australian council of trade unions

SECURE JOBS BETTER FUTURE

The conditions of employment of state public sector employees and the adequacy of protection of their rights at work as compared with other employees

ACTU Response to the Senate Education, Employment and Workplace Relations Committee

1 March 2013

D No. 13/2013

Introduction

1. The ACTU welcomes the opportunity to make a submission to the Senate Education, Employment and Workplace Relations References Committee Inquiry into the conditions of employment of state public sector employees and the adequacy of protection of their rights at work as compared with other employees.

2. The ACTU is the peak body representing 47 unions and almost two million working Australians and their families. We count among our affiliates a number of trade unions which represent employees in the state public services.

3. As the sole peak association for trade unions in Australia, the ACTU also plays an important role in monitoring the extent to which Australia governments (federal, state and territory) comply with international labour standards. This includes through the provision of comments on an annual basis to the Australian Government and to the ILO Committee of Experts on the Application of Conventions and Recommendations ('the ILO Committee of Experts') with respect to Australia's compliance with ratified ILO conventions.[1]

4. In this submission, the ACTU focuses predominately on the reforms implemented by conservative state governments in New South Wales and Queensland, although we also identify ongoing difficulties with bargaining encountered by state public sector workers who fall within the scope of the federal industrial relations jurisdiction. We do not provide an overview of state public sector employment in the respective jurisdictions or detail the extent or nature of damage inflicted on state public sector workers by conservative state governments. For such accounts, we refer the Committee to the submissions to this Inquiry by a number of our affiliates with members who have been directly affected by the measures.

[1] Under article 22 of the ILO Constitution, each Member State is required to report annually to the Committee of Experts on measures it has taken to give effect in law and practice to ratified ILO Conventions. The specific conventions upon which a country is required to report are determined according to a regular reporting schedule. As a social partner, the ACTU is invited to provide comments on the Government's report (which includes comments provided by state and territory governments) directly to the Australian Government and to the Committee of Experts.

5. The ACTU views the measures implemented by the O'Farrell Government in NSW and the Newman Government in Queensland as constituting serious and sustained attacks on the rights of public sector workers. As detailed in this submission, they also constitute attacks on rights set forth in various ILO conventions that have been ratified by Australia, including standards on freedom of association and collective bargaining, and termination of employment. Through their nature and their manner of implementation, the changes also violate the principles of social dialogue and collective bargaining, principles upon which the ILO itself and its conventions are based.[2]

6. This submission canvases a number of possible avenues open to the Commonwealth to improve the working conditions of state public sector workers in comparison with national system employees. In particular, the ACTU recommends:

- That the Federal Government work cooperatively with the states through the Council of Australian Governments (COAG) in order to get agreement among all states on a minimum standard of entitlements for all workers in all industrial relations jurisdictions across Australia, particularly around consultation, dispute resolution, general protections, major organisational change and entitlements;
- That the Commonwealth consider using its external affairs powers to override any state government provisions that contravene our international obligations under ILO conventions;
- That the Australian Government consider ratifying the ILO *Labour Relations (Public Service) Convention 1978 (No. 151);*
- That the government use its conciliation and arbitration powers to establish an award and agreement-making stream and extend national system coverage to all persons whose award or agreement is made using the conciliation and arbitration powers; and
- That the Commonwealth explore options to deal with the growing problem of indirect employment relationships, particularly through labour hire arrangements, and consider amending the *Fair Work Act 2009* to provide for the existence of a joint employment relationship where two or more parties exercise functional control over a work arrangement.

[2] The lack of any community consultation with respect to the changes has been noted explicitly by the Queensland Government in its Explanatory Notes to the *Industrial Relations (Fair Work Act Harmonisation) And Other Legislation Amendment Bill 2012* and the *Public Service and other Legislation Amendment Bill 2012.*

Whether the current state government industrial relations legislation provides state public sector workers with less protection and entitlements than workers to whom the Fair Work Act 2009 applies

7. A review of the current state government industrial relations legislation reveals that state public sector workers are provided with less protection and fewer entitlements than workers to whom the *Fair Work Act 2009* ('FW Act') applies.

8. The FW Act provides the legislative framework for the national industrial relations system. This system covers all national system employers and national system employees, defined at s14 as comprising: all constitutional corporations and their employees; the Commonwealth and its employees; and all employers and employees of both constitutional corporations and non-constitutional corporations operating within an Australian Territory (namely, the Northern Territory or the Australian Capital Territory).

9. With the exception of Western Australia, all states have referred their industrial relations powers, in whole or in part, to the Commonwealth, commencing with Victoria in 1996. In 2006, as part of the *Work Choices* amendments, the Howard Government relied on the corporations power within the Australian Constitution to bring all constitutional corporations into the federal industrial relations jurisdiction. This brought a majority of private sector employees into the federal system for the first time. This change did not affect public sector workers or employees of non-constitutional corporations (sole traders or partnerships). The industrial relations system was further nationalised in the lead up to the introduction of the FW Act, with all states except for Western Australia referring their industrial powers to the Commonwealth in 2009.

10. The ACTU has generally been supportive of this transition to a federal workplace relations system, provided that no worker is disadvantaged as a result of the process.

11. In all states (but not the territories, and also excepting Victoria), federal public servants are covered under the national workplace relations system whilst state public servants are covered under their respective state jurisdictions. In Victoria, the ACT and the Northern Territory, state public sector workers are national system employees and therefore their employment is covered by the FW Act, with a few exceptional provisions in Victoria.

12. This dual system has led to situations whereby state public servants are provided with fewer workplace protections than their counterparts employed within the Australian Public Service. Moreover, state public servants in Victoria, the ACT and NT fall within the scope of the FW Act and therefore have access to favourable working conditions and entitlements in comparison with public sector workers in other states.

