STANDING COMMITTEE ON LEGISLATION

WORKFORCE REFORM BILL 2013

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
THURSDAY, 13 FEBRUARY 2014

Members

Hon Robyn McSweeney (Chair)
Hon Sally Talbot (Deputy Chair)
Hon Donna Faragher
Hon Dave Grills
Hon Amber-Jade Sanderson

Hearing commenced at 2.08 pm

Ms MARIA SARACENI
Barrister, sworn and examined:

The CHAIR: On behalf of the committee, I would like to welcome you to the meeting. Before we begin, I must ask you to take either the oath or affirmation, and please state the capacity in which you appear before the committee.

[Witness took the oath.]

Ms Saraceni: I am practising as a barrister and I have been asked to appear today.

The CHAIR: Thank you. You will have signed a document entitled "Information for Witnesses". Have you read and understood that document?

Ms Saraceni: Yes.

The CHAIR: These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of this hearing for the record, and please be aware of the microphones and try to talk into them. Ensure that you do not cover them with papers or make noise near them. I remind you that your transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today's proceedings, you should request that the evidence be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Please note that until such time as the transcript of your public evidence is finalised, it should not be made public. I advise you that publication or disclosure of the uncorrected transcript of evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege. Would you like to make an opening statement to the committee?

Ms Saraceni: I had not planned to make an opening statement because I understood that I was being asked a specific series of questions as opposed to more generic things.

The CHAIR: That was my next question to you. We will ask you a series of questions which you already have, and the committee may come in at any time they wish with others. The committee has been considering clause 4 of the Workforce Reform Bill 2013. Can you help us understand how the WAIRC would consider government submissions currently?

Ms Saraceni: Prior to any such inclusion of the act. The starting point, I would have to suggest, is the Industrial Relations Act in its entirety. Whenever interpreting legislation, it is not beneficial to focus only on one section. The section is part of the bigger act. Section 26 of the Industrial Relations Act, as it currently stands, requires the commission to act according to equity and good conscience, and it lists a variety of things before the proposed amendments. Those variety of things it lists include—this is section 26(1) of the current act —

> In the exercise of its jurisdiction under this Act the Commission —

And it lists —

> (a) shall act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms;

That is section 26(1)(a). So it is already obligatory on the commission to factor into its decision-making a variety of things, and what it has to factor in are listed under (1)(a) as "equity, good conscience, and the substantial merits of the case". That wording is not unusual in a tribunal, other

than a court of equity, when considering things, and basically that—sorry; I beg the pardon of anyone who is a lawyer who is sitting on the committee, but in relation to strict legal principles, it gives some leeway to interpret, rather than black-letter law. Section 26(1) goes into other things. I think the next one that is relevant for the purpose of the committee is section 26(1)(d). I do not know if the committee has that anywhere near. Again, the commission "shall", not "may" —

> 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 —

Put in brackets "public sector 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;

And that section goes on. That section, I would suggest, is relevant for the committee's purposes when looking at the proposed new section 4 of the proposed amendments to the act simply because factors are already required to be taken into account. Now, when the commission is exercising its discretion and acting in accordance with section 26(1)(a) and (1)(d), particularly if we look at subsection (1)(d), because they are there, as listed, as (i), (ii), (iii), (iv), (v), that does not mean that the commission must take those things into consideration, with more weight being given to the state of the national economy, because that is number (i), then a little bit less weight to the state of the economy of WA. That is not how it is designed.

It is really those factors all are thrown into the pot and then the commission's discretion is exercised—it has to take those into account, but it does not mean you have to take more account of the national economy or less account of the state economy or more of the state, less of the national. It is purely a pot of things to put in. I was thinking before I came here what to say. It is the difference between a recipe and throwing things into the pot like my mum would do without knowing—I could never follow what she did. The recipe says you have to have certain amounts to make it work and you have to put in the—I am not a very good cook—but the butter should be first and the sugar then you mix and then you do this. That is a recipe. The other version of cooking is whatever is around you just grab it and throw it into the pot and come out with a minestrone. This section 26(1)(d) for the purpose of the analogy is like the minestrone. It is not the recipe. You have to have so much of this, do this first, then you put in this much, then you do this. So that is actually very important. I thought the nothing worked for the purposes of 26(1)(d).

Hon SALLY TALBOT: You know your mother is going to read the *Hansard*!

Ms Saraceni: Unfortunately, she is not with us.

The CHAIR: But she did like to cook.

