

Hon Robyn McSweeney MLC
Chair
Standing Committee on Legislation
Legislative Council
Parliament House
PERTH WA 6000

Attention: Ms Lauren Mesiti
Committee Clerk

Dear Ms McSweeney

INQUIRY INTO WORKFORCE REFORM BILL 2013

I refer to your 16 December 2013 letter, advising of the inquiry by the Standing Committee on Legislation into the Workforce Reform Bill 2013 and inviting a submission from myself.

As you may be aware, the Public Sector Commission, together with the Department of Commerce, has provided support to the Government in the development of its legislation. The attached submission reflects that practical role and is intended to provide the Committee with clarification of the broad approach of the Bill. It is necessarily a presentation of the issues from a largely technical perspective.

Officers of the Commission and the Department of Commerce are available to elaborate on the submission, if so required by the Committee. Naturally, in providing any such expansion on the issues, they would be limited as public service officers in their ability to discuss, or comment on, the merits of the Government policy position, which underpins the legislation.

Yours sincerely



M C Wauchope
PUBLIC SECTOR COMMISSIONER

21 January 2014

SUBMISSION BY THE PUBLIC SECTOR COMMISSION TO THE INQUIRY BY THE LEGISLATIVE COUNCIL STANDING COMMITTEE ON LEGISLATION INTO THE WORKFORCE REFORM BILL 2013

PURPOSE

The principal purposes of the Workforce Reform Bill 2013 are to amend the *Industrial Relations Act 1979* (IR Act), *Public Sector Management Act 1994* (PSM Act), and *Salaries and Allowances Act 1975* (SA Act) as follows:

1. To provide the capacity to implement enhanced and more flexible redeployment arrangements that may ultimately end with the involuntary severance of employees who are surplus to an agency's requirements or whose post, office or position has been abolished and cannot effectively be redeployed.
2. To ensure that decisions made by the Western Australian Industrial Relations Commission (WAIRC) and the Salaries and Allowances Tribunal (Tribunal) 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.

POLICY

Redeployment and Redundancy

The Bill supplements the enhanced voluntary severance scheme put in place by the Government that operated between 1 July and 31 December 2013. That scheme provided surplus public sector employees with potential to access separation packages amounting to 72 weeks' pay.

Involuntary severance

As a mechanism for managing surplus public sector employment, involuntary severance is only a part of a broader scheme that seeks to strike an appropriate balance between looking after the interests of employees who become surplus to an employer's requirements and treating their situation with fairness and due process, and meeting the Government's responsibility to the broader community to manage its workforce in an efficient and cost effective manner.

It is anticipated that the proposed changes will only affect a very small number of public sector employees.

Redeployment will continue to be the preferred option when positions become redundant, with involuntary severance to be used as a last resort. The current capacity for an employer to choose to provide an offer of voluntary severance will also be retained.

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. The introduction of involuntary severance will enable the Government, in the management of its workforce as a whole and locally, to more readily respond to changes in the needs of its workforce.

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.

The reasons why redeployees remain registered as such by the Public Sector Commission are complex and vary significantly from case to case. In a general sense, it is a reflection of the skills sets, experience and aptitudes of the individual redeployee when compared to the changing face of the public sector labour market.

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.

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.

The introduction of involuntary severance will be welcomed by public sector managers. 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.

By providing a fixed time frame for redeployment and retraining, involuntary severance would:

- act as a catalyst in ensuring that surplus employees take an active role in resolving their redeployment circumstance;
- provide an incentive to surplus employees to consider their employment options, and act promptly in making decisions in that regard; and
- assist agencies to plan and budget for workforce requirements.

All employees currently registered for redeployment will remain registered, thereby potentially leading to them being subject to involuntary severance. For the first time, the Public Sector Commissioner will have the power under the proposed new arrangements to revoke or suspend an employee's registration as a redeployee.

Appeal rights

Redeployees will continue to have access to grievance processes, and to the WAIRC in matters relating to redeployment and redundancy, and under this Bill, involuntary severance.

The Bill establishes rights of appeal to the WAIRC (but not to its constituent authorities, such as the Public Service Arbitrator or the Railways Classification Board). This will ensure all appeals are placed on a common footing.

Any decision made under the regulations (up to the point of a decision to terminate the employment of a public sector employee by way of involuntary severance) will be subject to review by the WAIRC (consistent with existing appeal processes), to the extent of determining whether or not the regulations have been fairly and properly applied.

Thus for example, any decision to seek to register, or to register, an employee for redeployment, thereby leaving them potentially open to involuntary severance, might be challenged on the grounds that the occasion had not properly arisen to deem that individual surplus to requirements.

That is, if an employee is sought to be registered, or is registered, as a surplus employee, the WAIRC is able upon a valid application to test whether the employee is surplus for genuine reasons. Should it find that the employee is not genuinely surplus but in reality the actions taken by the employer may result in the employee being redeployed elsewhere in the public sector or having their employment terminated for other reasons, it could issue orders to the effect that the employee cease to be a registered employee and the possibility of involuntary severance would fall away.

All affected employees (and relevant unions) will have a common right of access to the WAIRC to challenge any decisions made under the regulations, as these occur, up to the point of a decision to terminate due to redundancy.

The arrangements provide for a full review of all matters relevant to determining that a person is redundant, to be dealt with currently rather than after the event of termination, as might occur in other circumstances or jurisdictions. Importantly, the Bill does not require employment to cease before these matters are addressed. In this way, the Bill respects the interests of all employees concerned and treats their situation with fairness and due process.