13. The decision to refer industrial relations power is one solely made by state government with no scope for unions to initiate jurisdictional change from the state system to the FW Act. This forces unions to deal with state governments for matters concerning state public sector workers, even where the national workplace relations system would yield a more positive outcome for workers. This power to determine the jurisdiction of the public sector lies solely with the states, representing a potential conflict of interest on the basis of the state's dual role as employer and legislator. In other words, state governments have the power to legislate the industrial relations system in such a way that benefits their interests as an employer to the detriment of their employees. Conservative state governments in Queensland, Victoria, New South Wales and Western Australia have all taken advantage of this power by enacting legislation to strip away minimum wages and conditions from the state public sector.

14. After the election of conservative governments in Queensland, Victoria, New South Wales and Western Australia, a number of legislative changes were introduced that placed restrictions on public sector employees in those states. These changes were designed to directly benefit state governments in their role as employer by deliberately restricting the protections and entitlements of their own employees within the public service.

15. The limitations imposed by the O'Farrell Government in New South Wales on the rights of state public sector workers to bargain collectively and to have bargaining-related disputes fairly arbitrated are not paralleled in the FW Act. These reforms are discussed further below in the context of the extent to which these reforms breach Australia's obligations under the ILO's *Freedom of Association and Protection of the Right to Organise Convention,* 1948 (No.87)('Convention No. 87') and the ILO's *Right to Organise and Collective Bargaining Convention, 1949 (No. 98)('*Convention No. 98').

16. Changes introduced by the Newman Government in Queensland have left state public sector workers with fewer rights and protections than workers to whom the FW Act applies. These changes, implemented through the *Industrial Relations (Fair Work Act Harmonisation) and Other Legislation Amendment Act 2012* and the *Public Services and Other Legislation Amendment Act 2012,* include the removal of important protections for state public sector workers with respect to termination, change and redundancy, and the introduction of new limitations on the right to take industrial action. These reforms are addressed further below in our response to (B) and (C) of the terms of reference**.**

17. In Victoria, exclusions from the referral of the state's legislative powers to the Commonwealth in the *Fair Work (Commonwealth Powers) Act 2009 (Vic)* ('the Referral Act') have the effect of leaving Victorian public sector workers with fewer rights and entitlements than are available to other workers under the FW Act. This includes rights to have bargaining-related disputes arbitrated and redundancy standards. This is discussed further below.

18. In Western Australia, state government industrial relations legislation provides workers with fewer protections and entitlements in comparison to those afforded to workers under the FW Act. Deficiencies include the absence of financial compensation in lieu of reinstatement in unfair dismissal matters for Government Officers; limitations on the jurisdiction of the Public Service Arbitrator and Public Sector Appeal board in relation to industrial disputes concerning matters that are the subject of a public sector standard breach procedure; and the absence of a General Protections regime equivalent to that provided for in Part 3-1 of the FW Act. On these issues, we refer to, and adopt, the submission of our affiliate the CPSU/SPSF (pages 76-78).

Whether the removal of components of the long-held principles relating to termination, change and redundancy from state legislation is a breach of obligations under the International Labour Organization (ILO) conventions ratified by Australia

19. The changes implemented to termination, change and redundancy (TCR) standards found in Queensland public sector awards and agreements through the *Public Service and Other Legislation Amendment Act 2012* breach the ILO's *Termination of Employment Convention, 1982 (No. 158)*('Convention No. 158), ratified by Australia in 1993.

20. The *Public Service and Other Legislation Amendment Act 2012* inserted a new 691D into the *Industrial Relations Act 1999* which substitutes new principles that are to apply 'if a relevant industrial instrument includes a TCR provision about notifying an entity of a decision or consulting with an entity about a decision.' Subsection 2 sets out three principles that will apply in these circumstances:

- the employer is not required to notify employees (and where relevant a union/s) of a decision until the time the employer considers appropriate;

- the employer is not required to consult about the decision until after the employer has notified the employees (and where relevant a union/s);

- consultation is required in relation to the implementation of the decision, but not in relation to the making of the decision.

21. Subsection 3 clarifies that a TCR provision in an award does not apply if it is inconsistent with the three principles. Subsection 4 provides the definition of TCR and examples of TCR provisions contained in awards.

22. The amendments significantly weaken TCR standards that were adopted in Queensland by the Queensland Industrial Conciliation and Arbitration Commission in 1987,[3] and that closely resembled the requirements introduced in the federal jurisdiction through the *Termination, Change and Redundancy Case.*[4] In particular, they undermine the very purpose of TCR

[3] *Application by Trades and Labor Council (Qld) re General Ruling on Job Protection* (1987) 125 QGIG 1119; (1987) ALR 27.
[4] (1984) 8 IR 34; *Termination, Change and Redundancy Case – Supplementary Decision* (1984) 9 IR 115.

provisions: that is, for the employer and employees and their representatives to examine alternatives to termination of employment and to give employees maximum time to adjust to the impending redundancy.

23. The ILO's *Termination of Employment Convention, 1982 (No. 158)* sets out basic principles on termination of an employment relationship at the initiative of the employer, as agreed upon within the tripartite setting of the ILO's International Labour Conference. It is supplemented by the *Termination of Employment Recommendation, 19*82 (No. 155) which, while not binding on states, provides authoritative guidance to states on implementation of the Convention in practice.

