

## EXPLANATORY MEMORANDUM

### INDUSTRIAL LEGISLATION AMENDMENT BILL 2011

#### INTRODUCTION

The *Industrial Legislation Amendment Bill 2011 (the Bill)* will principally amend the *Construction Industry Portable Paid Long Service Leave Act 1985*. It will also make minor and/or technical amendments to the *Industrial Relations Act 1979*, the *Minimum Conditions of Employment Act 1993*, the *Employment Dispute Resolution Act 2008*, the *Litter Act 1979* and the *Occupational Safety and Health Act 1984*.

**Part 1** of the Bill provides for preliminary matters.

**Part 2** of the Bill provides for amendments to the *Construction Industry Portable Paid Long Service Leave Act 1985*. Among other things the amendments will replace outdated references to Commonwealth legislation and industrial instruments, clarify the scope of the Act and improve the administration of the portable long service leave scheme under the Act.

**Part 3** of the Bill provides for technical amendments to the *Industrial Relations Act 1979*. Among other things the amendments will replace outdated references to Commonwealth legislation and ensure the validity of statutory appointments made under the Act.

**Part 4** of the Bill provides for a minor amendment to the *Minimum Conditions of Employment Act 1993* to recognise special public holidays that may be declared from time to time.

**Part 5** of the Bill provides for technical amendments to the *Employment Dispute Resolution Act 2008* to replace outdated references to Commonwealth legislation.

**Part 6** of the Bill provides for a technical amendment to the *Litter Act 1979* to replace an outdated reference to the “Trades and Labor Council of Western Australia” with “UnionsWA”.

**Part 7** of the Bill provides for a technical amendment to the *Occupational Safety and Health Act 1984* to replace an outdated reference to the “Trades and Labor Council of Western Australia” with “UnionsWA”.

#### PART 1 OF THE BILL – PRELIMINARY

##### Clause 1

Clause 1 of the Bill provides that the short title of the Act will be the *Industrial Legislation Amendment Act 2011 (Amendment Act)*.

##### Clause 2

Clause 2 of the Bill provides for sections 1 and 2 of the Amendment Act to commence on Royal Assent, and the rest of the Act on a day or days fixed by proclamation.

## **PART 2 OF THE BILL – AMENDMENTS TO CONSTRUCTION INDUSTRY PORTABLE PAID LONG SERVICE LEAVE ACT 1985**

### **Clause 3**

Clause 3 of the Bill provides that Part 2 of the Amendment Act will amend the *Construction Industry Portable Paid Long Service Leave Act 1985* (**CIPPLSL Act**).

### **Clause 4**

Clause 4 of the Bill will insert section 3A into the CIPPLSL Act.

New section 3A will extend the application of the CIPPLSL Act to the offshore area prescribed by section 3(3) of the *Industrial Relations Act 1979* (**IR Act**). The CIPPLSL Act may already have offshore application by virtue of there being a “real and substantial connection” between the subject matter of the CIPPLSL Act and the State of Western Australia. Section 3A will remove any ambiguity that might arise concerning the application of the CIPPLSL Act in the prescribed offshore area (*Parker v Transfield* (2001) 81 WAIG 2505 at paragraph 72).

### **Clause 5**

Clause 5 of the Bill will amend existing definitions, as well as insert new definitions, in section 3 of the CIPPLSL Act. In particular, clause 5 of the Bill will:

- (a) insert a definition of “apprentice” by reference to the *Vocational Education and Training Act 1996* and equivalent training legislation in other jurisdictions;
- (b) amend the definition of “employee” to replace the reference to “award” with “industrial instrument” (see paragraph (d) below);
- (c) amend the definition of “employer” to specifically include labour hire agencies that supply employees to a third party to do work in the construction industry. Case law has already found that labour hire agencies may fall within the definition of “employer”, however, the amendment will remove any ambiguity (*Construction Industry Long Service Leave Payments Board v Positron Pty Limited* (1990) 70 WAIG 3062). The term “labour hire agency” will be defined;
- (d) delete the definition of “award” and replace the reference with “industrial instrument”. The definition of “industrial instrument” will encapsulate industrial instruments made or preserved under the IR Act, *Fair Work Act 2009* (Cth) and *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).

The definition of “industrial instrument” is particularly relevant to determining who is an “employee” for the purposes of the CIPPLSL Act. Importantly, the definition of “industrial instrument” will ensure that federal awards initially made under the *Workplace Relations Act 1996* (Cth) and subsequently preserved under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* can continue to be “prescribed industrial instruments”, notwithstanding they may have ceased to be in force (e.g. because they were terminated by Fair Work Australia);

- (e) insert paragraph (a)(iia) in the definition of “construction industry” to specifically refer to the construction/installation of “swimming pools and spa pools”, consistent with the Supreme Court of Western Australia decision in *Construction Industry Long Service Leave Payments Board v Precision Corporation Pty Limited* (No. 1111 of 1991, unreported judgment);
- (f) amend paragraph (a)(xvi) of the definition of “construction industry” to encapsulate structures, fixtures or works “for use on or for the use of” certain buildings or works. This amendment will ensure that fixtures such as patios and driveways, which are attached to a building but are not necessarily “for the use on” that building, are covered by the definition of “construction industry”; and
- (g) amend the existing definition of “union” to reflect that federal unions are now registered under the *Fair Work (Registered Organisations) Act 2009* (Cth).

