this provision is likely to continue.

7.4 We therefore recommend that the Bill establish minimum particulars that must be identified, such as details of the alleged breach, what equipment or processes are involved, where on the premises the breach is occurring and any other relevant particulars. In the case of a legitimate concern about OSH matters, it is reasonable to assume that the issue has been raised by an affected employee on site and as such the additional required information should be easy for the permit holder to provide.

7.5 A further area of concern is s 187(4) and (5) of the Bill which allows the permit holder to provide the entry notice up to 24 hours after right of entry has been exercised. This will effectively prevent the employer from determining whether the permit holder has a legitimate right to enter the premises until after the entry has occurred. The subsequent failure by the permit holder to demonstrate a lawful right will provide the employer with little relief as any damage arising from the misuse of this right will have already occurred.

[6] s177(7)&(8)

7.6 We do not believe that there is a legitimate reason for entry notices and permits not to be produced before entry is granted. Most unions use a pro-forma entry notice that could be carried by the permit holder in their vehicle and completed by hand where the need arises.

7.7 One of the content requirements for entry notices is that the permit holder must declare that the organisation is eligible to represent the industrial interests of the relevant member or employee(s) in question. This provision requires employers to rely upon the permit holder's assertions. Most union rules are vague and difficult to understand, and based upon our experiences in this matter, most permit holders appear to have a poor understanding of the coverage of the organisation that they represent. Consequently we do not believe that this is a suitable arrangement. We would therefore recommend that entry notices must include an extract from the relevant rules that demonstrate coverage of the relevant workers, including any exceptions to coverage. This will provide greater clarity to both the employer and the permit holder as to which employees right of entry can be exercised for.

8. State Employment Standards (SES)

8.1 Paragraph 597 of the Explanatory Memorandum identifies that the intention of the SES is to establish minimum employment standards in line with the National Employment Standards (NES) as prescribed by Part 2-2 of the *Fair Work Act* 2009.

8.2 It is the view of WALGA that the Bill fails to achieve this objective with substantial variance between the two instruments. In essence, it appears that the overall approach taken to the drafting of the SES was to compare and contrast the *Minimum Conditions of Employment Act* and the NES and then adopt the most beneficial provisions for employees from both instruments.

8.3 The proposed Compassionate Leave and Bereavement Leave provisions provide a clear example of this.

8.4 The *Minimum Conditions of Employment Act* provides for an entitlement to two paid days bereavement leave on the death of specified family members which is taken to apply to both casual and permanent employees.

8.5 In comparison the NES provides for 2 days compassionate leave on the death of specified family members ***or*** to spend time with a specified family member in the event of a life threatening illness or injury. The NES provides a paid leave entitlement to full time and part time employees. Casuals are entitled to compassionate leave without pay.

8.6 To accommodate these differences the proposed SES establishes an entitlement to paid bereavement leave for all employees on the death of specified family members. A separate additional entitlement is provided for compassionate leave in the event of a life threatening illness or injury based on a paid entitlement for permanent employees and an unpaid entitlement for casuals.

8.7 The result is a set of confusing provisions that reflects neither the NES nor the *Minimum Conditions of Employment Act* and potentially extends the entitlement to 4 days paid leave where a life threatening illness is followed by the death of a specified family member.

8.8 This approach to the development of the NES will result in a more complex set of minimum employment standards which is significantly different to the NES. If the goal of the SES is to harmonise with the NES it would be expected that the two provisions would be largely identical in nature. The SES fails to achieve this outcome.

8.9 If the goal of the SES is to harmonise with the NES, We would recommend that the NES provide the foundation for the establishment of the SES with amendments made to address identified deficiencies within the NES.

9. Public Holidays

9.1 With the commencement of the *Fair Work Act* 2009, there has been a potential doubling of entitlement to public holidays where either Anzac Day, Christmas Day, Boxing Day or New Years Day falls on a weekend.

9.2 This is as a consequence of the interaction between the NES and the *Public and Bank Holidays Act* 1972 (WA).

9.3 Section 115 of the Fair Work Act 2009 defines public holiday to mean:

115 Meaning of public holiday

The public holidays

(1) The following are public holidays:

(a) each of these days:

(i) 1 January (New Year's Day);

(ii) 26 January (Australia Day);

(iii) Good Friday;

(iv) Easter Monday;

(v) 25 April (Anzac Day);

(vi) the Queen's birthday holiday (on the day on which it is celebrated in a State or Territory or a region of a State or Territory);

(vii) 25 December (Christmas Day);

(viii) 26 December (Boxing Day);

(b) any other day, or part day, declared or prescribed by or under a law of a State or Territory to be observed generally within the State or Territory, or a region of the State or Territory, as a public holiday, other than a day or part day, or a kind of day or part day, that is excluded by the regulations from counting as a public holiday.