24. The standards in the Convention apply to public sector workers. Article 1 of the Convention emphasises that the Convention applies 'to all branches of economic activity and to all employed persons.' While the flexibility provisions in the Convention provide some scope for states to exclude certain categories of employed persons from some or all of the provisions of the Convention, the Australian Government has not sought to rely on these provisions.[5]

25. Articles 13 and 14 of the Convention provide standards on collective dismissals. Article 13 of the Convention deals with consultation of workers' representatives, and requires the employer to :

(i) Provide the workers' representative concerned in good time with relevant information including the reasons for the terminations completed, the number and category of workers likely to be affected and the period over which the terminations are intended to be carried out; and

(ii) Give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse

[5] Any state which seeks to rely on the flexibility provisions must only do so after consultation with worker and employer groups and must notify the ILO of any such exclusions in its first report to the ILO (art 2, para 6). The Australian Government did not identify any such exclusions in its first report to the ILO lodged in September 1995. In addition, article 18 of the Recommendation further explains that exclusions may only extend to 'public servants engaged in the administration of the state to the extent only that constitutional provisions preclude the application to them of one or more provisions of this Recommendation.'

effects of any terminations on the workers concerned such as finding alternative employment.

26. The measures introduced by the Queensland Government breach the letter and spirit of Convention No. 158 in a number of ways.

27. First, it is a basic premise of Convention 158 that consultation with respect to redundancies is to be meaningful. As the ILO Committee of Experts has emphasised:

> '*The opportunity for workers' representatives to be consulted… reflects a situation which differs from mere information or co-determination; it should be able to have some influence on the decision taken. In particular, consultation provides an opportunity for an exchange of views and the establishment of a dialogue which can only be beneficial for both the workers and the employer, by protecting employment as far as possible and hence ensuring harmonious labour relations and a social climate which is propitious to the continuation of the employer's activities. Indeed, transparency is a major element in moderating or reducing the social tensions inherent in any termination of employment for economic reasons.* '[6]

28. The measures introduced also breach a second principle of Convention 158 which is that consultation should take place as early in the process as possible. The ILO Committee of Experts has noted:

> *'For consultation to have a chance of making a positive contribution, the Convention stipulates that it must take place "as early as possible", which would allow the possible measures to be contemplated without haste and with circumspection. For the workers' representatives to be able to participate in consultations with the necessary information to allow them to put forward their ideas on the measures which might be taken, the employer must provide information "in good time", which must be "relevant" and include the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out. This information allows the workers' representatives to engage in the consultation with the necessary information to enable them to evaluate the situation. In the*

[6] ILO, *General Survey on the Protection against Unjustified Dismissal,* Report of the Committee of Experts on the Application of Conventions and Recommendations, 1995, [283].

absence of relevant information on the proposed terminations of employment, the workers' representatives would not be able to participate effectively and genuinely in such consultations and the objective of the Convention would not be achieved.'[7]

29. Finally, provision of guidance within Recommendation No. 166 as to measures which could be adopted as a means of 'averting' as well as 'minimising' and 'mitigating' terminations of employment, as well as providing guidance on examples of measures which could be adopted to avert or minimize dismissals for economic, technological or structural reasons (such as restriction of hiring, spreading the workforce reduction over a certain period of time to permit natural reduction of the workforce, internal transfers, training and retraining etc.)[8] confirms that the Convention envisages meaningful consultation with respect to the decision itself as well as with respect to its manner of implementation.

30. The removal by the Newman Government of any requirement on a public sector employer to notify the union of a decision until such time 'the employer considers appropriate', to consult prior to any such notification, and of any requirement to consult about anything other than the implementation to the decision, takes Queensland legislation a significant distance away from compliance with Convention No. 158.

[7] Ibid, para 285.
[8] Para 21.

Whether the rendering unenforceable of elements of existing collective agreements relating to employment security is a breach of the obligations under the ILO conventions ratified by Australia relating to collective bargaining.

32. Australia has ratified the ILO's two fundamental conventions related to the rights of workers to organise and collectively bargain: the *Freedom of Association and Protection of the Right to Organise Convention,* 1948 (No.87)('Convention No. 87') and the ILO's *Right to Organise and Collective Bargaining Convention, 1949 (No. 98)('*Convention No. 98')[9].

33. Convention No. 87 recognises the fundamental right to organise for both private sector and public sector workers, including those in the public service.[10] The Convention also states that workers' and employers' organizations have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes, and public authorities must refrain from any interference which would restrict this right. Convention No. 98 provides for the protection of workers against acts of discrimination, protection of workers' and employers' organizations against acts of interference, and for the promotion of the development and utilization of machinery for voluntary negotiation of collective agreements.

34. The ILO supervisory bodies (the ILO's Committee of Experts and the ILO's Committee on Freedom of Association) have emphasised that the bargaining rights laid down in Convention No. 98 extend to persons employed by the government, by public undertakings or by autonomous public institutions.

35. The effect of the *Industrial Instruments: Employment Security and Contracting Out Provisions Directive No. 08/12,* issued by the Queensland Public Service Commissioner in July 2012, was to render unenforceable all employment security provisions (including clauses maximizing permanent employment) and restrictions on the use of contractors to replace salaried

[9] Australia has not yet ratified the two supplementary conventions which supplement Conventions No. 87 and No. 98 through specifically dealing with collective bargaining in the public service: the *Labour Relations (Public Service) Convention, 1978* (No. 151), *the Collective Bargaining Convention, 1981* (No. 154). These conventions are underpinned by the *Labour Relations (Public Service) Recommendation, 1978* (No. 159), and the *Collective Bargaining Recommendation, 1981* (No. 163).