Ms Saraceni: Section 26(1) works in that fashion and that is how the commission is doing it. To do otherwise would mean the commission is restricted in the exercise of its jurisdiction and that would create a difficulty in the separation of powers as to who does what. The fact that it 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. But, on the other hand, if the factors are taken into account—for example, the state of the economy of WA, the state of the national economy—and those criteria lead the same way, as in the statistics show that CPI index is X and they are all trending the same way, that would be a very clear indicator to the commission, I would suggest, of which way it should be going, because all the indicators are pointing one way. Section 26(1)(d)(iii) is the capacity of employers to pay. If the employer was the public sector entity, then that is something it already has to take into account.

Now, what I said earlier, if you are happy for me just to talk a bit before I answer any questions, 26(1) is, in the exercise of its jurisdiction, the discretion is to be exercised taking those factors into account. What is interesting is this is not the jurisdiction of the commission. The jurisdiction of the commission you find under section 23 of the act and section 23 of the act deals with what is the jurisdiction of the commission. Essentially, under subsection (1), from memory, it is to inquire into and to deal with any industrial matter. That is the jurisdiction. There is some section s under section 23(2), from memory, that interlink the Public Sector Management Act with the Industrial Relations Act. For the purposes of what we are talking about that is important because the employment arrangements of various government entities come under the Public Sector Management Act. So, that is one lot of interrelationship linking, but then you need to look also at the objects of the Industrial Relations Act. When Parliament created the act in 1979 or thereabouts, section 6 very clearly states that the principle objects of the act, relevantly, are —

> (aa) to provide for rights and obligations in relation to good faith bargaining; and
>
> …
>
> (ae) to ensure all agreements registered under this Act provide for fair terms and conditions of employment; and
>
> …
>
> (ca) to provide a system of fair wages and conditions of employment; and

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.

[2.20 pm]

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. It is not going very much beyond that to say you need to factor in any government wages policy, particularly when you look at what the last government policy is in that, if I downloaded the right one. The "Public Sector Wages Policy Statement 2014", at subsection 3, states —

> 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.

How different is that from the state of the economy of Western Australia or the state of the national economy? That policy is a direction from the government to the government entities, "This is what you will do", but it is not telling the commission, "This is what you will do"; the commission just has to factor it into its consideration. The relevance of that also needs to be looked at in relation to an industrial agreement. An industrial agreement is not like an award, which we all know. As I understand it, the industrial agreement is part of the issue that the committee has. An industrial agreement is an agreement arrived at between parties where the bottom line is the award or the Minimum Conditions of Employment Act. So there is agreement above the minimum allowed under an enterprise bargaining agreement—an EBA—as opposed to the federal version of it. So when you are looking at those agreements for the bargaining process, the government has legislated that there be good faith bargaining for the purposes of bargaining. When you look at what good faith

bargaining is—I do not want to go into too much detail—section 42 of the Industrial Relations Act talks about when bargaining starts, but 42B talks about good faith bargaining. There is an obligation on parties, let alone the commission, beforehand when bargaining: they shall bargain in good faith. Under section 42B(2), good faith bargaining includes relevantly in (a) that they state their position on matters at issue and explain their position. So if you are a public sector entity as an employer, and you the employer are bound by the government policy, which says that any industrial agreements are capped at the projected growth in the Perth consumer price index, you the employer, bound by that, are bound in the negotiation process as a part of good faith to say, "I am here to negotiate with you, but you must understand that I have a master and my master has told me that all I can do is up to the projected growth in the consumer price index." That actually assists the government entity employer in bargaining in good faith, which it is required to do.

Section 42B(2)(c) talks about good faith bargaining including disclosing necessary and relevant information for bargaining. If the government employer has its hands tied by that policy, it is obliged to notify the other side, "Mate, I can only go up to this level. Even though I might like to do more, I can't." So that policy comes in in the discussion phase, let alone before the commission. Subsection (2)(d) states to act honestly and openly. If you have a limit on what you can spend, you are obliged as a part of good faith bargaining to tell the other side, "I can't spend any more because I do not have any more to spend." Then, subsection (2)(g) states "bargaining genuinely and dedicating sufficient resources to ensure this occurs". They were just some of the sections I pulled out. The employer public sector entity, with the relevant employee and their bargaining agents on the other side, need to bargain and they need to understand that the bargaining is not in a vacuum; there are all these financial considerations et cetera—that in particular. When it goes before the Industrial Relations Commission, the commission has to factor in those factors under section 26, which are there already. All this does is: "By the way, you have to take into account the policy document." When I look at the policy document, the policy document says it has to be read in conjunction with the Premier's Circular "Coordination and Governance of Public Sector Labour Relations", which I had a look at. The short version, I guess, of what I see there is the government telling the Department of Commerce labour relations division what it can and cannot do. If we look at item 9 of that document, being the Premier's Circular "Coordination and Governance of Public Sector Labour Relations" issued on 16 October 2013, which is the most recent one, it says —

> The Minister for Commerce has delegated authority to the Executive Director, Labor Relations Division of the Department of Commerce … to deal with:
>
> (a) industrial agreements that comply with Government policy and do not require additional funding; …

This to me is a division of labour, so that the minister says to the Department of Commerce labour relations guys, "If it complies with government policy"—relevantly, the one we are talking about is the wages sector policy—"you can deal with it and off you go." But item 8 of this says —

> The Minister for Commerce will advise public sector bodies to refer labour relations issues to the Economic and Expenditure Reform Committee —

I have no idea who they are.

