SENATE EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS COMMITTEE

INQUIRY INTO FAIR WORK BILL 2008

SUBMISSION BY CPSU, THE COMMUNITY AND PUBLIC SECTOR UNION – STATE PUBLIC SERVICES FEDERATION GROUP

1. The State Public Services Federation (SPSF) Group of CPSU, the Community and Public Sector Union, represents the industrial interests of approximately 120,000 employees of State Governments in departments, agencies, statutory authorities, instrumentalities and State owned corporations, as well as general staff employees of universities. While most of these are within the jurisdiction of the various State industrial tribunals, three major groups of our members are already within the Federal jurisdiction.

2. These are:

   - Employees of the Crown in right of the State of Victoria;
   - General staff in universities; and
   - Direct employees of State owned corporations which are trading or financial corporations, as well as employees of privatised former State Government entities (eg, prison officers employed by private prisons in Victoria).

3. The Bill has an immediate impact on these members, irrespective of what happens in the Federal Government's negotiations with the States about harmonisation of industrial relations laws and systems. If some or all of the State Governments either refer their industrial relations powers to the Commonwealth, as Victoria did in 1996, or enact legislation parallel to the Commonwealth's, the provisions of the Bill, and then the final legislation, will have implications for all or most of our members.

4. The SPSF Group of the CPSU accordingly has a major interest in the industrial relations system the Bill will create.

5. The industrial interests and employment relations circumstances of most of the members of the SPSF Group are different in significant respects from those of the members of many other unions.

6. Largely, State public sector employees are engaged as "officers" of the Crown and their employment is governed by legislation enacted by the Crown in Right of the State.

7. Many other unions have members who are mainly employed in the private sector. Many of these members are employed in highly unionised workplaces and are in a position to take industrial action that will have a significant commercial impact on their employers.

8. Many others, in contrast, are lowly paid workers in workplaces with low levels of union membership, employed either in small

businesses or economically marginal enterprises, with little capacity to take effective industrial action.

9. Most members of the SPSF Group work for organisations that are not primarily commercial in their purpose or operation. However, a small number work for enterprises that may be primarily commercial, e.g. the Lotteries Corporation in New South Wales, and some others work for enterprises that may engage in activities that generate income, even if that is not their primary purpose.

10. While some State owned corporations generate income for their State Governments, none exist in order to generate dividends for private owners or shareholders.

11. Most SPSF Group members are employed in workplaces which have no directly economic purpose or function. They work for departments, agencies or enterprises engaged either in:

- administration, public safety, justice and corrections;
- regulation of particular commercial, industrial agricultural or environmental activity;
- the provision of assistance of various kinds, whether to the private sector or to persons in need, or
- providing or maintaining essential services to the community.

12. On the other hand, most members of the SPSF Group are not low-paid employees of the kind whose interests the Bill seeks to protect by giving them access to binding arbitration.

13. From this brief overview, it can be seen that most members of the SPSF Group would not be able to take industrial action, protected or otherwise, that would have a sufficient economic impact on the employer to make it a commercial decision for the employer whether or not it accedes in whole or in part to the employees' claims.

14. This situation is recognised currently by the operation of the industrial relations legislation in the current State jurisdictions, where there is no restriction on the circumstances in which arbitration may occur.

15. Importantly, the Crown, that is, the State Government, is equally bound by orders made by the respective State Commissions as is any private employer.

16. If there is harmonisation of industrial relations law, the Commonwealth legislation inevitably will set the standard and, if the Bill in its current form is enacted, it will significantly cut down the rights currently enjoyed by State public sector employees.

17. The submissions below on particular provisions of the Bill should therefore be read in the context of these salient characteristics and particular circumstances and interests of State public sector employees.

AUSTRALIAN INDUSTRIAL RELATIONS – THE CONCEPT OF FAIRNESS AT WORK

18. The fundamental principles of a fair and just industrial system have been a corner stone of Australian society. The social consensus has been that a fair industrial system would facilitate mediation and, in unresolved disputes, an independent decision maker would arbitrate an outcome.

19. A fair system of industrial relations was premised on the belief that the work/labour relationship was a relationship based upon the relative power of the respective parties and not one of a contractual relationship of equal bargaining power. That being so the 'umpire' had the authority to determine irreconcilable disputes.

20. This fundamental consensus was, and still is, based on the belief that a worker or his/her representative organisation can call a party to the bargaining table and, should they fail to reach a fair outcome, the independent arbitrator would adjudicate and deliver a fair decision.

21. While not always called upon, arbitration remains an important reminder that if parties lack power or if they fail to negotiate in good faith than a decision will be arrived at by arbitration.

22. This consensus carried through the twentieth century and remains as significant as it did when the Australian system was developed.

23. The Australian system of industrial relations was a corner stone of the civil society, one which ameliorated the harshness of the unregulated free market, and developed a more egalitarian wage structure based on fair work principles.

24. The right to arbitration has always been contested by small groups within both labour and capital. The view that arbitration and the

independent industrial tribunal were an unwelcomed intervention in the employment relation was propounded by such groups as the H R Nicholls Society and the Institute of Public Affairs and some employer groups.

25. These groups and their views were considered to be out of step with those of the general Australian public and the concept of fairness. And, it should be said, they were opposed by industrially strong employee organisations as an interference with their capacity to maximise their bargaining strength.

26. The notion of industrial fairness was never more clearly demonstrated than in the rejection of the Bruce Government's attempt to dismantle the conciliation and arbitration system and when the Howard Government took a similar course of action in its Work Choices regime.

27. Work Choices, with it attempt to remove rights of workers and remove the legitimate role of the independent umpire was an attack of the fundamental belief in fairness held by Australian society.

28. Principles of a fair work system were eschewed by the Howard Government at great electoral cost to themselves. The Australian voting public resoundingly rejected what was perceived as a 'unfair' industrial relations system.

29. A strong award system, the right to collectively bargain and the ability to turn to the independent arbitrator remain important lynchpins of the idea of fair work in Australia. It is upon this very basis that a new Fair Work Australia must be built.