[10] The only exception to this provided for in Convention No. 87 relates to the armed forces and the police, for whom national laws or regulations shall determine the extent to which the guarantees provided for in the Convention shall apply (Article 9 of Convention No. 87).

employees in public sector awards and agreements. [11] Such provisions, which exist in a number of state awards and agreements, had been the subject of bargaining between unions and Government and formed part of existing conditions of employment for public sector employees.

36. The substance of this Directive was subsequently enshrined in the *Industrial Relations Act 1999* (Qld) through the *Public Service and Other Legislation Amendment Act 2012.* This Act further extended restrictions on the content of industrial instruments to cover termination, change and redundancy (TCR) provisions in industrial instruments.

37. New section 691C of the *Industrial Relations Act 1999* provides that particular provisions of industrial instruments are of no effect, including (a) a contracting provision; (b) an employment security provision; and (c) an organisational change provision. A relevant industrial instrument is defined to include an award, certified agreement, industrial agreement, determination or ruling (such as an Order) made by the Queensland Industrial Relations Commission.[12] The provisions apply to industrial instruments made or certified before or after the commencement of the sections of the Act.

38. These amendments violate ILO principles on collective bargaining in three main ways. First, they constitute unilateral measures taken by the authorities to restrict the scope of negotiable issues. The ILO's Committee on Freedom of Association ('CFA') – the tripartite body responsible for examining complaints submitted to the ILO concerning violations of freedom of association - has repeatedly emphasised that measures taken by the state to restrict or exclude issues or standards from collective bargaining are incompatible with Convention No. 98.[13]

39. Second, they constitute interference in collective agreements already in force. The CFA has clearly stated that:

[11] Defined in Schedule 4 of the *Public Sector Act 2008* to include (a) an award or industrial agreement; and (b) a determination or rule of a commission, court, board, tribunal or other entity having authority under a law of the Commonwealth or this State to exercise powers of conciliation or arbitration for industrial matters or industrial disputes.
[12] *Industrial Relations Act 1999,* Schedule 5.
[13] CFA Digest [912], [919]. The CFA has made this observation in the context of Australian legislation explicitly: see CFA, *Case No. 2698 (Australia),* Report No. 357, June 2010, [227].

'State bodies should refrain from intervening to alter the content of freely concluded collective agreements'[14]

and

'*The public authorities should promote free collective bargaining and not prevent the application of freely concluded collective agreements, particularly when these authorities are acting as employers or have assumed responsibility for the application of agreements by countersigning them.'*[15]

40. Interference in the content of existing agreements is also a violation of the principle of bargaining in good faith, which is considered by the ILO supervisory bodies to be a feature of Convention 98. Specifically, the notion that parties mutually respect the commitments undertaken in agreements and that agreements should be binding on the parties. The CFA's observation on the importance of adherence to existing agreements is particularly relevance to the subject of this inquiry:

> *'Collective bargaining implies both a give-and-take process and a reasonable certainty that negotiated commitments will be honored, at the very least for the duration of the agreement, such agreement being the result of compromises made by both parties on certain issues, and of certain bargaining demands dropped in order to secure other rights which were given more priority by trade unions and their members. If these rights, for which concessions on other points have been made, can be cancelled unilaterally, there could be neither reasonable expectation of industrial relations stability, nor sufficient reliance on negotiated agreements.'*[16]

41. The ACTU notes that this is precisely the case for public sector workers in Queensland: while stripping workers of these protections, the government has effectively retained the benefit of concessions the state's public service workers made to secure the protections their agreements had provided on job security and contracting out.

42. Finally, the ACTU notes that the Queensland amendments run directly counter to the obligation on states under article 4 of Convention No. 98 to *promote* collective bargaining, including in the public sector. The CFA has emphasised, 'the authorities should, to the

[14] CFA Digest [1001]. See also [918].
[15] CFA Digest [1011].
[16] CFA Digest [941].

greatest possible extent, promote the collective bargaining process as a mechanism for determining the conditions of employment of public servants.'[17]

[17] CFA Digest, [1042].

Whether the current state government industrial relations frameworks provides sufficient protection to workers as required under the ILO conventions ratified by Australia.

44. It is beyond the scope of this submission to examine the extent to which state government industrial relations frameworks fall within the scope of, and comply with, all 58 of the ILO Conventions which have been ratified by Australia. In the following comments, we identify a number of conventions where compliance by state governments is particularly problematic. These include three of the eight conventions considered by the ILO to cover subjects that are considered as fundamental rights at work.[18]

45. Before proceeding, it should be noted that the ILO has developed a sophisticated jurisprudence on the extent to which public sector workers enjoy the same rights of freedom of association and bargaining as other workers under fundamental ILO Conventions. In doing so, the supervisory bodies have sought to recognise, and apply fundamental ILO standards in a manner that appropriately addresses, the special characteristics of the public service and tensions inherent in situations where the state is both employer and legislative authority.[19]

Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)

46. The ILO's *Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)* is the foremost international instrument on the right of workers to establish and join unions and for unions to organise freely, without interference by the state. Australia ratified Convention No. 87 in 1973.

The right to strike under international law

47. The ILO supervisory bodies have identified the right to strike as an intrinsic corollary of the right to organise as protected by Convention No. 87.[20] It is considered to be one of the

[18] See further the ILO's *Declaration on Fundamental Principles and Rights at Work (1998).*

[19] ILO, *General Survey of the Reports on the Freedom of Association and the Right to Organize Convention (No.87), 1948 and the Right to Organize and Collective Bargaining Convention (No. 98), 1949,* Report of the Committee of Experts on the Application of Conventions and Recommendations, 1994, ('*ILO General Survey 1994'*), [261].