The CHAIR: We do!

Ms Saraceni: There you go. I am sure you would.

> … which:
>
> (a) have implications for the management of the Government's labour relations;
>
> (b) incur additional expenditure; and/or
>
> (c) have flow on-cost implications.

If a matter comes within the government wages policy, the labour relations guys can do it; if it might go beyond that for whatever reason, despite the wages policy, because it is a policy, then it has to go to someone else—the other committee. I see that as a division of labour. The fact that the commission is required to take it into account, it does not say what it has to do with it; it could just say, "I hear you; I don't want to accept it." But if all the indicators are the same—CPI nationally, state and then what the government has said in its policy—that must be the writing on the wall that everyone is in agreement that things are not what they were when the current industrial agreement was registered. When I look at the current industrial agreement, the general agreement that has been lodged, the wages increases under that agreement—I think the agreement was registered some time in 2011 so there would be annual pay increases—yes; we know which one I am talking about?

Hon AMBER-JADE SANDERSON: Is this the CPSU–CSA agreement?

Ms Saraceni: The general agreement, not the specific entity agreement, not the insurance commission agreement. It is just the general agreement. It is called the Public Service and Government Officers General Agreement 2011. It expires 1 April 2014 and it provides that, six months pre-expiry, negotiations are to open for a replacement general agreement. So that is happening now—six months and we are into it, so that is why I imagine some of the submissions you have received have been as they have been. It was registered 27 June 2011. The world was different then. The first pay increase in 2011 was a 3.75 per cent increase. In 2012, the salary increase was four per cent and on 12 April 2013, the pay increase was 4.25 per cent. If anyone goes and checks the CPI, currently it is not 4.25 per cent.

Hon AMBER-JADE SANDERSON: But that was negotiated under a different policy, though.

Ms Saraceni: Yes, but even if you look at the figures—forget the policy; look at the figures, the public figures, the national economy, the economy of WA—the figure is no longer 4.25 per cent; it is closer to just over two per cent, 2.5 per cent. When the government policy says "capped at the projected growth in the Perth Consumer Price Index", that is an objective figure which everyone can ascertain. For the new agreement coming in, the starting point is the current salary, but the increases will not be the current increases. If this all gets up, then you are looking at the current 2.5 per cent or thereabouts. But is the commission stuck by it? Is the commission being dictated to by the government by including this? No. The only dictation is you have to take it into account. But it does not say you have to accept it, agree with it, take more weight of it or less weight; it is just a factor thrown into the melting pot.

I am happy to answer any questions. I am not sure I can take it further, actually.

The CHAIR: You have obviously considered our new part—clause 4 of the bill. I know you said that you believe that things are already there and that it is not going to change much, but can you enlarge on that? How do you think that clause 4 of the bill is going to have an impact?

[2.30 pm]

Ms Saraceni: At a practical level or when it gets to the commission?

The CHAIR: It is both—practical and the other.

Ms Saraceni: The good faith bargaining provisions under the state industrial relations legislation are not dissimilar to those under the Fair Work Act 2009. Those who practice in the area of industrial relations are used to this concept of good faith bargaining and, as part of that, the parties are meant to declare their hands. There are requirements on an employer to provide financial information to the bargaining representatives or the employees—not necessarily commercial-in-confidence information, but financial information, which is already provided. If a company, for example, had annual reports it would show the annual reports, which would be available publicly in any event. The bargaining representatives would have done their homework before et cetera et cetera. Just as the employer has an agenda for purposes of bargaining, the bargaining representatives have an agenda in relation to targets they are looking for; there is room to

manoeuvre. They go to the bargaining table and say: "Parameters—where are we at? If I give you this, what will you give me by way of productivity improvements et cetera et cetera?" The financial position, or the amount of money that is available for salaries, and allowances et cetera is something that a private sector employer has to disclose; and the earlier that is disclosed the better. This is just saying that if you are a public sector employer, you also must disclose what you can and cannot do, rather than in the good old days, when it was, "Go in and see how much you can get" but the government department had already been told it cannot spend more than that or there was wage restraint or whatever. This is just making it bleedingly obvious. If anyone complaints to the commission that the other side is not playing fair, that they are not bargaining in good faith and it may be that is because they have been told it is capped at that and they are stuck with that cap. The commission has to factor that into its decision making: "Okay, if that is the government wages policy that is the government wages policy! You are bargaining in good faith so I cannot say that you are a naughty person and not bargaining in good faith." But it does not have to do anything more than that. It is a factor it considers.