30. The Fair Work Bill proposes a new industrial relations framework which attempts to restore some fairness and balance to the work relationship. It proposes a three tiered layered approach to the industrial relations framework: National Employment Standards, Modern Awards and Collective Bargaining.

31. Having discussed above the importance of arbitration in securing a fair industrial system we now make suggestions as to improvements we believe need to be considered if a fair work system is to be delivered to the Australian workforce.

THE AWARD SYSTEM

32. Historically the award system has played an integral role in setting wages and conditions for Australian workers. As mentioned earlier the award system underpinned notions of a fair and just society. Workers felt secure in the knowledge that a basic set of wages, conditions and rights underpinned their working arrangements.

33. The Australian industrial relations system was somewhat of a hybrid with awards providing the basis for employment arrangements and bargaining, supported by a right to arbitration, operating alongside the award system and covering a proportion of workers.

34. Many workers in the non bargaining sectors benefitted from the 'flow-on' effect of wage fixing arrangements, women and weaker groups in particular. Historically the award system produced a much flatter wage structure with less wage dispersion and wages inequality. This accorded with the Australian concept of fairness.

35. Over the last decade there has been a shift towards decentralisation and individualisation of employment arrangements. We have also seen the scope, coverage and content of awards reduced and it is no surprise that we have seen greater wage dispersion and a less even distribution of workplace entitlements.

36. Despite attempts to downgrade the award system, awards remain a significant instrument in the industrial framework and they provide a guide to standards for employers, unions and workers.

37. Collective agreements cover just under 40 per cent of the workforce, which means that awards provide standards for a majority of the workforce. This is not to be confused with those categorised as 'award reliant' – the proportion of men in this category is about 15 per cent and women about 22 per cent.

38. As part of the new Fair Work Australia system the Rudd Government passed legislation to allow for 'Award Modernisation'. Awards are to reflect the nature of a modern workforce.

39. The award modernisation process is being carried out by the Australian Industrial Relations Commission and is currently underway. We submit that there are significant areas to be addressed in this process and in the role and function of the Commission determining these new modern awards.

40. We draw the Committee's attention to the removal of conditions in the early rounds of the modernisation process. Important entitlements have been removed from some awards.

41. This will mean that many workers in the non bargaining sector have drastically reduced entitlements to redundancy, penalty rates and sick leave and rates of pay have been cut under new job classification structures. Some workers will be worse off NOT better off.

Awards Should be Measured Against Comparable Entitlements Achieved in Relevant Collective Agreements

42. The legislation requires that modern awards and agreements must contain flexibility clauses. These flexibility clauses could provide an avenue for significant award evasion. Award flexibility clauses are based on employers and employees 'agreeing' to flexible arrangements.

43. The Work Choices experience indicates that workers, particularly those in the unorganised award dependent sector have very little say in the making of 'agreements'. In many circumstances 'agreeing' is 'take it or leave it'. Agreements made under award flexibility clauses must be properly vetted to ensure that entitlements are not undermined.

44. **We submit that a "Flexibility Agreement" must be vetted by Fair Work Australia and the parties must have the opportunity to seek advice, consider and agree to the contents of these arrangements.**

45. The importance of a strong award system is manifest in the significant and important role that they play in skill based classification structures. Strong classification structure with appropriate work value assessment plays in an important role in providing a skilled labour force and an efficient functioning labour market. Appropriate skill structures also play an important role in gender wage outcomes – a point taken up in the pay equity section of this submission.

46. **We submit that modern awards should remain as comprehensive instruments of rights and entitlements and that parties to awards have rights to apply to Fair Work Australia to seek conciliation and arbitration in matters of disputes.**

47. **Awards should reflect community standards similar to those achieved through the bargaining process.**

48. **Awards should not be allowed to fall to the 'lowest safety net' but should remain comparable to entitlements received by the majority of the Australian workforce.**

49. **To allow any less is to allow for social and economic division – a divided, exclusionary society.**

NATIONAL EMPLOYMENT STANDARDS

50. The CPSU-SPSF welcomes the establishment of a set of National Employment Standards. These National Standards must remain comparable to those received by the general Australian community and therefore must be subject to review and improvement.

51. Rights and entitlements are of no use unless they are accessible, operable and enforceable. Fair Work Australia will not have a capacity to arbitrate issues in relation to the NES (or modern awards).

52. The extent of the Commission's powers will be limited to making recommendations and conciliating. Any contest as to the entitlements under the safety net will have to be carried out in the Federal Court or the Federal Magistrates Court. (See discussion at paragraph 76.)

The Review Process

53. Industrial relations is a dynamic process and the needs of a modern workforce and economy are subject to constant review. As many workers are reliant on National Standards and Awards, these entitlements must remain comparable to others in the workforce.

54. To let Standards for the non-bargaining sector level down is not fair and excludes workers from participating in the social and economic benefits of Australian society.

55. We therefore suggest that similarly to the Better Off Overall Test, that Standards and Awards be measured against comparable collective agreements.

56. **We submit that, as with the directions governing the Federal Minimum Wage and the Modern Award arrangements, a formal review process be included in the setting of Standards. We submit that these reviews should be considered in the context of entitlements that are comparable and relative to conditions attained in contemporary collective agreements.**

Requests for Flexible Working Arrangements

57. The Government's objective of assisting working families to balance their work and family responsibilities forms the basis of this entitlement. While we feel that these Standards go some way in providing an entitlement, we make suggestions that will strengthen and give effectiveness to the operation of this policy objective.

58. We welcome the extension of 'right to return to work' provisions achieved in the 2005 Australian Industrial Relations Commission Family Provisions Test case to wider forms of flexible work arrangements and the extension of eligible employees to all employees who are parents with children under school age.

59. We are however concerned that the right to return to work is somewhat weakened. The NES provides that 'requests may be only refused on reasonable business grounds' however what might constitute reasonable business grounds is not defined.