[20] *CFA Digest*, [523]. Australia is also obliged to recognise the right to strike as it is explicitly articulated in article 8(1)(d) of the International Covenant on Economic Social and Cultural Rights (ICESCR), which Australia has ratified.

essential means through which workers and their organisations can legitimately promote and defend their economic and social interests.

48. As a general principle, the rights in Convention 87 extend to public service workers. With respect to the right to strike, the ILO has identified several categories of workers upon whom states may impose restrictions on the right to strike. These include:

(i) public service workers engaged in the administration of the state, understood as civil servants employed in government ministries and other comparable bodies, as well as officials acting as supporting elements in these activities;
(ii) police and armed forces;[21] and
(iii) workers engaged in essential services.[22]

49. There are two important aspects on ILO jurisprudence regarding the extent to which the right to strike by workers in the public sector may legitimately be restricted by states. First, the ILO has consistently emphasised that the term 'essential services' is to be interpreted 'in the strict sense of the term', that is 'services the interruption of which would endanger the life, personal safety or health of the whole or part of the population.'[23] It is also a requirement that there be a 'clear and imminent threat' to life, personal safety or health.[24]

50. Second, where restrictions or prohibitions are imposed on the rights of workers to strike in these circumstances, the ILO has emphasised that there should be appropriate 'compensatory guarantees' available to these workers. In particular, restrictions on the right to strike should be accompanied by 'adequate, impartial and speedy conciliation and arbitration proceedings in which parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented.'[25]

[21] See article 5 of Convention No. 87.
[22] *CFA Digest* [574], [576] In these cases, even where some restriction on rights is recognised, any such limitation must be counterbalanced by certain guarantees and compensations to fully compensate workers for the loss of the right to strike.
[23] *CFA Digest*, [576] and [583].
[24] CFA, *Complaint against the Government of Norway presented by the Norwegian Trade Union Federation of Oil Workers,* 1991, Report 279, Case 1576, [114], and *CFA Digest*, [581].
[25] *ILO General Survey 1994,* [164], and *CFA Digest*, [595] – [603].

Specific comments on the right to strike in state jurisdictions

NSW

51. The measures introduced by the NSW Government through the *Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011* (NSW) have implications for the extent to which NSW legislation complies with the requirements of Convention No. 87.

52. As noted above, under ILO jurisprudence, where restrictions are placed on rights of workers in essential services to take industrial action, this must be balanced by the provision of appropriate compensatory guarantees, including access to an effective and independent tribunal for the resolution of the dispute.

53. In NSW, there are longstanding limitations on the capacity of workers to take industrial action under the *Industrial Relations Act 1996* (NSW) and the *Essential Services Act 1988* (NSW). The state has long relied on compulsory conciliation and arbitration as a means of resolving disputes.

54. The *Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011* (NSW) inserted a new section 146C into the *Industrial Relations Act 1996 (NSW)* which requires the NSW Industrial Relations Commission give effect to the Government's public sector policies when making or varying awards or orders relating to the remuneration or other conditions of employment of public sector employees. Public sector employees are defined in the Act to include public servants, teachers, police, and health services employees. Under the Act, an award or order of the Commission does not have effect to the extent that it is inconsistent with government policy.[26] An 'award or order' is defined in the new s.146C(8)(b) of the Act to include a decision to approve an enterprise agreement under Part 2 of Chapter 2 of the Act.

55. The effect of s.146C is to remove the discretion held by the Commission when it is asked to consider matters the subject of which deals with an aspect of government policy that has been declared by the regulations. In these cases, the Commission *must* give effect to the government policy.[27] This includes cases in which the Commission is asked to arbitrate a dispute in which the capacity of workers to take industrial action has been limited.

[26] *Industrial Relations Act 1996,* s.146C(3).
[27] Section 146C(1).

56. We believe this requirement undermines the impartiality of the Commission in arbitration proceedings The ILO's CFA has emphasised:

> 'In mediation and arbitration proceedings it is essential that all the members of the bodies entrusted with such functions should not only be strictly impartial but, if the confidence of both sides, on which the successful outcome even of compulsory arbitration really depends, is to be gained and maintained, they should also appear to be impartial both to the employers and to the workers concerned.' [28]

57. Finally, in relation to the extent to which NSW legislation complies with Convention 87, we note that the Committee of Experts, in a Direct Request issued to the Australian Government in 2012, noted:

> 'The Committee recalls that previous comments concerned the need to amend section 226(C) of the Industrial Relations Act, 1996, which provides that the registration of an organization may be cancelled where it or its members engage in industrial action having a major and substantially adverse effect on the provision of any public service. The Committee notes that the Government indicates that no registered industrial organization has had its registration cancelled on the grounds set out in section 226(c). ***The Committee once again requests the Government to provide information on any measure taken or contemplated with a view to ensuring that any prohibition on the right to strike and related penalties are limited to essential services in the strict sense of the term and to public servants exercising authority in the name of the State.'***[Emphasis in original][29]

58. As far as the ACTU is aware, the NSW Government is yet to act upon this request.

<u>Queensland</u>

59. The *Industrial Relations (Fair Work Act Harmonisation) and Other Legislation Amendment Act 2012,* passed by the Queensland Parliament on 6 June 2012, makes a number of amendments to the *Industrial Relations Act 1999* which take Queensland law further from conformity with international standards on the right to strike.

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[28] *CFA Digest*, [598].