### Clause 6

Clause 6(1) of the Bill will amend section 6(1) of the CIPPLSL Act to change the process for selecting members to the Construction Industry Long Service Leave Payments Board (**the Board**).

Currently under section 6(1) of the CIPPLSL Act the Board consists of seven members appointed by the Minister for Commerce (**the Minister**), namely one chairperson and six other members (**ordinary members**). The six ordinary members are appointed from nominations made by the Chamber of Commerce and Industry Western Australia, the Master Builders Association of Western Australia, UnionsWA and The Building Trades Association of Unions of Western Australia (**the prescribed industrial organisations**). The Minister does not have discretion to appoint ordinary members outside of these nominations.

Section 6(1) will be amended to provide the Minister with discretion to appoint two ordinary members, regardless of whether they have been nominated by the prescribed industrial organisations. One member must represent the interests of employers in the construction industry, and the other the interests of employees in the construction industry. This amendment will enable broader industry representation on the Board. The other four ordinary members will continue to be appointed from nominations made by the prescribed industrial organisations.

Clause 6(1) of the Bill will further amend section 6(1)(c) of the CIPPLSL Act to reflect the change in name of the “Trades and Labor Council of Western Australia” to “UnionsWA”. Clause 6(2) of the Bill will insert section 6(6) into the CIPPLSL Act to enable any future name change of a prescribed industrial organisation to be dealt with by the regulations.

Clause 6(2) of the Bill will also insert section 6(5) into the CIPPLSL Act to ensure that existing Board members’ appointments are not affected by the amendments to section 6(1) of the CIPPLSL Act. The new process for selecting Board members will only apply once an existing member ceases to hold office (e.g. when that member’s term of appointment expires).

**Clause 7**

Clause 7 of the Bill will amend section 7 of the CIPPLSL Act to reflect the new process for selecting Board members in section 6(1) of the CIPPLSL Act.

Section 7 of the CIPPLSL Act enables the appointment of acting Board members in certain circumstances. Currently under section 7, the Minister can only appoint an acting ordinary member on the nomination of the relevant prescribed industrial organisation. Section 7 will be amended to enable the Minister to appoint an acting ordinary member, without the requirement for that acting member to be nominated, where the acting member is to replace an ordinary member who was appointed under new section 6(1)(d) or (e) of the CIPPLSL Act.

**Clause 8**

Clause 8(1) of the Bill will amend section 8(1) of the CIPPLSL Act to update the grounds on which a Board member may be removed from office by the Minister (e.g. neglect of duty). The new grounds expand upon the current grounds under section 8(1) and also include where a Board member is absent from three consecutive Board meetings without the Minister's leave or a satisfactory excuse (new section 8(1)(d)). Currently under section 8(2) of the CIPPLSL Act, a Board member's office automatically becomes vacant if they are absent from three consecutive Board meetings without the Minister's leave. This provision will be replaced by new section 8(1)(d).

Clause 8(2) of the Bill will amend section 8(2) of the CIPPLSL Act to reflect that a Board member will be "removed from office" rather than "terminated" by the Minister under new section 8(1), and to delete section 8(2)(c) as this ground is now dealt with by new section 8(1)(d).

**Clause 9**

Clause 9 of the Bill will amend section 21 of the CIPPLSL Act which sets out the entitlement to paid long service leave. The entitlement is based on an employee's length of service in the construction industry. Relevantly, an employee must be registered under the CIPPLSL Act in order to be entitled to long service leave.

Clause 9(1) of the Bill will amend section 21(1) of the CIPPLSL Act to replace the reference to "award" with "industrial instrument" (see clause 5 of the Bill).

Clause 9(2) of the Bill will insert section 21(3A) into the CIPPLSL Act. New section 21(3A) will remedy an existing anomaly which gives unregistered employees an advantage over registered employees under the CIPPLSL Act. Breaks in service in the construction industry may have the effect of extinguishing a registered employee's entitlement to long service leave. Section 23(1) sets out the circumstances in which an employee's entitlement will be extinguished. For employees with 1,100 or fewer days in the construction industry, a two-year break will extinguish the entitlement. For employees with more than 1,100 days, a four-year break will extinguish the entitlement.

In contrast, there is currently no equivalent provision to section 23(1) for unregistered employees. When employees register under the CIPPLSL Act, all of their prior service in the construction industry is recognised notwithstanding the service occurred while they were unregistered, and notwithstanding any breaks in service.

New section 21(3A) will ensure that breaks in service that occur before an employee is registered are taken into account when determining the employee's entitlement to long service leave. Section 21(3A) will only apply to service that occurs after section 9(2) of the Amendment Act commences. Any service prior to the amendment can be recognised regardless of any breaks in service.