The CHAIR: Do you think that the amendment will achieve the government's policy objective, in practice?

Ms Saraceni: Yes. I think it is just spelling out more what is already in there and that in making a decision the commission has to take all these things into account. This is just saying: "By the way, you have to put this in as well." It is a bit of a tidying-up exercise, as I see it.

Hon SALLY TALBOT: I wonder whether we can ask you about the different language that is used to frame those requirements. In section 26 of the existing act, which I think you have been quoting, the direction is "shall take into consideration to the extent that it is relevant". We have a number of phrases around the new provision, one of them that we pulled out is "ensure appropriate regard". There are a couple of others, I think. We have a submission from the Public Sector Commission that says the WAIRC is not presently specifically required to consider the government's public sector wages policy. We know that is true, but can I ask for your comments on terms like "ensure appropriate regard" compared with what is in the existing Industrial Relations Act?

Ms Saraceni: May I ask you to point me to where that is in the bill?

Hon SALLY TALBOT: It is section 26 of the Industrial Relations Act.

Ms Saraceni: Subsection (1)(d), "shall take into consideration to the extent that it is relevant".

Hon SALLY TALBOT: I am looking at the preamble, "shall take into consideration to the extent that it is relevant". The bill that we are looking at says "ensure appropriate regard". I am sorry, that is in the explanatory memorandum.

Ms Saraceni: I was going to say—I did not see that.

Hon SALLY TALBOT: Let us take these points one at a time. Are those significantly different instructions to the court or do you read them the same?

Ms Saraceni: I would start by answering that section 26(1)(d) of the current act states, "shall take into consideration". Proposed new section 26(2A) to be added on is "in making a public sector decision the Commission must take into consideration". It is "shall" and "must", but they are exactly the same with "take into consideration". I think the words "to the extent that it is relevant" adds or makes more clear that the commission has a discretion. "Must" says you have to do it, but then it just reminds the commission that it is to the extent that it thinks it is relevant. It is not to the extent that the parties think is relevant or the extent that Parliament thinks is relevant; it is the extent that the commission thinks is relevant. It is just clarifying its discretion.

Hon SALLY TALBOT: In the second reading speech, the minister says that the proposed changes will not bind the commission.

Ms Saraceni: I agree with that. If I could just say, though, that if the commission were not to take it into account, it would be in breach of the act, but it does not have to abide by it: "I have considered it; thank you very much. Next!"

Hon SALLY TALBOT: That leads me to a second line of questioning, but before I get there I will tease out one more thing. In its submission to us the Public Sector Commission said that the WAIRC is not presently specifically required to consider the government's public sector wages policy.

Ms Saraceni: That is correct; no they are not.

Hon SALLY TALBOT: We know that it does not have to consider the wages policy, but it does have to consider all those other things in section 26. Are they specifically required to consider those things?

Ms Saraceni: The ones that are there already?

Hon SALLY TALBOT: Yes.

Ms Saraceni: Yes; it says they "shall" take consideration.

Hon SALLY TALBOT: So it is exactly the same direction, it is just adding on extra things?

Ms Saraceni: The wages policy.

Hon SALLY TALBOT: We have established that the commission is still operating essentially in the same way but it has a couple of extra factors to consider. What are the implications for the grounds for appeal? First of all, let us take a commission decision.

Ms Saraceni: The appeal from any decision of the commission is very limited and essentially has to be an error of law. If the commission failed to take into account matters that it is required to take into account that would arguably be an error that needs to be corrected.

Hon SALLY TALBOT: So the matters it is required to take into account are now extended by three from where they were?

Ms Saraceni: It is not that their decision is limited by those factors; it is just that they have to take it into account. Courts and tribunals do this all the time and these sorts of wordings are there in the industrial jurisdictions in other states and federally as well; it is in the environmental laws. Anywhere a court or tribunal is exercising a discretion, it is just saying, "Guys, you really need think of this, this and this and then make up your mind." It is not, "This is what I want you to find at the end of the day." It is just, "Factor it in."

Hon SALLY TALBOT: Going back specifically to the public sector wages policy, there was a hypothetical situation put to us in a public hearing the other day, so I can raise it with you now. Under the new provisions in the bill, for example, about the 14 per cent pay rise that was given to the nurses, there will be a ground for appealing that decision, either from another group of workers or their representatives or from another government agency. They would be able to say that these people got 14 per cent, whereas CPI is 2.X per cent, therefore, the commission did not have due regard—or whatever phrase is.