[29] Direct Request (CEACR) – adopted 2011, published 101st ILC session (2012), *Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – Australia.*

Ministerial power to terminate industrial action

60. Section 12 of the *Industrial Relations (Fair Work Act Harmonisation) and Other Legislation Amendment Act 2012* inserted a new Division 6A into the *Industrial Relations Act 1999* which provides the Minister (defined in s.181A as the Attorney-General) with the power to terminate protected industrial action in relation to a proposed agreement if the Minister is satisfied that the action is being engaged in, or is threatened, intending or probable; and

(i) is threatening or would threaten to cause, or has caused, significant damage to the economy, community or local community, or part of the economy; or

(ii) is threatening or would threaten to endanger, or has endangered, the personal health, safety or welfare of the community or part of it.[30]

61. According to the state government, these provisions were intended to mirror provisions in the *Fair Work Act 2009.*[31] However the provisions enacted are broader than their federal counterparts, which provide for similar powers for the Federal Minister in cases where the action threatens or would threaten, 'to endanger the life, the personal safety or health, or the welfare, of the population or a part of it'; or 'to cause significant damage to the Australian economy or an important part of it'.[32] There is no reference within the federal provisions to damage to the 'community or local community'.

62. The ACTU further notes that section 431 of the FW Act, upon which s 181A of the *Industrial Relations Act 1999 (Qld)* is purportedly based, has been found by the ILO to be in contravention of Australia's obligations under Convention 87.[33]

[30] IR Act 1999 (Qld), s.181B.
[31] Explanatory Note, page 3.
[32] FW Act, s.431.
[33] See Observation (CEACR) – adopted 2011, published 101st ILC Session (2012), *Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – Australia*. A similar provision in the *Workplace Relations Act 1996* (Cth) was also the subject of ILO criticism: see, eg, Observation (CEACR) – adopted 2008, published 98th ILC Session (2009), *Freedom of Association and Protection of the Right to Organise Convention, 1948(No. 87) – Australia.*

63. First, according to the ILO, removal of access to industrial action where such action threatens to cause significant economic damage is not in accordance with the right to strike and 'economic damage is of itself not relevant' as a basis for identifying work as an essential service.[34]

64. Second, the responsibility for making declarations with respect to industrial action should be held by an independent and impartial body which has the confidence of industrial parties.[35] This is considered especially important in cases where the government is a party to the dispute.[36] In the case of the Queensland amendment, not only is the power given to a member of the Government, but – by virtue of the fact that the *Industrial Relations Act 1999* only applies to state and local government employees – the power can *only* be exercised in circumstances where the state government is also the employer.

Requirement for QIRC to take into account state's financial position and fiscal strategy

65. The *Industrial Relations (Fair Work Act Harmonisation) and Other Legislation Amendment Act 2012* amended the objects of the *Industrial Relations Act 1999* so as to introduce a new requirement upon the Queensland Industrial Relations Commission (QIRC) to take account of the state's financial position and fiscal strategy when determining public sector wages and conditions by arbitration. The amending act also introduced a new s.339AA which enables a senior government administrative official to brief the Commission about the State's financial position, fiscal strategy and related matters. This briefing must be conducted in open hearing or made public, however there is no capacity for parties to cross-examine or test the evidence in any way.

66. This provision would appear to place the state government in a privileged position as employer and to present difficulties in terms of meeting the requirements of Convention No. 87 as interpreted by the ILO's CFA, to the effect that, where industrial action is terminated

[34] CFA *Complaint against the Government of Australia presented by the International Confederation of Free Trade Unions, the International Transport Workers' Federation, the Australian Council of Trade Unions and the Maritime Union of Australia,* 2000, Report 230, Case 1963. See further Committee of Experts, *Individual Observation – Australia, Convention 87,* 1999
[35] *CFA Digest*, [628]
[36] *CFA Digest*, [629].

and proceeds to arbitration, the body resolving the dispute must be and appear to be strictly impartial and enjoy the confidence of all parties concerned. [37]

Protected action ballots

67. The *Industrial Relations (Fair Work Act Harmonisation) and Other Legislation Amendment Act 2012* also introduced a protected action ballot regime, under which an employee organisation or employee who is a negotiating party may apply to the QIRC for a protected action ballot. Again these provisions purport to mirror provisions in the Fair Work Act.[38]

68. The ACTU notes that two aspects of the protected action ballot regime introduced by the *Industrial Relations (Fair Work Act Harmonisation) and Other Legislation Amendment Act 2012* are problematic in respect to Australia's international obligations.

69. First, like the counterpart provisions in the FW Act, [39] the provisions require that, in order to authorise industrial action, a quorum of at least 50 per cent of eligible voters must cast a vote, of which more than 50 per cent must approve the action.[40]

70. According to ILO standards, limitations can be placed on access to strike action but any such limitations or regulation should not unduly hinder the exercise of the right to strike in practice.[41] While the ILO Committee on Freedom of Association has observed that the requirement to observe a certain quorum and to take strike action by secret ballot may be acceptable,[42] it has held that 'the requirement of a decision by over half of all the workers involved in order to declare a strike is excessive and could excessively hinder the possibility of carrying out a strike, particularly in large enterprises.'[43] Other aspects of the protected action ballot regime, such as the potential for employers to oppose ballot applications and the short period that approvals last, may also pose unacceptable impediments upon the right to strike.[44] The protected action ballot provisions in the FW Act have been noted by the ILO

[37] *CFA Digest*, [598].
[38] Explanatory Note, p. 4.
[39] FW Act, s.459.
[40] *Industrial Relations Act 1999 (Qld)*, s.176(3).
[41] *CFA Digest* [547].
[42] Ibid.
[43] Ibid, [556].
[44] See S. McCrystal, 'The Fair Work Act 2009(Cth) and the Right to Strike', Legal Studies Research Paper No. 10/18, Sydney Law School, February 2010, 26-27.