Clause 9(3) of the Bill will amend section 21(3) of the CIPPLSL Act to define "break in service" for the purposes of new section 21(3A), consistent with the provisions in section 23(1) for registered employees.

#### **Clause 10**

Clause 10 of the Bill will amend section 22 of the CIPPLSL Act dealing with lump sum payments of long service leave on termination of employment.

Currently under section 22(1)(b)(ii), employees are entitled to a lump sum payment for each year of service completed after 10 years of service ("year of service" is defined in section 3(1) of the CIPPLSL Act). Clause 10(1) of the Bill will amend section 22(1)(b)(ii) so that employees will be entitled to proportionate payment for any service after 10 years of service (i.e. not just for completed years of service). This will ensure consistency with the payment of long service leave on termination of employment under the *Long Service Leave Act 1958*.

Clause 10(2) of the Bill will insert sections 22(3) and 22(4) into the CIPPLSL Act.

New section 22(3) will require the Board to deregister employees who receive a lump sum payment. This is consistent with current Board practice to ensure that the register of employees (defined as "employees register" in section 3(1) of the CIPPLSL Act) is accurate and up-to-date. The Board currently deregisters employees pursuant to its general powers under section 14(3) of the CIPPLSL Act. However, new section 22(3) will expressly provide for employees to be deregistered where they receive a lump sum payment. New section 22(4) will clarify that deregistration does not prevent an employee who recommences work in the construction industry from registering afresh.

#### **Clause 11**

Clause 11 of the Bill will amend section 23(1)(a) and (b) of the CIPPLSL Act to replace the reference to "1 100 days" with "1 100 days of service". The term "day of service" is defined in section 3(1) of the CIPPLSL Act and will provide greater clarity.

#### **Clause 12**

Clause 12 of the Bill will delete section 24(2) of the CIPPLSL Act. Section 24(2) currently requires the Board to notify employers and employees of an impending long service leave entitlement (within two months of the entitlement falling due).

The requirement to notify is administratively burdensome and cannot always be fulfilled by the Board (e.g. the Board is unable to notify employers when employees become entitled to long service leave by virtue of reciprocal arrangements with other jurisdictions under section 29A of the CIPPLSL Act). Registered employees can access information about their long service leave accrual and entitlements from the Board, including online.

**Clause 13**

Clause 13 of the Bill will replace the current offence provisions in section 28 of the CIPPLSL Act with civil penalty provisions. Section 28 generally prohibits employment during a period of long service leave under the CIPPLSL Act.

Contravention of the civil penalty provisions will be dealt with by the Industrial Magistrates Court under section 83E of the IR Act. Officers of the Board will be able to bring proceedings for a civil penalty under new section 83E(7A) of the IR Act (see clause 31(2) of the Bill). The Industrial Magistrates Court will be able to impose penalties of up to \$5,000 for an employer and \$1,000 for an employee.

Civil penalty provisions are generally considered more appropriate than offence provisions to deal with contraventions of industrial legislation and will ensure consistency with the enforcement scheme under the *Long Service Leave Act 1958*. Civil penalty provisions are also more flexible than offence provisions and enable the Industrial Magistrates Court to make orders to prevent further contraventions (see section 83E(2) and (5) of the IR Act).

The Bill will replace all of the offence provisions in the CIPPLSL Act with civil penalty provisions, other than those offences in section 54 and new section 54A(8). For the types of conduct proscribed by these sections, offence provisions remain appropriate.

New section 28(4B) of the CIPPLSL Act will apply the civil penalty provisions to contraventions that occurred up to 12 months before section 13 of the Amendment Act commenced (unless the person has already been charged with an offence).

**Clause 14**

Clause 14 of the Bill will rename and substantially replace section 30 of the CIPPLSL Act. Section 30 currently deals with the registration of employers and employees under the CIPPLSL Act. Clause 14 will rename section 30 “Registration of employers” and deal only with the registration of employers. New section 31A of the CIPPLSL Act will deal with the registration of employees (see clause 15 of the Bill).

New section 30(1) will clarify that every employer which engages employees in the construction industry must register under the CIPPLSL Act, and not just those employers “in the construction industry”. Case law has found that an employer (as defined) is still liable to make contributions under section 34(1) of the CIPPLSL Act, even though they are not required to register because they are not “in the construction industry” (*Aust-Amec Pty Ltd v Construction Industry Long Service Leave Payments Board* (1995) 15 WAR 150). If an employer is required to make contributions under the CIPPLSL Act, then it is logical that they also be required to register. It is practically difficult for the Board to monitor and recover contributions from unregistered employers.

Clause 14 will also replace the current offence provisions in section 30 of the CIPPLSL Act with civil penalty provisions.

**Clause 15**

Clause 15 of the Bill will insert section 31A into the CIPPLSL Act dealing with the registration of employees.