9.4 It is s115(1)(b) of the *Fair Work Act* 2009 that has the effect of increasing the number of recognised public holidays, in that in addition to the prescribed eight public holidays cited in s115(1)(a), when read against the second schedule prescribed by the *Public and Bank Holidays Act* 1972 which lists the recognised public holidays as:

- *New Year's Day (1st January).*
- *Australia Day (26th January or, when that day falls on a Saturday or Sunday, the first Monday following the 26th January).*
- *Labour Day (Monday on or first Monday following the 1st March).*
- *Good Friday.*
- *Easter Monday.*
- *Anzac Day (25th April).*
- *Western Australia Day (Monday on or first Monday following the 1st June).*
- *Celebration Day for the Anniversary of the Birthday of the Reigning Sovereign (day to be appointed for each year by proclamation published in the Government Gazette at least 3 weeks before the day so appointed).*
- *Christmas Day (25th December).*
- *Boxing Day (26th December).*
- *When New Year's Day, Anzac Day, or Christmas Day falls on a Saturday or Sunday the next following Monday **is also a** public holiday and bank holiday.*
- *When Boxing Day falls on a Saturday the next following Monday **is also** a public holiday and bank holiday.*
- *When Boxing Day falls on a Sunday or Monday the next following Tuesday **is also** a public holiday and bank holiday.*

9.5 It is the term "is also a public holiday" when referring to when Christmas, Boxing, New Year or Anzac Days fall on a weekend that has the effect of increasing the leave entitlement for National System employers where this occurs. This is a particular problem for Local Governments, as many employees in Local Government regularly work shifts across all seven days of the week. Given that the penalty rate provisions for the federal *Local Government Industry Award* 2010 and the overwhelming majority of industrial instruments are tied to the public holidays prescribed by the NES this can substantially increase the costs of Local Governments operating over these times.

9.6 The creation of these additional public holidays results in considerable confusion for National System Local Government employers, contributes to loss of business efficiency, results in increased employment costs and adds further regulatory burdens on the operations of Local Government.

9.7 There is no evidence that it was the intention of the Federal Government to create additional public holidays beyond the standard of ten days when it introduced the NES. Indeed, the Explanatory Memorandum to the Fair Work Act 2009 expressly states that employers are not required to provide public holiday entitlements on two days in respect of one holiday.

9.8 During 2012 the Federal Government commissioned a review into the operation of the *Fair Work Act* 2009. The report issued by the independent review panel identified

the problem created through the establishment of additional public holidays under relevant State legislation, finding that:

The ability for state and territory governments to declare additional public holidays has a fairly significant impact on wages costs for employers who operate on such days, due to public holiday penalty rates typically involving a loading of 200 per cent or 250 per cent of base rates of pay (in recognition of the unsocial nature of working on such days). Employers affected by the penalty rates typically include those operating in the hospitality, retail and tourism sectors. Employers may alternatively elect that it is not economic to open on the particular day (unless they are obliged to open on such days, due to, for example, lease requirements), which would mean forgoing any takings for the particular day. Additional public holidays also impose costs for businesses that decide not to operate on such days, as they may be required to pay employees even though the employees have not had to work.[7]

9.9 Further at page 105 of the report the Panel concluded that:

The issue of public holidays was identified as important for many stakeholders in submissions and discussions with the Panel. Current arrangements have meant that the number of public holidays in each jurisdiction can vary widely. For example, in 2012 the number is expected to range from between 10 and 13 days, depending on the state or territory. The uncertainty with current arrangements for employees and employers and the potential additional costs for employers concerns the Panel.

9.10 WALGA recommend amendments are made to the *Public and Bank Holidays* Act 1972, as follows:

a) Where New Years' Day or Australia Day fall on a Saturday or Sunday, a substitute public holiday should be appointed on the following Monday.

b) Where Anzac Day falls on a Sunday, a substitute public holiday should be appointed on the following Monday.

c) Where Christmas Day or Boxing Day fall on a Saturday, a substitute public holiday should be declared on the following Monday.

d) Where Boxing Day falls on a Sunday or a Monday, a substitute public holiday should be declared on the following Tuesday.

e) That a State or Federal industrial instrument may provide for the public holiday to be recognised on the day of significance in lieu of the substituted day.

[7] *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation (August 2012) p*

10. Agreements

10.1 WALGA is of the view that the proposed amendments to agreement making fails to address the needs of Local Government employers.

10.2 The amendments proposed by the Bill are relatively minor in nature and as such do not go far enough to create a viable alternative to the State award system.

10.3 Notwithstanding the intention to modernise State Awards, awards by their very nature look at the industry as a whole and as such fail to take into account the specific nature of an individual employer. Consequently there is an ongoing demand by employers to utilise formal agreement making options to establish terms and conditions of employment that meet the specific needs of an individual employer and its employees.

10.4 The two options currently available have a number of shortcomings which result in them being unavailable options for most Local Government employers.

Industrial Agreements

10.5 The most significant limitation of Industrial Agreements is that they can only be made between an employer and the relevant union. The system provides for no formal involvement of affected employees, including no obligation on either the union or employer to seek the views of the employees prior to the agreement being made.