60. Further there is no mechanism for appeal if the employer refuses this request. Employers must give the employee a written response to the request within 21 days. Employers and employees are encouraged to 'discuss' their working arrangements. There is no compliance process or effective means of enforcement. Fair Work Australia cannot arbitrate on this issue and, as pointed out above, any dispute over NES can only be referred to the Courts or to arbitration by consent.

61. We would submit that securing an entitlement to an employee's ability to discuss and negotiate is not an entitlement or right at all. It ignores any imbalance of power that exists within the employment relationship and effectively removes such a right or entitlement for many workers.

62. This would particularly be the case with many women, for whom the policy proposals are mainly intended to benefit. One only need to point to women's sorry experience with Australian Workplace Agreements, as acknowledged by the Labor Government, to

recognize imbalances of power that spring from workers' ability to 'discuss' and negotiate fair rights.

63. We submit that it is a serious flaw not to provide an independent grievance procedure within Fair Work Australia to test whether or not a request has been refused on 'reasonable business grounds'. It is curious that this is the only entitlement in the NES that is specifically excluded from intended grievance or disputes resolution processes.

64. **We therefore recommend that guidelines be developed that give certainty to the definition of 'reasonable business grounds' and that a similar remedy for settling grievances and a right to arbitration within Fair Work Australia apply to this Standard.**

Parental Leave and Related Entitlements

65. We refer to the AIRC Family Test Case standard that granted 8 weeks concurrent parental leave and note that the new Standard reduces that to 3 weeks.

66. **We therefore submit that the previous 8 weeks should be reinstated.**

Public Holidays

67. Recognition of public holidays and the payment of appropriate compensation for work undertaken on these days is an important issue in the Australian community. While protecting public holidays and granting workers the right to work or decline work on those days, the NES is silent on payment of penalty rates that would apply for that work.

68. **We submit that payment of public holiday penalties is an established standard in the Australian community and that the NES must protect the payment of these rates where applicable alongside entitlements set down in the appropriate modern award.**

Notice of Termination and Redundancy Pay

69. The NES sets down termination and redundancy entitlements. While the Government set these Standards as a safety net for all workers we find an exclusion of employees of a small business. We find this exemption of this Standard to employers where there are less than 15 employees to be discriminatory. Entitlements should not be determined upon the size of a workplace in which a worker is employed. Workers in workplaces of less then 15 workers are in no less a need of this entitlement than other workers. It in fact reduces the whole concept of a safety net.

70. **We submit that these rights and entitlements should be universally applied irrespective of the size of the workplace in which a worker is employed.**

UNFAIR DISMISSAL

71. The issue of unfair dismissal was significant issue in the Australia society's rejection of the Work Choices regime. Australians believed that the removal of protection against arbitrary decisions by employers to sack them wasn't 'fair'. The fear of unfair dismissal is alive in the minds of workers, this is particularly so in time of economic downturn.

72. We applaud that the new Government has attempted to strengthen the rights of workers. We believe that while the Bill is an improvement it needs to go further.

73. The Bill requires unfair dismissal applications be lodged within 7 seven days. This is too short a timeframe it should be extended to 21 days. The qualifying period of 6 months and 12 months for small business is too long. We suggest that the traditional three months provides a fairer outcome. The Bill also exempts employers from the obligation to give notice of dismissal during the qualifying period. This would be extremely harsh on workers.

74. We submit that distinguishing rights on the basis of size of workplace in discrimination and a violation of the rights enjoyed by all workers in Australian society. This will be particularly harsh on women and the more vulnerable of workers.

75. **We submit that equal rights to protection from unfair dismissal should extend to all workers.**

LACK OF ARBITRATION FOR NES AND MODERN AWARDS AND ACCESS TO THE FAIR WORK DIVISION OF THE FEDERAL MAGISTRATES COURT

76. The Bill does not contain general powers of arbitration. Procedures for settling disputes in relation to the NES and with respect to modern awards end in arbitration only with the consent of both parties to the dispute.

77. Further, the Bill does not mandate compulsory arbitration as the ultimate step in dispute settlement in relation to the terms of an agreement. It is therefore up to the parties to bargain for a dispute settlement procedure which ends in compulsory arbitration.

78. Given the virtually limitless extent of the corporations power as established by the High Court in the *Work Choices Judgment* and the experience of previous industrial tribunals successfully negotiating the limits of administrative (as opposed to judicial) power, this must have been a conscious policy decision by the Government rather than a decision based on a lack of Constitutional power.

79. The Bill favours a method of dispute settlement which is resolved by a Court process rather than through Fair Work Australia. We understand it is contemplated the Federal Magistrates Court will have a relatively informal 'small claims' process whereby matters can be resolved with limited formality in the Magistrates Court.

80. The Court-centred model for the enforcement of workplace rights is problematic and we remind the Committee of the acceptance of specialist legal regimes in many facets of law governing civil society. The experience is that Courts are rarely used by unions on behalf of their members and the persons within the non-unionised sector rarely engage with the Court system.

81. Anecdotally the number of award and other proceedings commenced under the existing law is rare relative to the numbers of persons who have the benefit of federal awards and agreements. We anticipate this will not change under the regime of Fair Work Australia.

82. If the Government is to persist with a 'Court centric' conception of dispute resolution, and prefers the Court rather than FWA as the arbiter of workplace rights disputes, we submit the Committee should urge the Government, in consultation with the Federal Court,

to create a specialist and separate industrial magistracy to deal with Fair Work Division matters.

83. Industrial law is a byzantine discipline for the neophyte. The experience of legally qualified industrial staff of the SPSF Group has been mixed in dealing with Magistrates who do not have sufficient grounding in industrial law. Specialist industrial magistrates would lead to the more efficient and competent disposition of matters by the Federal Magistracy.

84. Labor policy in relation to legal disputes generally is aimed at promoting improved access to justice and alternative dispute resolution as a cost effective means of resolving disputes.