Currently under the CIPPLSL Act, employees can only be registered by applying to the Board (section 30(4)). New section 31A will enable employees to be registered by two methods, namely:

- (a) under section 31A(2), employees will still be able to apply to the Board for registration; and
- (b) under section 31A(1), employees can be automatically registered when an employer makes a statement to the Board under section 31(1) (the statement identifies employees employed by the employer in the construction industry).

As is currently the case, the Board will not register an employee unless satisfied that they are an “employee” as defined in section 3(1) of the CIPPLSL Act. To this end, the Board may require employers and employees to provide it with information under new section 31A(4).

**Clause 16**

Clause 16(1) of the Bill will amend section 31(1) of the CIPPLSL Act dealing with the requirement for employers to make statements and contributions on behalf of employees.

Currently under section 31(1)(a), employers are required to submit a written statement to the Board within 15 days after the end of the prescribed period (the “prescribed period” being quarterly periods as per regulation 6 of the *Construction Industry Portable Paid Long Service Leave Regulations 1986*). Section 31(1)(b) requires employers to pay contributions on behalf of employees. However, there is no time period specified for the payment of contributions.

The failure to specify a time period for the payment of contributions undermines the efficacy of the CIPPLSL Act and increases the Board’s administrative workload. Clause 16(1) of the Bill will amend section 31(1) so that employers are required to submit both the written statement and contributions within 15 days after the end of the prescribed period.

Clause 16(2) of the Bill will replace the current offence provision in section 31(2) of the CIPPLSL Act with a civil penalty provision.

**Clause 17**

Clause 17 of the Bill will replace the current offence provision in section 32 of the CIPPLSL Act with a civil penalty provision. Section 32 prescribes record-keeping requirements for employers.

**Clause 18**

Clause 18 of the Bill will insert section 34(2A) into the CIPPLSL Act to clarify that employers are not required to make contributions on behalf of employees who are “apprentices” (as defined in section 3(1) of the CIPPLSL Act).

This amendment will maintain the status quo regarding apprentices under the CIPPLSL Act. Employers are not currently required to make contributions on behalf of apprentices as a consequence of section 3(3) of the CIPPLSL Act (which will be deleted by clause 5(5) of the Bill). Service as an apprentice in the construction industry will, however, continue to count as “service” for the purposes of calculating an entitlement to long service leave under section 21(1) of the CIPPLSL Act. This is because apprentices are “employees” as defined in section 3(3) of the CIPPLSL Act (see clause 5(2) of the Bill).

**Clause 19**

Clause 19 of the Bill will insert section 35A into the CIPPLSL Act to enable the Board to impose a surcharge where employers fail to pay contributions within the specified time period (contributions will be payable within 15 days after the end of the prescribed period).

**Clause 20**

Clause 20(1) of the Bill will replace the current offence provision in section 38 of the CIPPLSL Act with a civil penalty provision. Section 38(1) requires a liquidator of a company (that is an employer under the CIPPLSL Act) to notify the Chief Executive Officer of the Board (**CEO**) of the liquidator’s appointment.

Clause 20(2) of the Bill will delete section 38(3) to (6) of the CIPPLSL Act, which purport to give priority to any outstanding contributions and surcharges owing to the Board on the liquidation of a company. These provisions are no longer relevant and are inconsistent with the prioritisation of debts under the *Corporations Act 2001* (Cth).

**Clause 21**

Clause 21 of the Bill will amend section 45 of the CIPPLSL Act dealing with the CEO’s powers to obtain information from parties.

New section 45(2) will clarify that a person must not, without reasonable excuse, fail to comply with a requirement of the CEO under section 45(1). Clause 21 of the Bill will also replace the current offence provision in section 45 with a civil penalty provision.

**Clause 22**

Clause 22 of the Bill will insert section 49(2A) into the CIPPLSL Act to reflect new section 35A, which will enable the Board to impose a surcharge where employers fail to pay contributions within the specified time period (see clause 19 of the Bill).

Section 49(2A) will provide that in proceedings for recovery of a surcharge under new section 35A, a certificate purporting to be signed by the CEO will be conclusive proof of the matters stated in the certificate (unless there is evidence to the contrary).



**Clause 23**

Clause 23 of the Bill will delete section 50 of the CIPPLSL Act and insert new sections 50 and 51A.

Currently under section 50, appeals from certain decisions of the Board may be made to “the Board of Reference constituted under the *Industrial Relations Act 1979* in relation to long service leave”. A Board of Reference consists of a chairperson appointed by the Chief Commissioner of the Western Australian Industrial Relations Commission (**WAIRC**) and an equal number of employer and employee members (section 48 of the IR Act).

New section 50 of the CIPPLSL Act will provide for reviews of decisions of the Board to be undertaken by a single commissioner of the WAIRC, rather than a Board of Reference. A Board of Reference is not as efficient as a single commissioner as it requires the involvement of at least three members.