Ms Saraceni: I would suggest that is an interesting example, because it does show that the commission is not bound by the policy of "capped at 2.5 per cent". It is interesting that the example just shows —

Hon AMBER-JADE SANDERSON: It was not —

Ms Saraceni: No; it shows that it can be more than that. At the end of the day, for there to be an error of law, there is a decision in the High Court—a very old case—House versus the Crown and I cannot remember the year, 1914; it is a very famous.

Hon SALLY TALBOT: Colin probably knows it.

Ms Saraceni: It is a very famous case, in any event. When looking at an appeal from a discretionary decision, just because a review tribunal or court would have found differently does not mean there was an error made by the first tribunal. The error of law is: did the tribunal exercise its discretion in accordance with the way it was meant to exercise its discretion? It is not whether the answer was right or wrong.

[2.40 pm]

In looking at that, you look at section 26(1)(d), for the purposes of what we are talking about, let alone the new provision and that says did the commission factor in the state of the national economy, the state of the economy of WA and the capacity of employers to pay; then if this one were to get up, the wages policy. If it factored all that into account and then it said, "Thank you very much, but I don't think that is appropriate; I think because of the nurses having been behind the eight ball for years, there is a catch-up that needs to be had so 14 per cent is fine."

Hon SALLY TALBOT: That discretion is still there?

Ms Saraceni: Yes. I think it just paints the picture that it is a discretion. Is it an error? It would have to be, under the House v Crown decision, that it was so far off the mark that no reasonable person could possibly have found that that was appropriate. So when there is an error in a discretion, it is harder to find; it has to be something blatantly obvious that no reasonable person would have said that. If a reasonable person would have found 14 per cent, for example, with the nurses because, yes, all those things were taken into account by the commission: tick, the national economy; tick, the state economy; tick, capacity to pay; and tick, if it were to get up, the wages policy, but then it had all these other criteria that it took into account, such as equity and good conscience, which is when you go back to section 26(1)(a)—we have only been looking at section 26(1)(d); (1)(a) is there separate from and in addition to the criteria —

Hon SALLY TALBOT: Which is the equity and good conscience?

Ms Saraceni: Yes. So the equity, good conscience and substantial merits of the case allow the flexibility to go wider than statistics in relation to CPI or whatever.

Hon SALLY TALBOT: What was the relative weighting of those different clauses in terms of your recipe ingredient metaphor?

Ms Saraceni: When you look at the way section 26(1) is drafted, it is cascading; it does not say one more than another, it is a factor to be taken into account. So 26(1)(a) says —

> shall act according to equity, good conscience, and the substantial merits of the case … and
>
> (b) shall not be bound by any rules of evidence … and
>
> (c) shall have regard for the interests of the persons …

And then there is (d), which is the one we have been looking at. So they are all to be taken into account. Often you will hear counsel making submissions to the commission on the basis of equity and good conscience from the heart as opposed to the black —

Hon SALLY TALBOT: If I can be absolutely clear as a non-lawyer: an error of law has a very narrow meaning?

Ms Saraceni: Yes.

Hon SALLY TALBOT: If a commissioner were to say, for example, "In making this decision I will not consider the government's public sector wages policy", that could be an error of law?

Ms Saraceni: Yes.

Hon SALLY TALBOT: Okay.

Ms Saraceni: But to say, "I have considered the government wages policy, and given the national economy and the state of the WA economy and given the catching up with the nurses, I am not

going to give that any more weight than this; I am going to give more weight to that", that would not be an error.

The CHAIR: Some of the submissions to the committee have suggested that if adopted, clause 4 would materially advantage government representatives in appearances before the commission. Do you have a view about that?

Ms Saraceni: I must say that I did look for the submissions before I came to try to do some preparation, but they are not available on the site. I do not understand how that proposal is made or that statement is made. Could someone perhaps just clarify that for me? I find it very hard to —

Hon AMBER-JADE SANDERSON: Some of the evidence we had from the union groups and their members was that when you enter into arbitration, for example, they are already required to take into account all those factors you have just discussed—(a) to (d): the national economy and the WA economy—and any submissions made by the other side as well. They said that by adding to those list of requirements they need to take into account—so the CPI, the government wages policy and the fiscal strategy of the state—it unfairly advantages the employer, which is the government, in any of those arbitration discussions, and that no other employer in the state has ability to influence the commission by legislating that it is required to take certain things into account.

Ms Saraceni: I guess the difficulty I have with that is that that 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. I have a problem with the way the question has been posed—not by you but by the person who said that—because the commission is not having its hands tied; it is just being told, "You will consider (a), (b), (c) and (d). What you do with it is your business." So to say that a public sector employer is advantaged because of it, I find it very hard to believe because the good faith bargaining provisions state–federal are all the same; that the financial position of the employer, private or public sector, are open to be shown to the other side. There is nothing private in it. In fact, section 26(1)(d)(iii) talks about capacity to pay under the current legislation. So all that is doing is saying that the capacity to pay is one thing—a sort of Treasury thing—but, okay, the policy is this. I do not see how it is an advantage. I am just trying to think out loud, but I just do not see how it would advantage —

Hon AMBER-JADE SANDERSON: I think the anxiety arises from whether it is binding on the commission or not.