85. It is not consistent with such a policy framework for Courts to be the ultimate arbiter of workplace disputes in relation to NES, Award or agreements as the Bill currently proposes.

86. The Fair Work Bill fails the test of fairness in that award dependent workers, who are least able to afford access to Courts, are compelled to contest disputes in relation to the NES or awards through a Court process in order to obtain relief.

87. Furthermore, the fact that that parties are not compelled to include compulsory arbitration as a means of resolving agreement disputes means that weak parties, who cannot force an employer to include compulsory arbitration by bargaining, will end up with a dispute settlement procedure that is incapable of settling intractable disputes outside of a Court process.

88. **We submit that, if Fair Work Australia is to justify its name, it must be given comprehensive powers to conciliate and, if conciliation fails, compulsorily arbitrate disputes between employers and employees in the Federal industrial relations system.**

89. **These powers should be exercisable whether those disputes arise in the course of enterprise bargaining or as a result of a dispute over the application of an agreement or award or as a result of a dispute that arises for whatever reason in the workplace at any time. This is because there is no constitutional impediment to granting FWA such powers in light of the High Court's *Work Choices Judgment*.**

90. **We therefore submit the Committee should recommend that the Bill be amended to compel compulsory arbitration as the**

final step in relation to disputes in relation to the NES, Awards and Agreements.

91. Awards and National Employment Standards must be just that, NATIONAL STANDARDS, not a weak set of entitlements, wages and conditions that exacerbate workforce inequality and social and economic exclusion. They must be measured against, relative and comparable to entitlements received by others in the workforce.

THE BARGAINING SYSTEM

92. In its current form the Fair Work Australia Bill departs from the notion of 'fairness' in its reliance on good faith collective bargaining unsupported by the right to arbitration.

93. The role of FWA is restricted to making bargaining orders that relate to procedural matters only and not the content of the agreement. Where agreement about content fails to be achieved the parties can walk away, take protected industrial action or jointly seek FWA's assistance in determining a settlement.

94. 'Jointly seeking assistance' and arbitration by 'consent' are hollow concepts when one considers the very nature of the imbalance in the employment relationship. To quote Justice Higgins 'the power to withhold bread is far greater than to withhold labour'. The right to walk away is no right for a worker. An employer may see no benefit in jointly seeking assistance on the content of an agreement when they can 'walk away'.

95. Industrial disputes, in themselves, indicate conflict and failure to negotiate to a mutually acceptable conclusion. 'Consent arbitration' is as hollow as the notion of free and equal bargaining in individual contracts that was so resoundingly rejected by the Australian community. A lack of effective rights will not result in an efficient and fair system to govern the work relationship.

96. We submit that bargaining processes and outcomes are determined by the power of the respective parties and indeed that this fundamental premise is acknowledged by the Government in its reasoning for providing a right to arbitration for workers in lower paid sectors.

97. The framers of the Bill accept the fundamental principle that bargaining in the employment relationship is a power relationship. We submit that arbitration by consent will effectively deny parties access to a fair resolution of a dispute. This will exacerbate the

settlement of disputes and endanger economic prosperity and not be in the public interest.

98. The failure of adequate recourse to arbitration can be seen in the operation of the Victorian Employee Relations ACT 1992, which resulted in avoidance of making collective agreements and greater disparity and a lowering of standards and conditions for some workers.

99. The Victorian Branch of the CPSU-SPSF Group found that resolving industrial disputes and agreement making became particularly difficult in public sector bargaining with a single powerful employer whose intention it was to avoid making agreements.

100. The then President of the Victorian Employee Relations Commission expressed frustration at not having adequate power to intervene and settle long running disputes in that the Commission's hand were tied. (Zeitz, Susan 2000 Report to the Industrial Relations Taskforce on the Industrial and Employment Law system applying under the Employee Relations Act 1992 & 31 December 1996)

101. In his Inquiry into the Victorian Industrial Relations System Professor Ron McCallum found that a 'significant number of Victorian employees were disadvantaged under this system' (McCallum 2000 Victorian Industrial Relations Taskforce "Independent Report of the Industrial Relations Taskforce" July 2000, State of Victoria). He recommended that that any new Victorian Commission should have similar power that are possessed by the NSW and Queensland Commissions and that when employees have failed to resolve a grievance they may make application to the Tribunals for assistance in resolving the grievance.

102. The McCallum Inquiry found that parties to a grievance should have the capacity to resolve disputes by conciliation and arbitration and that there is a critical need in a small number of cases for an independent tribunal to resolve such disputes (2000:197).

103. **We submit that it is in the public interest that in the making of agreements the bargaining parties have a right, should they desire to seek conciliation and arbitration in the settlement of industrial matters before the Fair Work Australia.**

Good Faith Bargaining

104. While the Australian industrial system has been a hybrid of bargaining within an arbitral framework the new proposed Fair Work Australia moves further from providing supporting arbitration to a collective bargaining model. It adopts a process of good faith bargaining and sees these rules as providing adequate support for collective bargaining. We submit that to be effective these processes require a right to arbitration.

105. Good faith bargaining obligations are process obligations. Good faith compels the horse to come to the water but does not compel it to drink. The Commission expressly cannot enforce agreement making.

106. Good faith obligations are dependent on the willingness of the parties to reach a final resolution, as pointed out, public sector workers maybe unable to achieve settlement when dealing with an intransigent Crown employer with virtually unlimited resources. We further submit that in many cases the knowledge of the right to arbitration encourages the parties to settle.

107. International experiences with good faith bargaining without access to the right to arbitration can lead to inadequate collective bargaining coverage and resulting divergence in workforce outcomes and greater workforce inequality.

108. Studies by Godard find that in Canada, where the right to request arbitration is provided, settlement is more likely to be achieved than in the USA where this is not provided. In the USA more than one third of negotiations failed to reach agreement compared to less than ten percent in Canada where there is provision for first contract arbitration (Godard 46.).

109. In eight of eleven Canadian jurisdictions the first collective agreement may be determined by binding arbitration. Collective bargaining coverage is much greater in Canada than in the USA.