In addition, it is currently unclear under section 50 what the Board of Reference can do in determining an appeal. New sections 50(3) and 51A will clearly set out the powers and procedures applicable to a single commissioner when reviewing a decision. The Chief Commissioner of the WAIRC will be able to make regulations on procedural matters relating to a review under section 50.

An appeal from a decision of a single commissioner under new section 50 will proceed to the Full Bench of the WAIRC (new section 51A(1) of the CIPPLSL Act will apply certain provisions of the IR Act, including section 49 of the IR Act which provides for appeals to the Full Bench).

**Clause 24**

Clause 24 of the Bill will amend section 51(1) of the CIPPLSL Act dealing with employees becoming entitled to long service leave by virtue of continuous service with a particular employer (rather than by virtue of the CIPPLSL Act). In this situation, the employer may recover from the Board an amount proportionate to what the employee would have received under the CIPPLSL Act.

Clause 24 of the Bill will amend section 51(1) so that the entitlement to long service leave by virtue of continuous service with the employer must arise under another Act or an industrial instrument (as defined by section 3(1) of the CIPPLSL Act). It is difficult for the Board to assess the validity of a long service leave entitlement that does not arise under statute or a registered industrial instrument.

**Clause 25**

Clause 25 of the Bill will replace section 52 of the CIPPLSL Act dealing with the obstruction of investigations arising under the CIPPLSL Act.

New section 52 will clarify that a person must not, without reasonable excuse, fail to cooperate with an inspector (as defined in section 3(1) of the CIPPLSL Act) or an authorised person. Clause 25 of the Bill will also replace the current offence provision in section 52 with a civil penalty provision.

**Clause 26**

Clause 26 of the Bill will replace section 53 of the CIPPLSL Act prohibiting discrimination against persons who provide information to an inspector or the CEO under the CIPPLSL Act. Clause 26 will also insert section 54A into the CIPPLSL Act to provide remedies to a person discriminated against under new section 53.

New section 53(1) of the CIPPLSL Act will substantially replicate existing section 53(1). However, clause 26 of the Bill will replace the current offence provision in section 53 with a civil penalty provision.

New section 54A of the CIPPLSL Act will replace existing section 53(2), which contains outdated references. Existing section 53(2) purports to provide remedies by reference to sections 96B and 96I of the IR Act, which have since been amended and are no longer relevant. New section 54A will enable a person discriminated against under section 53 to seek a remedy in the Industrial Magistrates Court. Among other things, the Industrial Magistrates Court will be able to order that a person be reinstated (if they were dismissed) and/or or compensated. New section 54A of the CIPPLSL Act is similar to existing remedies in the IR Act (see sections 97YG and 96L).

**Clause 27**

Clause 27 of the Bill will amend section 55 of the CIPPLSL Act to replace the reference to “award” with “industrial instrument” (see clause 5 of the Bill).

**PART 3 OF THE BILL – AMENDMENTS TO INDUSTRIAL RELATIONS ACT 1979****Clause 28**

Clause 28 of the Bill provides that Part 3 of the Amendment Act will amend the IR Act. There are four main objectives of Part 3, namely to:

- (a) recognise that most of the offence provisions in the CIPPLSL Act will be replaced with civil penalty provisions under the IR Act;
- (b) update references in the IR Act to reflect current federal industrial laws and instruments;
- (c) amend publication requirements relating to area and scope provisions of awards and industrial agreements in section 29A of the IR Act; and
- (d) ensure the validity of appointments under the IR Act including those of industrial inspectors, the Registrar and deputy registrars of the WAIRC and the clerk of the Western Australian Industrial Appeal Court.

**Clause 29**

Clause 29 of the Bill will amend section 81AA of the IR Act.

Section 81AA currently provides that in addition to the jurisdiction under the IR Act, the Industrial Magistrates Court has jurisdiction conferred on it by the *Long Service Leave Act 1958* and the *Children and Community Services Act 2004*.

Section 81AA of the IR Act will be amended to note that the Industrial Magistrates Court will also have jurisdiction conferred on it by new section 53 of the CIPPLSL Act (see clause 26 of the Bill).

### **Clause 30**

Clause 30 of the Bill will amend section 81CA of the IR Act to include in the meaning of “general jurisdiction” of the Industrial Magistrates Court, the jurisdiction under new section 53 of the CIPPLSL Act (see clause 26 of the Bill).

### **Clause 31**

Clause 31 of the Bill will amend section 83E of the IR Act relating to contraventions of civil penalty provisions. Section 83E(6) prescribes who may generally apply for a civil penalty.

Clause 31 will insert section 83E(7A) into the IR Act to prescribe who may apply for a civil penalty under the CIPPLSL Act. Section 83E(6) will not apply in this instance. An application will be able to be made by an officer of the Board (with the Board’s written consent).

### **Clauses 32 to 39**

The amendments in clauses 32 to 39 of the Bill will primarily update references in the IR Act to reflect current federal industrial laws and instruments. These amendments are technical in nature and arise out of the introduction of the *Fair Work Act 2009 (FW Act)* and other related transitional legislation.