For an employee whose employment has been terminated as a result of an involuntary severance decision, a right of review to the WAIRC will also exist within a specified period of time. However, the WAIRC will be confined to determining whether the employee has been allowed the benefits to which they are entitled under the regulations. The WAIRC will not have the jurisdiction to reinstate or otherwise compensate the employee.

Redeployment and redundancy framework

As is currently the case with arrangements for redeployment and redundancy, details of the new regime will be contained in regulations made under the PSM Act. The content of those regulations, which are still under development, will in the normal manner be subject to appropriate consultation (including with unions and public sector employers) before being finalised and consideration by the Parliament through its Joint Standing Committee on Delegated Legislation.

Considerations of the WAIRC and the Tribunal

The WAIRC

The WAIRC is currently required by s.26 of the IR Act to take into consideration at the broad level the state of the national and WA economies and the capacity of employers to pay.

The proposed amendments focus the WAIRC's attention, when making decisions related to the WA public sector, on the specific elements of:

- the Government's Public Sector Wages Policy as enunciated from time to time;
- the most recent statements released by the Government about the State's financial position and fiscal strategy; and
- the financial position of the relevant public sector entity.

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.

The Salaries and Allowances Tribunal

The Bill also requires the Tribunal in its determinations to formally take into consideration the Government's Public Sector Wages Policy Statement and the State's financial position and fiscal strategy.

It is to be noted that, as Tribunal determinations result in automatic appropriation from the Consolidated Fund, the Tribunal is not required to take into account the financial position of individual public sector entities.

Furthermore, in recognition of the doctrine of the separation of legislative, executive and judicial powers, it has been deemed inappropriate for Executive Government policy potentially to constrain decisions about remuneration for the Judiciary and Officers and Members of the Parliament. Accordingly, decisions by the Tribunal with respect to parliamentary and judicial salaries and entitlements will not be subject to specific consideration of the Government's Wages Policy or its fiscal circumstances and strategies. This limitation does not extend to Ministers and Parliamentary Secretaries who form part of the Executive.

STRUCTURE

The Bill is comprised of four Parts, as follows:

Part 1 – Preliminary

Part 2 – *Industrial Relations Act 1979* amended

Part 3 – *Public Sector Management Act 1994* amended

Part 4 – *Salaries and Allowances Act 1975* amended

These are summarised in turn below.

Part 1

This Part provides for preliminary matters, namely the short title of the Bill and its commencement, which in relation to the substantive parts of the Act is a day to be fixed by proclamation.

Part 2

This Part amends the IR Act, by requiring the WAIRC to take into specific account in its various considerations:

- the Government's applicable Public Sector Wages Policy Statement;
- the financial position and fiscal strategy of the State; and
- the financial position of the relevant public sector entity.

It also adjusts the appeal right provisions to ensure there is a consistent and common avenue of access to the Commission in relation to decisions made under the PSM Act regulations dealing with redeployment and redundancy.

Part 3

This Part amends the PSM Act to allow for the application of involuntary severance as a measure of last resort.

The future arrangements for redeployment and redundancy will be promulgated at the operational level through PSM Act regulations (supplemented where necessary by Commissioner's instructions).

The amendments to the PSM Act to facilitate this include:

- A specific head of power for the Public Sector Commissioner to issue Commissioner's instructions relevant to redeployment and redundancy and termination of employment.

- A specific head of power for CEOs to deal with matters of termination of employment.
- Inclusion of involuntary severance as one of the ways by which a public service office is vacated under the PSM Act.
- Definition of a “registrable employee” for the purposes of registration for redeployment.

Note: The definition of the new term ‘registrable employee’ provides for the capacity for additional categories to be prescribed by regulations.

This capacity has been included to capture circumstances in which an employee may be considered excess beyond the scope of the plain definition of surplus. Such circumstances may include:

- an employee who has lost an essential qualification for performing their duties - for example, an employee who has lost their driver’s licence and is thereby unable to perform an integral part of their duties and cannot be placed elsewhere within the department; or
 - an employee whose job has not been abolished but who is neither appointed nor assigned to a substantive post, office or position – for example, where an employee returns from a long-term secondment or period of leave without pay, whose absence was originally approved on the basis that their substantive position would have to be backfilled and them being advised of the possibility of being registered upon their return.
 - Provision of a capacity for registration of employees for redeployment to be suspended or revoked.
 - The capacity for the Governor to make regulations dealing with the termination of employment of registered employees and the associated terms and conditions that are to apply.
 - The overriding by the regulations of inconsistent industrial instruments and contracts of employment (for example, where a different process or regime of compensation is provided).
- Note: This provision will apply to current contracts of employment and not just those entered into after the regulations take effect. This would result in all public sector employees being treated the same under the regulations.
- Capacity for compensation for early termination of employment available under the redeployment and redundancy regulations (and a decision of the Commission made under section 23A(6) of the IR Act) to exceed the limit of one year’s remuneration otherwise imposed by section 101 of the PSM Act.

Part 4

Finally, the Bill also amends the SA Act, along similar lines to the IR Act, in that it requires the Tribunal in its determinations formally to take into consideration the Government’s Public Sector Wages Policy Statement and the State’s financial position and fiscal strategy.

SCOPE

In its two principal purposes as listed above, the Bill has varying scope.

In relation to the redeployment and redundancy arrangements, it has effect only with respect to the Public Sector as defined by the PSM Act. It therefore does not cover entities listed in Schedule 1 of the PSM Act.

In relation to matters to be taken into account by the WAIRC in its relevant considerations, it applies to the Public Sector as defined by the PSM Act, as well as those PSM Act Schedule 1 entities that are prescribed from time to time under the IR Act by the Governor (for example, the Police Force would be so included).

Public Sector Commission
21 January 2014