110. We also submit that while the Fair Work Bill sets out provisions that govern 'good faith', the experience in the United States sees much employer evasion of good faith processes. Bad faith bargaining is difficult to establish and can be subject to lengthy appeal, which further stymies the resolution of disputes and agreement making (Godard 2003:474).

111. Unfair labor practice charges for violation of the duty to bargain in good faith require the charging of parties and case investigations takes up to 45 days. If it is found that the employer has bargained in good faith and has reached a 'bona fide impasse' the union can either accept or reject the final offer.

112. Good faith bargaining simply means that the employer can take a 'hard position', provide some justification, not make any concessions and when it has had enough, declare an impasse and implement its final offer. This leaves the union with two options, accept the offer or strike.

113. This is similar to what is proposed in the Fair Work Bill, which will allow a party to walk away or take industrial action. This provides no answer and in fact harms good industrial relations.

114. We again point to the experience for our Victorian Branch under the Kennett Government's *Employee Relations Act*. This would place public sector workers in an unfair bargaining position when dealing with well resourced, powerful employer such as a State Government.

115. Collective bargaining coverage in the United States is poor. Only 13.3% of the US labour force over the age of 16 are covered by collective agreements (Bureau of Labour Statistics).

116. The lack of arbitration and failure of good faith bargaining is highlighted in the characteristics of strike patterns in the United States. Strikes in the USA are often long, drawn out and can continue on for weeks and months without agreement being reached. Processes to gain final arbitration with the National Labour Relations Boards are highly legalistic and often frustrate any quick resolution.

117. **We submit that premising a collective bargaining system on good faith bargaining process which only provides consent arbitration is designing a bargaining system that is set to fail.**

Level of Bargaining

118. The core of the new FWA system is enterprise bargaining. Under the rejected, unfair Work Choices regime, multi-employer bargaining was prohibited unless the Commission could be convinced that it was in the public interest to allow such bargaining to occur.

119. Under FWA employers and employees are free to engage in multi-employer bargaining should they genuinely wish to do so. However, protected action and good faith bargaining orders are not available in those circumstances.

120. It will be unlawful to coerce an employer to make a multi-employer agreement or discriminate against an employer if they have not entered into a multi-employer agreement. Industrial action in support of pattern bargaining is not protected.

121. The International Labour Organisation Convention recommendations 86, 98 and 163 set out rights and obligations for collective bargaining. Recommendation 163 states that there should be free choice of bargaining at 'any level whatsoever'. Workers must have the right to bargain agreements at a national, industry, occupational or workplace level.

122. There are many reasons why workers need to have the right to negotiate agreements at levels higher than that of the workplace, for example, economic efficiency for both employers and employees.

123. Higher level and more centralised bargaining regimes also produce greater wage equality. This is particularly true in the case of gender wage outcomes. A Fair Work system must provide mechanism for bargaining at industry, occupation, national and workplace level.

124. **We submit that limitations on multi-employer bargaining breach international conventions and therefore seek amendments that allow Australia to comply with our international obligations.**

125. **We further submit that the Government should amend the Bill to ensure that workers have an enforceable right to bargain collectively at what ever level they prefer and they should be free to include whatever matters they choose in agreements and that they should have the right to arbitration should negotiations fail to reach agreement.**

RIGHT OF ENTRY AND OUR ILO OBLIGATIONS

126. The right of entry regime sought to be established in Part 3-4 of the Bill is (with few exceptions) a continuation of the regime established under Workchoices.

127. The restrictions on entry rights and the incapacity to bargain in respect to them breach Australia's international labour obligations.

128. Article 8 of the ILO International Covenant on Economic, Social and Cultural Rights (ICESCR) seek to ensure "the right of a trade union to function freely" and Article 11 of the Freedom of Association and Protection of the Right to Organise Convention 1948 which enshrines the rights of workers and employers to freely exercise the right to organise. The regime established by the Bill would breach each of these conventions.

129. **The right of entry regime sought to be established by the Bill is too prescriptive. We submit that at minimum unions should be free to bargain to increase the access that unions have to their members and potential members.**

Right to Inspect Non-Member Records

130. The re-establishment of the right to inspect records in respect to contraventions of the Act or a term of a fair work instrument (including the records of non-members) is sensible and a recognition of the reality that State employed enforcement agencies have a limited ability to police and enforce NES, modern award or agreement conditions.

131. The ability of unions to inspect non-union records is a private sector remedy for the under-resourcing of public sector enforcement agencies. Right of entry to workplaces where there is no member is vitally important in halting exploitative working conditions and advising workers of their workplace rights. It is also an important measure in securing workplace health and safety.

132. The union believes that, with the minimal capacity of State enforcement agencies to ensure compliance, employers will draw a benefit from the capacity of union or employee organisation having rights to inspect employer records, regardless of whether the employer is a member or not.

133. The employer(s) can be confident then that there are additional means available to discover whether unscrupulous or anti competitive underpayment practices are being employed by their business competitors.

134. **We submit that the right to enter workplaces where no member is present to inspect records must be reinstated.**

PROCESS FOR THE TAKING OF PROTECTED INDUSTRIAL ACTION

135. The process for taking protected industrial action set out in Division 2 is (with few exceptions) the prescriptive regime that was created by Work Choices.

136. Scholarly research in relation to state mandated processes for the approval of lawful industrial action establishes that each procedural step provides an opportunity for an employer to confound the desire of a union and its members to utilise the weapon of strikes.

137. The technicality of the secret ballot process established by Work Choices will continue to be used by employers to prevent workers for utilising one their most effective weapons to secure bargains.

Powers Of FWA To Terminate Protected Action

138. The power of FWA to stop industrial action also denudes the powers of unions and particular public sector unions from effectively utilising the weapon of strike or work bans.