Clauses 32 and 39 of the Bill will update the IR Act to reflect that the Australian Industrial Relations Commission has been replaced by Fair Work Australia.

Clauses 33 and 37 of the Bill (which amend sections 31(1) and 80ZJ of the IR Act) will update the IR Act to replace references to the “Commonwealth Act” with the “*Fair Work Act 2009 (Commonwealth)*”.

Clauses 34 and 36 of the Bill (which amend sections 71(1) and 80H of the IR Act) will update the IR Act to reflect that federal unions are now registered under the *Fair Work (Registered Organisations) Act 2009*.

Clauses 35 and 38 of the Bill (which amend sections 73(3) and 97VS(5) of the IR Act) will update references in the IR Act to reflect industrial instruments made under the FW Act or preserved under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

### **Clause 40**

Clause 40 of the Bill will amend section 7(1) of the IR Act by:

- (a) deleting the existing definitions of “deputy registrar”, “industrial inspector” and “Registrar” and inserting new definitions; and
- (b) deleting the existing definition of “Council” (clause 48 of the Bill will replace references to the “Council” in the IR Act with “UnionsWA”).

**Clause 41**

Clause 41 of the Bill will replace section 29A(2a) of the IR Act with new section 29A(2A).

Section 29A(2) of the IR Act currently requires the area and scope provisions of a proposed award or industrial agreement to be published before the WAIRC can hear the claim or application. Similarly, details of any proposed variation to the area and scope provisions of an existing award or industrial agreement must be published before the WAIRC can hear the claim or application.

Existing section 29A(2a) of the IR Act allows the Chief Commissioner of the WAIRC to waive the publication requirements only where the area and scope provisions are identical to the previous award or industrial agreement, as the case may be.

New section 29A(2A) will authorise the Chief Commissioner to waive the publication requirements where appropriate. This might include, for example, circumstances where the area and scope of an award or industrial agreement are substantially the same but not identical.

**Clause 42**

Clause 42 of the Bill will delete section 81AA(bb) of the IR Act, which refers to the Industrial Magistrates Court's jurisdiction under section 36 of the *Long Service Leave Act 1958*.

Section 81AA(bb) of the IR Act will be deleted as section 36 of the *Long Service Leave Act* was repealed in 2006.

**Clauses 43 to 45**

The amendments in clauses 43 to 45 of the Bill will ensure the validity of appointments under the IR Act including those of industrial inspectors, the Registrar and deputy registrars of the WAIRC and the clerk of the Western Australian Industrial Appeal Court.

The amendments arise from a deficiency identified in a decision of the Industrial Magistrates Court of Western Australia. In that decision of 23 May 2007<sup>1</sup>, the Industrial Magistrate questioned the validity of the process used to appoint industrial inspectors of the (then) Department of Consumer and Employment Protection. The question was not conclusively determined in that decision.

Section 98 of the IR Act presently provides that industrial inspectors "*may be appointed under and subject to Part 3 of the Public Sector Management Act 1994*". The wording in this section poses three problems in that it does not:

- (a) identify who can appoint industrial inspectors;
- (b) explain the relationship between the appointment of industrial inspectors and the *Public Sector Management Act 1994* (**the PSMA**); and

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<sup>1</sup>*Milward v Melrose Farm Pty Ltd T/As Milesaway Tours M99 of 2006 and Milward v C.A. Miles and R.G. Miles T/As Milesaway Tours M15 of 2007.*

- (c) define the meaning of “appoint”, which is distinct from a “transfer” pursuant to the PSMA.

The terminology causing the deficiency is replicated in other provisions providing for appointments under the IR Act.

### **Clause 43**

Clause 43 of the Bill will amend section 85 of the IR Act dealing with the appointment of the clerk of the Western Australian Industrial Appeal Court (**the Court**). Section 85(7) currently provides that “There shall be appointed under and subject to Part 3 of the *Public Sector Management Act 1994* a clerk of the court and such other officers as are necessary for the proper functioning of the Court, and each of them may hold the office to which they are so appointed in conjunction with any other office under that Act”.

Section 85(7) will be deleted and replaced with three subsections providing for the chief executive officer of the Registrar’s Department to be the clerk of the Court, unless the chief executive officer designates another Registrar’s Department officer to be the clerk of the Court (new section 85(7) and (9) of the IR Act).

New section 85(8) of the IR Act will provide that section 32(1) of the PSMA does not apply to the performance of functions of the clerk of the Court by the chief executive officer of the Registrar’s Department. Importantly, section 32(1) of the PSMA will continue to apply to the chief executive officer of the Registrar’s Department when that person is acting in the capacity of a public servant and as the chief executive officer.

Section 32(1) of the PSMA generally requires a chief executive officer to comply with any lawful directions or instructions given by the responsible authority of his or her department or organisation (including, for example, compliance with public sector standards, codes of ethics and Public Sector Commissioner’s Instructions). New section 85(8) of the IR Act will remove the potential for conflict between the chief executive officer’s obligations as chief executive officer of the Registrar’s Department, and as clerk of the Court.