Ms Saraceni: It is not binding.

Hon AMBER-JADE SANDERSON: That is the question we were asking you right up-front.

Ms Saraceni: It is not binding. It is binding to consider it, but not binding to accept it as —

Hon AMBER-JADE SANDERSON: To execute it as such?

Ms Saraceni: Yes.

The CHAIR: The wages policy seeks to limit or cap wages growth at a level of CPI, which you have already mentioned, defined in the policy at 2.5 per cent. By making the policy a statutorily relevant consideration, do you believe this puts government representatives before the WAIRC at some sort of advantage in any given manner?

Ms Saraceni: I think that was the question we looked at before, but if I could just say that the wages policy statement of 2014 that I have does not actually specify a figure.

The CHAIR: No.

Ms Saraceni: Unless I am wrong. The document I have downloaded in relation to the 2014 policy statement at item 3 talks about "capped at the projected growth in the Perth Consumer Price Index", so there is no figure there.

Hon DONNA FARAGHER: You are right; you are correct.

The CHAIR: Can you foresee any unintended consequences from the introduction of the statutorily relevant considerations of clause 4, which you have been at great pains before to say that you cannot see it?

Ms Saraceni: Other than it is more paperwork and another hurdle to jump over. I think it does give some clarity. If you were negotiating on the other side, like good faith bargaining generally, if you know how much money the other side has to spend, that gives you parameters within which you can bargain. So it may be that the salary cannot be increased above a certain amount, but what about the other conditions of employment? It may be that you look to provide for other things other than increases in wages. It talks about "associated conditions", but I think the conditions can be played with a bit more easily because some of the conditions do not sound in money.

Hon SALLY TALBOT: So you are talking about, sort of, an increase in the administrative burden. Do you see that as being a problem for the commission? Is it also a problem for government representatives who are presenting the government's case as the employer?

Ms Saraceni: Only that the documents need to be produced, and because the rules of evidence do not apply in the commission and these documents are available electronically on a website and someone says, "Yes, that is the current government policy, and, yes, this is the current state of the national economy", if those things are all accepted, it is just a hurdle you go through. So a decision of the commission would say, "Okay, the documents I have been given and I have considered are these, I have considered the national economy, looking at the blah, blah ABS provision of whatever, and I have considered the state economy and looked at the ABS, I have considered the 2013 wages policy and they're all annexed as exhibits A, B and C", that is what it would be. The only discussion could be whether the definition of Perth consumer price index is very clear. It says, "As published from time to time by the Department of Treasury", so if there was anything in relation to the interpretation of what that means, there might be a little bit more argy-bargy, but otherwise —

Hon SALLY TALBOT: That is an interesting point. If we can just move on to definitions, you can see the other two things that the commission is now obliged to consider—that is, the state's financial position and fiscal strategy, and the financial position of the relevant public sector agency. Have you had a chance to think about those concepts and how they might be defined? Some of the committee's early work on this suggests that there is not actually a document that is called "the state's financial strategy". In fact, the information you might expect to find there is actually scattered amongst several different sources.

[2.50 pm]

Ms Saraceni: Sorry, the last thing you read out, was it just strategy or financial —

Hon SALLY TALBOT: The three new statutory considerations.

Ms Saraceni: I am just looking at here—yes, the bill.

Hon SALLY TALBOT: It is proposed new section 26(2A).

Ms Saraceni: It reads the "financial position and fiscal strategy", yes.

Hon SALLY TALBOT: I am asking you specifically about proposed sections 26(2A)(b) and (c) and whether there is any concern in your mind about the lack of clarity around the definition of those two concepts.

Ms Saraceni: I would have thought that the financial position was a matter of pure maths, so that is not going to be difficult. It is either yes or no; it is either $5 or $500; it is not going to be an issue. The fiscal strategy is different and, again, the guidance that this proposed subsection provides, the (i), (ii), (iii), would be what the fiscal strategy is. I would have thought there is argument to be had as to the fiscal strategy.

Hon AMBER-JADE SANDERSON: Going back to the financial position, I think the point that Hon Sally Talbot was making is that there are a number of different documents that define it differently across government; there is no one, so it is not just a matter of maths because it is different in each department and again it is different across various documents.

Ms Saraceni: Sorry, when I look at 26(2A)(b) it refers to the financial position of the state, not of individual government departments.

Hon AMBER-JADE SANDERSON: Is this on the bill?