10.6 Consequently WALGA recommends that the existing Industrial Agreement provisions be amended to provide that agreements are made between the employer and the relevant employees, with the opportunity for employees to appoint a person (which may include a union) as a bargaining representative. This, again, reflects the operation of the *Fair Work Act* 2009.

10.7 We would also recommend that the process for making an Industrial Agreement be simplified to allow for employers and employees to be able to make agreements without the need for the involvement of third parties. This would include the removal of the little used good faith bargaining and enterprise order provisions.

10.8 We also advocate that the current provisions of the *Fair Work Act* 2009[8] be adopted which prohibit unions and their officials being involved in making agreements for employees who do not fall within their coverage.

Employer Employee Agreements (EEAs)

10.9 WALGA is particularly disappointed that the existing EEA provisions are not being amended.

10.10 EEAs were introduced in 2002 by the then Gallop Government as a replacement to the state workplace agreements that had previously been in operation since 1993.

[8] Section 176(3)

10.11 However the provisions providing for EEAs were drafted in such a manner as to make the system extremely complex and unworkable. This appears to have been an intended consequence of the drafting process as is evidenced by the low number of EEAs made since their introduction. In the 2002/03 financial year a total of 501 agreements were lodged of which 398 agreements were registered[9], with only 3 agreements registered in 2011/12[10]. In comparison 4,842 applications per month were made for State workplace agreements during 2001/02[11], equating to 58,104 agreements over the course of the year. Such a sharp drop in numbers clearly demonstrates that EEAs do not provide a viable form of individual agreement making.

10.12 It is WALGA's belief that there remains a strong desire amongst Local Government employers to have the option to negotiate registered individual agreements with their employees. We therefore recommend that the EEA provisions be overhauled to provide for a system of individual agreements that:

a) are simple to make and are formally registered;

b) are subject to a truly global No Disadvantage Test (NDT) against the relevant award;

c) can be made a condition of employment;

d) operate to the exclusion of the relevant award or industrial agreement;

e) continue to operate after the expiry date of the agreement unless terminated by one of the parties to the agreement.

[9] Fortieth Annual Report of the Chief Commissioner of the Western Australian Industrial Relations Commission for the Period 1 July 2002 to 30 June 2003, p 36

[10] Report of the Chief Commissioner of the Western Australian Industrial Relations Commission on the operation of the Industrial Relations Act 1979 1 July 2011 to 30 June 2012, p30.

[11] *Commissioner of Workplace Agreements Final Annual Report For the Period Ended 15 September 2002, p20*

11. Industrial Action

11.1 Industrial action involving Local Government employees has the potential to significantly impact upon the general public given the wide variety of services that Local Governments provide to local communities.

11.2 The WA Industrial Relation Commission is frequently called upon to help resolve disputes about the taking of industrial action and in doing so will often recommend that the industrial action cease. However these recommendations are frequently ignored.

11.3 WALGA recommends that the *Industrial Relations Act* be amended to provide the WA Industrial Relation Commission with the clear ability to issue an order to cease industrial action, with applications for orders able to be made by the relevant employer, relevant employer association, the Minister, a section 50 party, an affected party, or upon its own motion.

11.4 Further we would recommend that the industrial inspectorate be responsible for making application for civil penalty provisions against individuals and organisations which fail to comply with such orders.

Submitted on behalf of the

Western Australian Local Government Association

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Schedule A

Section 51 of the *Industrial Relations Act*

51. Powers and duties of Commission in respect of National Wage Decisions

(1) In this section, National Wage Decision means a decision which -

(a) is made by a Full Bench of the Australian Commission;

(b) relates to rates of wages; and

(c) is applicable generally to awards made under the Commonwealth Act.

(2) Subject to section 50(10), when and as often as a National Wage Decision is made after the coming into operation of this section the Commission shall of its own motion consider that decision and -

(a) unless it is satisfied that there are good reasons not to do so, shall make a General Order to adjust, by the amount of any change in the rate of wages under that decision, rates of wages paid under awards; and

(b) may make a General Order to adopt in whole or in part and with or without modification any principle, guideline, condition or other matter having effect under that decision.

(3) If the Commission makes a General Order under subsection (2) the Commission shall ensure that the order has effect no more than 30 days after the day on which the relevant National Wage Decision was made.

(4) Subject to this Act, the Commission may add to, vary or rescind a General Order made under subsection (2) but the Commission shall not add to or vary such an order in relation to any amount other than the amount of any change in the rate of wages under the relevant National Wage Decision.

(5) Without limiting the generality of section 26(1), in the exercise of its jurisdiction under this section the Commission shall ensure, to the extent possible, that there is consistency and equity -

(a) in relation to the variation of awards; and

(b) in relation to when such variations have effect.

[Section 51 amended by No. 119 of 1987 s. 13; No. 15 of 1993 s. 19; No. 20 of 2002 s. 189 15.]