### **Clause 44**

Clause 44(1) of the Bill will delete section 93(1) of the IR Act dealing with the appointment of the Registrar, deputy registrars and other officers of the WAIRC. Section 93(1) will be replaced with five new subsections providing for the following:

- (a) the chief executive officer of the Registrar’s Department will be the Registrar (new subsection (1)), subject to new subsection (1AB) which allows the chief executive officer of the Registrar’s Department to designate a Registrar’s Department officer to be the Registrar in consultation with the Chief Commissioner;
- (b) where the chief executive officer of the Registrar’s Department is the Registrar, section 32(1) of the PSMA (requiring chief executive officers to comply with lawful directions or instructions given by the responsible authority of his or her department or organisation) will not apply to the performance of functions of the Registrar (new subsection (1AA)). This will remove the potential for conflict

between the role of chief executive officer of the Registrar's Department (which is subject to the direction of the Minister) and the role of Registrar (which is subject to direction by the WAIRC under section 93(2) of the IR Act);

- (c) the Registrar will be able to designate as many Registrar's Department officers to be deputy registrars as are necessary for the purposes of the IR Act (new subsection (1AD)).

Clause 44(2) of the Bill will amend section 93(1a) of the IR Act dealing with the appointment of associates by the Minister on the recommendation of the Chief Commissioner. Presently, section 93(1a) provides that associates shall not be "appointed under and subject to Part 3 of the *Public Sector Management Act 1994*". The amendment deletes that phrase and replaces it with "public service officers". This is a consequential amendment arising from the removal of all references to the appointment under and subject to Part 3 of the PSMA.

Clause 44(3) of the Bill will insert section 93(3A) into the IR Act to clarify the functions of the Registrar and the chief executive officer of the Registrar's Department where both roles are performed by the same person. It provides that section 93(2) of the IR Act – "*The duties of officers of the Commission shall be as prescribed and as directed by the Commission*" – will apply despite the PSMA, however nothing in section 93(2) will affect the functions of the Registrar as chief executive officer of the Registrar's Department. This provision will ensure that the roles and their separate functions are discrete. The PSMA will apply to the functions of the role of the chief executive officer of the Registrar's Department.

#### **Clause 45**

Clause 45 of the Bill will amend section 98 of the IR Act dealing with the appointment of industrial inspectors.

Given the legal questions that have arisen concerning the validity of appointments under the section, section 98(1) will be deleted and replaced with new provisions enabling the chief executive officer of the Department of Commerce (**CEO of Commerce**) to designate a departmental officer to be an industrial inspector.

#### **Clause 46**

Clause 46 of the Bill will insert sections 99A, 99B, 99C and 99D into the IR Act.

#### ***New section 99A of the IR Act***

New section 99A relates to identity cards for industrial inspectors. New section 99A(1) will require that every industrial inspector is to be provided with an identity card signed by the CEO of Commerce or a departmental officer authorised by the CEO to do so.

New section 99A(2) will provide that an identity card is evidence in a court of an appointment as an industrial inspector and any other matter specified on the card.

New section 99A(3) will require an identity card to be returned if the designation of an industrial inspector is revoked or ceases to have effect (see new section 99D(4) of the IR Act). The identity card must be returned to the CEO of Commerce or a departmental officer of Commerce authorised by the CEO.

***New section 99B of the IR Act***

New section 99B(1) will require an industrial inspector to produce the identity card where requested and where the industrial inspector has performed or is about to perform a function as an industrial inspector.

New section 99B(2) will require an industrial inspector to produce the identity card under subsection (1) only where they are in physical presence of the person in respect of whom they have performed or are about to perform a function as an industrial inspector.

New section 99B(3) will provide that where it is impracticable for an industrial inspector to produce the identity card under subsection (1), they must do so at the first reasonable opportunity.

***New section 99C of the IR Act***

New section 99C(1) will provide that a person who is seconded to Commerce or the Registrar's Department is taken to be employed for the purposes of the section.

New section 99C(2) will provide that as many public service officers are to be employed in Commerce as are necessary for the purposes of the IR Act.

New section 99C(3) will provide that as many public service officers are to be employed in the Registrar's Department as are necessary for the performance of the Court's functions, the performance of the WAIRC's functions and otherwise for the purposes of the IR Act.

***New section 99D of the IR Act***

New section 99D will apply to the designation of a person as clerk of the Court (under new section 85(9) of the IR Act), as the Registrar (under new section 93(1AB) of the IR Act), as a deputy registrar (under new section 93(1AC) of the IR Act) and as an industrial inspector (under amended section 98(1) of the IR Act).

New section 99D(2) will apply section 52 of the *Interpretation Act 1984*, providing among other things that the power to make a designation includes a power to revoke a designation previously made, or to designate another person to perform the functions when it is impractical for the designated person to perform the functions.

New section 99D(3) will provide that a designation of clerk of the Court, Registrar or deputy registrar ceases to have effect if the person designated ceases to be a Registrar's Department officer.