Ms Saraceni: Yes; so it is not whether a particular agency has or has not got anything.

Hon SALLY TALBOT: What we are getting at is that the terminology used by Treasury in the budget papers refers to that entity by a different name and the midyear review has got chapters called "Financial Projections", "Financial Strategy" and "The Western Australian Economy". The budget papers talk about the economic and fiscal outlook and we also have another chapter headed "Financial Projections and Fiscal Strategy". Do you think there is any possibility for some—I do not know whether I want to go as far as to say confusion, but is it unnecessarily complex to clarify what each of those concepts mean?

Ms Saraceni: I am still of the view that the financial position would be clearer. I think the fiscal strategy has a bit more leeway in it, but as I read 26(2A)(b)(i) and (ii), there is an attempt there to point to the instruments, the documents, that would constitute the fiscal strategy, so (b)(i) and (ii) are very helpful. I think the problems would start coming in when you look at (b)(iii), which reads —

> any submissions made to the Commission on behalf of the State government;

That is wide and perhaps is less predictable and obvious. There could be connotations subject to who is in government and what the government of the day is aiming to do generally with things.

Hon SALLY TALBOT: Would your concern be with processes of the commission or with the establishment of appeal grounds that do not currently exist? Would that become a ground for appeal? I know we have talked about errors in law; could there be an appeal that said, "This term is so vague and I am convinced that you did not take this into account"?

Ms Saraceni: All it would need is one case and then the full bench would make a decision that would then be binding for future reference, so if there was to be any ambiguity, it would be clarified in the short term.

Hon SALLY TALBOT: We really are throwing ourselves at your mercy now, or I am. There is a clause in the bill that I wonder whether you could talk to to help us understand exactly what it means. It is on page 4 of the bill at proposed section 26(2B)(c) from lines 7 to 12. It reads —

> 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 …

What I have been trying to understand is exactly how wide that provision goes. I struggled to find any sort of concrete example that can give me a sort of foothold into getting my head around what it means.

Ms Saraceni: I know now why lawyers had such difficulty trying to follow everything through. I am just looking at section 42G. I need to go back and again need to read it in context, not just one section. Proposed section 26(2B) states —

> In subsection (2A) —
>
> ***public sector decision*** means any of the following —
>
> (a) an order made under section 42G —

Section 42G of the Industrial Relations Act is "Parties may agree to Commission making orders as to terms of agreement". Proposed section 26(2B) continues —

> that will be included in an agreement that will extend to and bind a public sector entity or its employing authority …

Yes, as per —

> (b) an enterprise order …

Okay —

> (c) if the matters set out in … (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 …

I am not sure why that is there. It seems to be a catch-all.

The CHAIR: Can I just read this to you, which might make it easier for you to answer —

> … if the Bill is adopted as drafted, from that point forward, nominated Government representatives will need to take great care to ensure that any and all considerations regarding the Government's submission to the Commission addresses "*any other decision that will extend to and bind a public sector entity*". It can be seen, therefore, that the Bill, as drafted, has the potential to considerably impact the administrative burden currently placed on nominated Government representatives before the WAIRC.

Does that make it clearer in that context?

Ms Saraceni: If I understand that appropriately, I think that needs to look at the Public Sector Management Act as it currently stands because there are certain things under section 22A of the Public Sector Management Act. The Public Sector Commissioner can issue instructions, so the public sector entities for industrial relations purposes, other than those that are covered by federal law—there are state government sectors, the water authority, for example, they are under the federal system in any event, so that needs to be taken into account. But for those that are stuck in the state system, I use that word loosely, not as a negative thing —

Hon SALLY TALBOT: A legal technical term!

Ms Saraceni: A legal technical term. Section 22A of the Public Sector Management Act talks about the commissioner issuing instructions, but they have to be subject to section 6, 7, 8 and 9 of the Public Sector Management Act. Section 6(1) of the act says —

> This Act binds the Crown in right of the State.

That is fine, but section 6(2) says —

> Except to the extent to which a provision of this Act specifies otherwise, the *Industrial Relations Act 1979* applies to and in relation to matters dealt with by this Act.

The interrelationship between the IR act and the Public Sector Management Act is there, so any Public Sector Commissioner instruction has to be mindful of that. It also has to be mindful of section 7, which talks about public administration and management principles. I just happen to note here that that subsection (g) states —

> proper standards of financial management and accounting are to be maintained at all times; …

So this is the Public Sector Management Act saying to its own people, "This is what you have to do." Section 8 of the Public Sector Management Act talks about HR management principles, and section 9 principles of conduct by public sector bodies. There are certain things under the Public Sector Management Act where the Public Sector Commissioner can issue instructions that are

binding on entities covered by that, taking all those things into account. When I look at the proposal that we have just looked at —

Hon SALLY TALBOT: "Any other decision".