139. The power of FWA to stop employees from engaging in industrial action that "endangers life, personal safety or welfare of the population or a part thereof " (see s424) poses particular problems for public sector unions. By virtue of this provision any form of industrial action we engage in must, of its nature, deprive a section of the population of a public service. In those circumstances, the ability of any of our members to take protected industrial action can be removed at will by our employers.

140. Further, section 419 perpetuates the Work Choices power for the Commission (now to be FWA) to order non-Federal system employees to cease industrial action if it would cause 'substantial loss or damage' to the business of a constitutional corporation.

141. This means that industrial action by State public sector employees could, in many instances, be subject to an order by FWA on application by a business that is not a party to the dispute and of which the union and its members have no knowledge.

142. Because FWA will have to make orders or at least interim orders to stop the industrial action within two days of the application being made, the union will effectively have no fair opportunity to properly test the evidence of the applicant as to its 'substantial loss or damage'.

143. **The capacity of the FWA to stop employees from engaging in industrial action who are outside the Federal system (see s419) is illogical and substantially deprives employees and their unions who operate in the State systems from the benefits of the State systems. The SPSF Group submits this provision should be removed.**

Ministerial Declarations to Terminate Industrial Action

144. The provisions in Division 7 which enable the Minister to make a declaration terminating industrial action are an egregious breach of our international obligations and to widely accepted concepts of the rights of trade unions in developed Western democracies.

145. Further, the ability to make declarations has been a dead letter in that it was never used by the various Ministers of the Howard Government.

146. **We submit that Division 7 should be removed from the Bill.**

Voting Requirements for Protected Action Ballots

147. Pursuant to s459 a protected action ballot is successful if at least 50% of "employees on the roll of voters" vote to approve the industrial action. This effectively means that a majority of people who are *eligible* to vote must vote to approve industrial action.

148. A lesser standard applies for voting to approve an enterprise agreement which only requires "a majority of persons who cast a valid vote" in order for the enterprise agreement to be approved (see s182).

149. It is illogical that that the level of approval required for approving the terms and conditions of employment (which govern every aspect of their working lives) is lower than that required when approving industrial action. It is submitted that a vote on an enterprise agreement is more significant to the working lives of employees than a decision to take industrial action.

150. **We submit that the voting approval requirements for approving enterprise agreements and for taking protected industrial action should be the same. That is "a majority of persons who cast a valid vote" rather than "a majority of persons on the roll of voters."**

Strike Pay

151. The Bill has retained the Work Choices requirement that the minimum deduction for pay for unprotected industrial action is four hours (see s474). The experience under Work Choices is that this has acted as a disincentive for workers to return to work quickly after short periods of unprotected industrial action like a stop work meeting.

152. There have been many occasions where unions have given a report at a stop work meeting that has gone no longer than half an hour which requires the employer (against their will) to deduct four hours pay where the employees were ready willing and able to return to work after the meeting.

153. **We submit that this section should allow for periods of shorter industrial action to be docked only for the duration of the action, with disputes to be resolved by FWA.**

PAY EQUITY

154. The Australian tribunal industrial relations system has, in the past, provided the most effective means to resolve the pay equity problem. The adoption of equal pay principles in 1969 and 1972 resulted in a marked closing of the gender wage gap. International studies indicated that the centralised wage fixing system had delivered greater wage equality and less wage dispersion than countries with more decentralised industrial systems. (Whitehouse, Hammond and Harbridge).

155. A significant determinate in addressing pay equity has been the ability of the State and Federal tribunals to make decision that effect whole classes of women at an occupational and industry level.

156. In 1993 the Commonwealth Industrial Relations Act was amended to include equal remuneration provisions based on International Labour Organisation Convention 100, *Convention Concerning Remuneration for Men and Women Workers for Work of Equal Value.*

157. There have been few Cases taken under the provisions in the Federal Act owing to uncertainty as to the meaning and scope of the provisions and, when tested, failure in producing a satisfactory outcome. Put simply, cases have failed in the federal jurisdiction because of the need to prove direct discrimination.

158. In the only application in the Federal Commission to proceed to arbitration, the HPM Case, the applicants were required to establish a discriminatory cause for any male/female earnings disparity. There was a reluctance by the AIRC to intervene in the regulation of over award payments and the decision in many ways narrowed the grounds in which equal remuneration claims could be heard.

159. This highlights the importance of the advances in the Principles set in NSW and Queensland. The NSW and Queensland Principles are less restrictive (see Principles attached).

160. The current provisions have proved to be inadequate in redressing the undervaluation of work. In reviewing the Equal Remuneration Provisions of the Federal Act, those drafting the Fair Work Australia framework need to examine Principles set in State Tribunals such as New South Wales and Queensland (see attachment).

161. In those jurisdictions, the need to prove discrimination and establish comparable work value, as currently bedevils the Federal Act, are not required. The State Tribunals and Principles have proven to be much more successful in correcting gender wage inequality.

162. **We therefore welcome changes to the Equal Remuneration provisions that remove the requirement to prove discrimination.**

Award Modernisation and Pay Equity

163. Historically the award system has played an integral role in setting wages and conditions for women workers. Women are more likely to be award reliant and have in the past benefited from the 'flow-on' effect of decisions that have affected occupational and industry level awards.

164. Centralised wage fixing arrangements provided a better outcome for women than relying on their capacity to bargain outcomes.

165. Despite criticism of the 'inflexible' nature of awards, award setting and awards have been reflective of changes in industry and the economy. As part of maintaining the evolutionary nature of awards, the Rudd Government passed legislation to allow for 'Award Modernisation'. Awards are to reflect the nature of a modern workforce.

166. As part of the Award Modernisation Process the Australian Industrial Relations Commission (the Members of which certainly have the expertise to do so) could investigate skill, value, pay and classification structures which may reflect past concepts of the value of women's work. Award Modernisation provides a unique opportunity for tackling long held gender biased notions of skill and value of work.

167. In order to satisfy the legislative requirements of the award modernisation process, award rates of pay and classification structures must be subject to Equal Remuneration work value assessments as set out in the Objects of the Act and in accordance with section 576B (2).