New section 99D(4) will provide that a designation of industrial inspector ceases to have effect if the person designated ceases to be an officer of Commerce.

New section 99D(5) will allow for the power to make a designation by the Minister, Registrar or the chief executive officer of the Registrar's Department to be delegated to another person.

**Clause 47**

Clause 47 of the Bill will amend section 113 (1)(d)(ii)(III) of the IR Act to correct typographical errors contained in that subsection. The subsection currently contains two subparagraphs (1)(d)(ii)(III) which will be amended and correctly renumbered.

**Clause 48**

Clause 48 of the Bill will replace outdated references in the IR Act to the “Trades and Labor Council of Western Australia” with “UnionsWA”.

**PART 4 OF THE BILL – AMENDMENT TO MINIMUM CONDITIONS OF EMPLOYMENT ACT 1993****Clause 49**

Clause 49 of the Bill provides that Part 4 of the Amendment Act will amend the *Minimum Conditions of Employment Act 1993 (MCE Act)*.

**Clause 50**

Clause 50 will amend Schedule 1 of the MCE Act to recognise special public holidays that may be proclaimed from time to time under section 7 of the *Public and Bank Holidays Act 1972*.

Section 30 of the MCE Act entitles full-time and part-time employees to pay if they are not required to work on a day solely because it is a public holiday. Schedule 1 to the MCE Act prescribes public holidays for the purposes of section 30, but does not currently prescribe special public holidays. The amendment to Schedule 1 of the MCE Act will overcome this oversight.

**PART 5 OF THE BILL – AMENDMENTS TO EMPLOYMENT DISPUTE RESOLUTION ACT 2008****Clause 51**

Clause 51 of the Bill provides that Part 5 of the Amendment Act will amend the *Employment Dispute Resolution Act 2008 (EDR Act)*. The amendments are technical in nature and will update references in the EDR Act to reflect current federal industrial laws and agreements. The EDR Act enables the WAIRC to conduct low-cost and informal dispute resolution at the request of employers and employees.

**Clause 52**

Clause 52 of the Bill will amend existing definitions in section 3(1) of the EDR Act. In particular, clause 52 of the Bill will:

- (a) delete the definitions of “Commonwealth workplace agreement” and “Workplace Relations Act”;
- (b) insert a new definition of “Commonwealth enterprise agreement” which will encapsulate agreements made under the FW Act or prescribed under section 113 of the IR Act (e.g. to include transitional agreements preserved under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*);



- (c) amend the definition of “organisation” to reflect that federal unions are now registered under the *Fair Work (Registered Organisations) Act 2009*.

**Clause 53**

Clause 53 of the Bill will delete section 26 of the EDR Act dealing with dispute resolution under the *Workplace Relations Act 1996*. Section 26 will be deleted as a result of the *Workplace Relations Act 1996* being substantially repealed.

**Clause 54**

Clause 54 of the Bill will delete section 27 of the EDR Act also dealing with dispute resolution under the *Workplace Relations Act 1996*.

Clause 54 will insert new section 27 into the EDR Act to enable the WAIRC to conduct dispute resolution under an enterprise agreement made under the FW Act (or under an agreement prescribed by the regulations). Section 740 of the FW Act enables a third party, such as the WAIRC, to resolve disputes under enterprise agreements. New section 27 of the EDR Act will facilitate parties nominating the WAIRC as their dispute resolution provider under an enterprise agreement.

**Clause 55**

Clause 55 of the Bill will amend section 28 of the EDR Act to replace references to “Commonwealth workplace agreement” with “Commonwealth enterprise agreement” (see clause 52 of the Bill).

**Clause 56**

Clause 56 of the Bill will amend section 29 of the EDR Act to replace outdated references (see clause 52 of the Bill).

**Clause 57**

Clause 57 of the Bill will amend section 31(1) of the EDR Act to clarify that the Chief Commissioner of the WAIRC will be responsible for making regulations under section 113 of the IR Act, relating to the practice and procedure of the WAIRC when exercising functions under the EDR Act.

**PART 6 OF THE BILL – AMENDMENT TO LITTER ACT 1979**

**Clause 58**

Clause 58 of the Bill provides that Part 6 of the Amendment Act will amend the *Litter Act 1979*.

**Clause 59**

Clause 59 of the Bill will amend section 9(1) of the *Litter Act 1979* to reflect the change in name of the “Trades and Labor Council of Western Australia” to “UnionsWA”.

**PART 7 OF THE BILL – AMENDMENT TO OCCUPATIONAL SAFETY AND HEALTH ACT 1984**

**Clause 60**

Clause 60 of the Bill provides that Part 7 of the Amendment Act will amend the *Occupational Safety and Health Act 1984*.

**Clause 61**

Clause 61 of the Bill will amend section 6(2)(d)(ii) of the *Occupational Safety and Health Act 1984* to reflect the change in name of the “Trades and Labor Council of Western Australia” to “UnionsWA”.