Ms Saraceni: Yes, "any other decision"; I guess any other decision, as I see it, is one of the things that would be there—decisions that are binding on a public sector agency.

[3.00 pm]

Hon SALLY TALBOT: Any other decision.

Ms Saraceni: Yes, that is one of the decisions that would be binding

Hon SALLY TALBOT: Would it sort of be a commissioner's instruction?

Ms Saraceni: As I see it—I stand to be corrected—but as I see it.

Hon SALLY TALBOT: And a commissioner's instruction currently does not have that definition. A commissioner's instruction is not a public sector decision.

Ms Saraceni: I am not in a position to answer that question.

Hon SALLY TALBOT: Again, in a public hearing last week the commissioner told us that his instructions are merely administrative instruments.

Ms Saraceni: Not binding.

Hon SALLY TALBOT: They are only from a disciplinary perspective, but aside from that instructional.

Ms Saraceni: Again, it is like having any policy in a private sector employer: there is a policy that is there. Is the policy part of the contract or it is just a guideline to be followed as appropriate? I think that is how those commissioner's instructions work. Not to follow it is not good either. You are not bound to but if you do not, what happens then? So it is allowing entities to be seen to still have discretion individually, but because they are part of the public sector, to try to have some consistency through the public sector, which is difficult because some public sector agencies are under the federal industrial system. But anyhow, to try to have some consistency that is what is there, so it is a very hotchpotch system, and we will not go into local government because that is even worse in the current situation.

The CHAIR: No. We have to now go back to the full bench as I have another question. If the full bench gives a final definition of financial affairs of the agency, that would mean that from that point forward agencies could not define the concept to suit their particular views or needs. Is that how you understand that or not?

Ms Saraceni: The decision of the full bench of the commission is binding on the commission; it is not binding on the agencies in relation to what they do. It is only when there are matters that would come within the jurisdiction of the commission under section 23 of the Industrial Relations Act that you know for the purposes of that, this is what it means. But for the purposes of the agency doing something else, preparing its financial records or whatever, there are other laws that deal with it. It would not be binding on it in all circumstances.

The CHAIR: In terms of an industrial relations dispute, would it be binding?

Ms Saraceni: It would be very authoritative, yes.

Hon SALLY TALBOT: Because I know we cannot come back to you as we have such a short reporting time, I just want to ask you one more question about commissioner's instructions, as I had not thought of commissioner's instructions as being part of that part (c) that I have just asked you about.

Ms Saraceni: I am not sure that it is but I think my interpretations —

Hon SALLY TALBOT: No, no. It is an interesting possibility that we will look into in more detail. We have asked in public hearings a number of times about the fact that commissioner's instructions are not disallowable, and it has been confirmed that they are not disallowable. We then went to clause 14 of the bill we are looking at, proposed section 95A(4), which refers to the regulations the government may make, and states —

> Regulations referred to in subsection (2) may require specified matters to be dealt with in accordance with the Commissioner's instructions.

One of the things that concern me is that if we have now got commissioner's instructions that we assume are simply an administrative instrument—we all understand how administrative instruments work—that will take supremacy when they are in conflict with the regulation or the act itself, we have got an entirely different sort of instrument with a power that we are not familiar with in legislation or regulation.

Ms Saraceni: Yes. I am smiling because I am just thinking that it is not binding but if you do not do it, you are in trouble. How is that different to it being binding in a practical sense? I mean, legalistically there is a difference but practically what difference is there?

Hon SALLY TALBOT: They are binding.

Ms Saraceni: Yes.

Hon SALLY TALBOT: If that proposed subsection (4) says that regulations may require specified matters to be dealt with in accordance with the commissioner's instructions, and commissioner's instructions are treated like regulations except they are not disallowable, they will never be reviewable by the Parliament.

Ms Saraceni: And that is when I guess all I can say is I would look to section 22A of the Public Sector Management Act, which talks about the commissioner's instructions. They are subject to sections 6, 7, 8 and 9, and I have read out section 6(2), which deals with the interlinking with the Industrial Relations Act, and states —

> Except to the extent to which a provision of this Act specifies otherwise, the *Industrial Relations Act 1979* applies to and in relation to matters dealt with by this Act.

That sort of provision is not dissimilar to what is in place in New South Wales, when I had a quick look at it before I came to this tribunal.

Hon SALLY TALBOT: Okay, and that reference again was, 22?

Ms Saraceni: Section 22A of the Public Sector Management Act, which refers back to sections 6, 7, 8 and 9 of that act.

The CHAIR: The committee would like to thank you very much for coming in and giving us your time and your considerable talents in IR law.

Ms Saraceni: Thank you very much.

Hearing concluded at 3.05 pm