168. Section 576B (2) requires the Commission, in carrying out the award modernisation process, to consider a number of factors, one of which is "the need to help prevent and eliminate discrimination on the grounds of", inter alia, "sex…marital status, family responsibilities, pregnancy…**and to promote the principle of equal remuneration for work of equal value**" (emphasis added).

169. **We submit that in order to satisfy these requirements the Commission, in conducting the award modernisation process, therefore has jurisdiction to review awards to satisfy the Object of equal remuneration for work of equal value, in accordance with Section 576B(2).**

170. **We further submit that a contemporary assessment of work value and classification structures and rates of pay must be undertaken as part of the award modernisation process in order to satisfy other legislative requirements in s576B of addressing the needs of the low paid, assisting employees to balance work and family responsibilities and improving retention and participation in the workforce.**

Pay Equity and Collective Bargaining

171. Women's workforce experience has shown that the ability to bargain collectively rather than individually has been important in achieving fair and decent working standards and closing the gender pay gap.

172. All research indicates that women in unions do better than unorganised women when they have the right to collectively bargain agreements.

173. Professor David Peetz's analyses of Australian Workplace Agreements under Work Choices indicated a widening of the gender pay gap. Under registered collective agreements women received 90 per cent of the hourly rate of men on such agreements. Women on AWAs received only 80 per cent of the hourly pay of men on AWAs.

174. He also found that the outcome for part-time workers was worse and that the gender pay gap widened significantly for women working part-time. They received 24 percent less per hour than men working part-time hours.

175. Australian Bureau of Statistics data showed that women on AWAs have hourly earnings 11 per cent less than women on collective agreements. Full time women workers in the organised sector are the best paid and part-time workers in the non-organised sector are the worst paid. Women in trade unions do better than women who are not union members (Peetz 2005).

176. The findings of the *Report of the Taskforce on Pay and Employment Equity in the Public Service and the Public Health and Public Education Sectors* highlights the relationship between the ability to collectively bargain and pay equity outcomes.

177. This Inquiry found that women in the public sector do better when they are members of a union and that collective organisation is more likely to produce pay equity than individual pay setting.

178. Importantly, one of the main recommendations of the Inquiry was to promote and strengthen collective bargaining. The Inquiry found that decentralised pay fixing in the public service appears to have disadvantaged women and can result in salary rates for the same occupations and the same job sizes varying between departments. The Inquiry recommended the promotion of multi-employer agreements.

179. A significant factor in determining bargaining outcomes is the level at which the bargaining takes place. Women fare less well in decentralised bargaining systems and do better in higher level bargaining.

180. Research by the OECD also suggests that coordinated bargaining is more likely to result in a compressed wage structure and lower gender pay gaps (OECD 2004 and Hammond and Harbridge 1996).

181. **It is therefore important that the schema for bargaining should allow for industry, occupational and workplace agreements. The agreements must be enforceable and the Commission must have the power to enable the review of agreements to ensure that they provide for equal remuneration.**

182. The current Federal Act has been unable to produce successful outcomes in solving the problem of undervaluation of women's work. To be effective the Fair Work Bill should allow applications to be made at industry, workplace and occupational levels.

183. We applaud that Fair Work Australia has the capacity for unions to bring cases to adjust rates of pay based on undervaluation of work.

184. **We submit that in order to deal with systemic discrimination in pay, Fair Work Australia should have broad arbitral powers to make, conciliate and arbitrate awards and agreements in matters of equal remuneration on an industry, occupational and workplace level.**

185. **Equal Remuneration Principles adopted in New South Wales and Queensland provide a good model and ought to be considered. We submit that that rather than amending the wording of the provision to 'equal or comparable value' it**

should be amended to 'equal remuneration for work of equal value'. We submit that the concept of finding undervaluation of work would provide a more effective way of correcting for wage discrimination.

186. **We submit that financial support similar to that provided in Queensland should be made available to assist unions, organisations and employer groups in making equal remuneration claims.**

187. The Minimum Wage is important to gender equity, as many women are low paid and reliant on minimum wages. The Minimum Wage should be set at a fair and decent level and not be subject to the personal tax and welfare circumstances of the wage earner.

188. When setting minimum award wages, the Commission should be mindful that any reduction of rates based on tax and welfare arrangements will have a detrimental impact on superannuation accumulation.

189. **We applaud the return of award wage fixing to the jurisdiction of the Australian Industrial Relations Commission and the proposed Fair Work Australia.**

190. **We submit that the Equal Remuneration Test Case provisions should be reinstated into State industrial jurisdictions as was the case prior to the Work Choices amendments.**

191. **We submit that a specialised Division and Commissioner for Equal Remuneration should be appointed within Fair Work Australia to have research, investigatory and award making ability. A specialist Commissioner can provide guidance and assist in conciliating awards and agreements.**

192. **We further submit that annual wage rate reviews and award reviews must satisfy the equal remuneration provisions of the legislation governing award modernisation.**

193. The issue of continued gender wage inequality undermines fundamental values in our society which holds that discrimination is intolerable and unlawful. Failure to take measures to redress gender wage inequality ignores discrimination which not only results in Australia's economic loss but comes at a personal economic and social cost to women and their equal sharing of the benefits of our society.

194. All evidence suggests that the major gains in closing the gap and addressing the problem of women's low pay occurred as a result of industrial decisions from industrial tribunals with powers to conciliate and arbitrate awards and agreements.

195. Those Decisions that applied at an industry and occupational level have provided wage justice to whole classes of women workers and have been more effective than individualist based legal mechanisms. In order to deal with systemic discrimination the Industrial Commissions must have broad arbitral powers to conciliate, make and arbitrate awards and agreements on matters of equal remuneration.

CONCLUSION

196. The Work Choices regime delivered an egregious assault on the Australian industrial relations consensus. It severely undermined the role of the independent arbitrator and removed many worker rights and entitlements. It restricted workers' ability to join and form unions, to bargain collectively and the right to take legitimate industrial action was severely restricted in law and practice.