Committee of Experts, which has requested that the Australian Government '*continue to take steps to ensure that the exercise of the right to strike in practice is not restricted by unduly challenging and complicated strike ballot procedures.' The Committee has also noted its intention to continue to monitor the application of these provisions, through requesting that the Government to continue to provide statistics on the number of protected action ballots authorized out of a total number of applications, as well as to any important or excessive delays resulting from this procedure.*[45]

71. Second, through introducing the protected action ballot regime, the amendments limit the right to strike for Queensland public sector workers to action taken in the course of negotiations for a collective agreement. In doing so, it replicates a feature of federal industrial relations law that has repeatedly and consistently been found by the ILO Committee of Experts to be in contravention of international standards on freedom of association. The ILO Committee of Experts has emphasised that legitimate industrial action is all strike action designed to defend and further the interests of workers and is not limited to the pursuit of negotiations for a collective agreement.[46] The Committee has, on a number of occasions, requested that the Australian Government review those provisions of federal industrial relations law that have the effect of limiting the 'right to strike' to industrial action taken in support of negotiations for a collective agreement.[47]

72. Finally, the Queensland amendments take Australian law even further from compliance with the internationally-recognized right to strike, as embodied in Convention No 87 through inserting a provision within the *Industrial Relations Act 1999 (Qld)* which provides that the QIRC can only make a protected action ballot order once bargaining for a proposed agreement has commenced.[48]

73. This provision has the effect of legislating to ensure that workers cannot use industrial action to induce an employer who has refused to bargain for an enterprise agreement to commence bargaining. In effect, it ensures that those workers that continue to be covered by the Queensland industrial relations system do not have the rights that workers enjoy

[45] See Observation (CEACR) – adopted 2011, published 101st ILC Session (2012)*, Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – Australia.*
[46] ILO, *ILO General Survey 1994*; and CFA Digest, [531].
[47] See, for example, Observation (CEACR) – adopted 2011, published 101st ILC session (2012) – *Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – Australia.*
[48] See *Industrial Relations Act 1999* (Qld), Schedule 4, s.8(1)(c).

under federal law, as confirmed by the Full Federal Court of Australia in *JJ Richards & Sons Pty Ltd v Fair Work Australia.*[49] It is also inconsistent with ILO jurisprudence, which has emphasised that prohibitions on strikes related to recognition disputes (for the purposes of collective bargaining) are not in conformity with the principles of freedom of association.[50]

Submission of proposed agreement directly to employees

74. Finally, through the *Industrial Relations (Fair Work Act Harmonisation) and Other Legislation Amendment Act 2012*, the Newman Government has also amended the Industrial Relations Act 1999 so as to enable an employer to submit a ballot directly to employees.[51]

75. The ACTU notes that the federal equivalent of this provision has been considered by the ILO Committee on Freedom of Association. The Committee noted that ILO standards emphasise the role of workers' organisations as one of the parties in collective bargaining and that direct negotiation between the undertaking and its employees, bypassing representative organizations where these exist may in certain cases be detrimental to the principle that negotiation between employers and organizations of workers should be encouraged and promoted. The Committee proceeded to request that the Australian Government 'ensure respect for this principle' and to provide detailed information on the application of the relevant provision (s.172 of the FW Act) in practice, so as to allow it to determine the impact of this provision on the promotion of negotiations between employers and workers' organizations.'[52]

<u>Victoria</u>

76. Victoria is the only state to have referred its public sector to the Commonwealth.[53] As a result, the capacity of Victorian public sector workers to take industrial action is regulated by the *Fair Work Act 2009.*

77. The FW Act provides a number of circumstances in which Fair Work Australia or the Minister can or must suspend or terminate protected industrial action. The ACTU believes a number

[49] [2012] FCAFC 53.
[50] *CFA Digest*, [536].
[51] *Industrial Relations Act 1999* (Qld) s. 147A.
[52] Case No. 2698 (Australia), *Report No 364, June 2012.*
[53] *Commonwealth Powers (industrial Relations) Act 1996* (Vic); *Fair Work (Commonwealth Powers) Act 2009* (Vic).

of these circumstances go beyond the limitations on the right to strike permissible under international law.[54]

78. Under section 424 of the FW Act, the Fair Work Commission is required to suspend or terminate protected industrial action for a proposed enterprise agreement if it is satisfied that the action being engaged in (or threatened, impeding or probable action) has threatened, is threatening or would threaten:

- to endanger the life, the personal safety or health, or the welfare, of the population or of part of it; or
- to cause significant damage to the Australian economy or an important part of it.

79. As noted above, section 424 of the FW Act goes beyond the narrowly defined exceptions permitted under international law. Moreover, FWC's interpretation of these provisions has further broadened the effect of this provision.[55] The ACTU believes the effect of the provision as drafted and its interpretation in practice unduly restricts the rights of workers to take industrial action and goes beyond the limited and narrow restrictions on the right to strike permissible under international law.

80. The breadth of the above restriction particularly disadvantages workers in the public sector as many instances of action taken by them in support of bargaining – under such a broad interpretation of the provisions – are held to constitute a threat to personal health, safety and welfare of the population and so to suspension or termination of protected action under the Act. Even where the merits of a claim made under s.424 may be weak, the breadth of the provision and the requirement that FWC determine the matter in 5 days (as far as practicable) has the effect of diverting union's resources away from legitimately taken industrial action towards defending a claim that the industrial action be stopped. They also face an opponent who has significantly greater economic power and resources.

[54] While the following comments focus on section 424 of the Act, it is important to note that other provisions also contravene international standards, including s.423 ('significant economic harm') ; section 426 ('significant harm to a third party') and section 431 ('Ministerial declaration terminating industrial action').
[55] See further *University of South Australia v National Tertiary Education Union (NTEU)* [2009] FWA 1535 (4 December 2009); *Victoria Hospitals' Industrial Association v Australian Nursing Federation* [2011] FWAFB 8165.