197. The Work Choices regime was disproportionately slanted in favour of employers. Work Choices was resoundingly rejected as it offended the notion of a fair system of work.

198. While the Fair Work Bill does reinstate some worker rights and entitlements, more needs to be done.

199. In particular, we strongly emphasise the need to reinstate comprehensive powers for the independent umpire, which will be Fair Work Australia, to conciliate and if necessary arbitrate and make binding orders to settle industrial disputes however they arise.

200. We also strongly emphasise the need for bargaining to be collective, conducted for employees by their representative, democratically structured organisations (that is, their unions) and free of arbitrary and technical constraints and prohibitions as to content. A necessary corollary to this is the right to resort to binding arbitration if negotiations for an agreement break down.

201. We commend the recommendations in this Submission, which we submit will provide a more balanced and fairer industrial relations system.

David Carey
Joint National Secretary, CPSU
Federal Secretary, SPSF Group
9 January 2009

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Attachment

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – *s. 288 – application for statement of policy*

The Queensland Council of Unions and Others AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others (No. B450 of 2002)

EQUAL REMUNERATION PRINCIPLE

VICE PRESIDENT LINNANE
COMMISSIONER SWAN
COMMISSIONER BROWN 29 April 2002

STATEMENT OF POLICY

This matter coming on for hearing before the Full Bench of the Commission on 22 March, 16 April and 24 April 2002, the Commission declares by consent as follows:–

EQUAL REMUNERATION PRINCIPLE

1. This principle applies when the Commission:

   (a) makes, amends or reviews awards;

   (b) makes orders under Chapter 2 Part 5 of the *Industrial Relations Act 1999*;

   (c) arbitrates industrial disputes about equal remuneration; or

   (d) values or assesses the work of employees in "female" industries, occupations or callings.

2. In assessing the value of work, the Commission is required to examine the nature of work, skill and responsibility required and the conditions under which work is performed as well as other relevant work features. The expression "conditions under which work is performed" has the same meaning as in Principle 7 "Work Value Changes" in the Statement of Policy regarding Making and Amending Awards.

3. The assessment is to be transparent, objective, non-discriminatory and free of assumptions based on gender.

4. The purpose of the assessment is to ascertain the current value of work. Changes in work value do not have to be demonstrated.

5. Prior work value assessments or the application of previous wage principles cannot be assumed to have been free of assumptions based on gender.

6. In assessing the value of the work, the Commission is to have regard to the history of the award including whether there have been any assessments of the work in the past and whether remuneration has been affected by the gender of the workers. Relevant matters to consider may include:

   (a) whether there has been some characterisation or labelling of the work as "female";

   (b) whether there has been some underrating or undervaluation of the skills of female employees*;*

   (c) whether remuneration in an industry or occupation has been undervalued as a result of occupational segregation or segmentation;

   (d) whether there are features of the industry or occupation that may have influenced the value of the work such as the degree of occupational segregation, the disproportionate representation of women in part-time or casual work, low rates of unionisation, limited representation by unions in workplaces covered by formal or informal work agreements, the incidence of consent awards or agreements and other considerations of that type; or

   (e) Whether sufficient and adequate weight has been placed on the typical work performed and the skills and responsibilities exercised by women as well as the conditions under which the work is performed and other relevant work features.

7. Gender discrimination is not required to be shown to establish undervaluation of work.

8. Comparisons within and between occupations and industries are not required in order to establish undervaluation of work on a gender basis.

9. Such comparisons may be used for guidance in ascertaining appropriate remuneration. The proper basis for comparison is not restricted to similar work.

10. Where the principle has been satisfied, an assessment will be made as to how equal remuneration is to be achieved. Outcomes may include but are not limited to the reclassification of work, the establishment of new career paths, changes to incremental scales, wage increases, the establishment of new allowances and the reassessment of definitions and descriptions of work to properly reflect the value of the work.

11. There will be no wage leapfrogging as a result of any changes in wage relativities arising from any adjustments under this principle.

12. The Commission will guard against contrived classifications and over classification of jobs.

13. The Commission may determine in each case whether any increases in wages will be absorbed into overaward payments.

14. Equal remuneration will not be achieved by reducing current wage rates or other conditions of employment.

15. The Commission may decide to phase in any decision arising from this principle. Any affected employer may apply to have any decision phased in. The merit of such application will be determined in the light of the particular circumstances of each case and any material relating thereto will be rigorously tested.

16. Claims brought under this principle will be considered on a case by case basis.

17. This Statement of Policy will operate from 1 May 2002.

Dated 29 April 2002.

D.M. LINNANE, Vice President.

D.A. SWAN, Commissioner.

D.K. BROWN, Commissioner.

Appearances:–

Ms S. Herbert for the Queensland Council of Unions.
Ms Y. D'Ath for The Australian Workers' Union of Employees, Queensland.
Ms V. Semple for the Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees.
Ms F. Bucknall for the Department of Industrial Relations.
Mr M. Smith and Mr P. Ryan for the Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers.
Ms S. Davis and J. McDonald for the Australian Industry Group, Industrial Organisation of Employers (Queensland).
Ms L. Vanderstoep for the Retailers' Association of Queensland Limited, Union of Employers.
Mr K. Law for The Restaurant and Caterers Employers Association of Queensland Industrial Organisation of Employers.
Mr R. Beer for the Local Government Association of Queensland (Incorporated).
Mr C. Lentini for the Queensland Hotels Association, Union of Employers.
Ms V. Lincoln for the Queensland Country Press Association – Union of Employers.
Mr G. Muir and Mr M. Patti of Employer Services Pty Ltd for the Private Hospitals Association of Queensland Incorporated, the Royal Queensland Bowls Association, the Australian Dental Association (Queensland Branch) Union of Employers, the Child Care Industry Association of Queensland Incorporated and the Queensland Master Hairdressers' Industrial Union of Employers.

Released: 30 April 2002