Access to arbitration for certain groups of state public sector workers

81. Certain groups of public sector workers in Victoria face particular difficulties in bargaining due to restrictions on their capacity to take industrial action and, at the same time, limitations on the capacity of the Fair Work Commission (FWC) from settling bargaining disputes through arbitration.

82. Limitations on the capacity of FWC to resolve matters in dispute involving state public sector workers arise by virtue of the implied limitation in the Australian Constitution applying to the exercise of Commonwealth legislative power over the States identified in *Melbourne Corporation Commonwealth.*[56] This implication of this limitation for state public sector employment was subsequently set out in *Re Australian Education Union; Ex parte Victoria (*'Re AEU').[57]

83. In referring its industrial powers to the Commonwealth, Victoria has had regard to these limitations.[58] Exemptions from Victoria's referral include those relating to core government functions – such as the number, identity, appointment and redundancy of public sector employees – as well as matters concerning essential services employees and the police.[59] At the same time, Victoria has not enacted state legislation to deal with the excluded matters in the event of a dispute. The result is that Victorian state public sector workers face considerable difficulties as the capacity of the Fair Work Commission to effectively resolve bargaining and other disputes (including those related to redundancies) is significantly curtailed.

84. The recent experience of a number of our affiliates (the CPSU, AWU, ASU and APESMA) in relation to recent bargaining with Parks Victoria illuminates the limitations of the current arrangements. After months of bargaining (and failed attempts at resolution of the dispute through section 240 applications to FWC), the unions notified Parks Victoria of their intention to take protected industrial action in the form of bans on engaging emergency response work. On the day the action was scheduled to commence, FWC made an order terminating

[56] (1947) 74 CLR 31.
[57] (1995) 184 CLR 188.
[58] See, e.g., s.5 (1) of the *Fair Work (Commonwealth Powers) Act 2009 (Vic).*
[59] *Fair Work (Commonwealth Powers) Act 2009,* s. 5(2). On issues concerning Victoria Police, we refer the Committee further to the submission to this Inquiry by the Police Federation of Australia.

the bans under s.424 of the FW Act.[60] The parties were unable to settle all of the matters in dispute during the post-industrial action negotiating period and the FWC issued a workplace determination under s.266 of the FW Act in early February 2013.[61]

85. During the proceedings, Parks Victoria submitted that a number of the terms agreed upon by the parties should not be included in the workplace determination on the basis that it would be inconsistent with the *Fair Work (Commonwealth Powers) Act 2009* (Vic)('the Referral Act') and *Re AEU.* A Full Bench of the FWC held that the Commission is only empowered to make an enterprise agreement or workplace determination in respect of Victorian public sector employers and its employees to the extent that this is authorised by the Referral Act. On this basis, the Commission did not have jurisdiction to include within the workplace determination provisions within the determination clauses relating to the regulation of fixed term, casual and seasonal employment.

86. As noted above, ILO supervisory bodies have emphasised that– where the rights of workers to engage in industrial action are limited on public interest grounds in the case of essential services – compensatory measures must be in place. Under current law, public sector workers in Victoria, however, are effectively being denied the right to take industrial action *and* the right to arbitration of all the matters in dispute. The ACTU believes the current situation –whereby Victorian public sector workers are left without any mechanism through which to effectively settle their bargaining disputes in full – to be an unfair and unacceptable state of affairs.

<u>Western Australia</u>

87. Workers in the Western Australian industrial relations system do not have a protected right to strike. The *Industrial Relations Act 1979 (WA)* does not recognise any such right and those who engage in industrial action do not enjoy immunity from civil suit. The absence of any recognition of a right to take industrial action is inconsistent with articles 3 and 10 of Convention No. 87.

88. Section 64B of the *Industrial Relations Act 1979 (WA)* stipulates that union membership must cease where subscriptions have not been paid for a period of three months since the subscription expired. This provision has been identified by the ILO Committee of Experts as

[60] PR526198.
[61] *Parks Victoria v the Australian Workers' Union and Others* [2013] FWCFB 950.

being inconsistent with article 3 of Convention No. 87, as matters relating to membership and subscriptions of an organisation should be matters for the organisation concerned.[62]

Right to Organise and Collective Bargaining Convention, 1949 (No. 98)

NSW

89. The ACTU believes that the *Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011,* and the *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011* are in breach of Australia's obligations under Convention No. 98.

90. First, as noted above, the effect of the new section 146C of the *Industrial Relations Act 1996 (NSW)* is to require the NSW Industrial Relations Commission to give effect to the Government's public sector policies when making or varying awards or orders relating to the remuneration or other conditions of employment of public sector employees. We believe this requirement on the Commission violates the basic principle espoused by the ILO's Committee on Freedom of Association that the bodies appointed for the settlement of disputes between the parties to collective bargaining should be independent.[63]

91. Second, the *Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011* and the *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011* contravene Convention No. 98 through directly imposing restrictions on the content of collective agreements. These restrictions are in the form of legislative maximum outcomes for wage increases and restrictions on the types of protections that can be included in agreements.[64] Clause 6(1)(f) of the regulation states that 'policies regarding the management of excess public sector employees are not to be incorporated into industrial instruments.'

92. The ILO Committee of Experts has stipulated that a requirement for collective agreements between the parties to be submitted for approval to an administrative authority, labour authorities or a labour tribunal before coming into force may be compatible with Convention No. 98. However, this is only on the proviso that such requirements provide for approval to

[62] Observation (CEACR) – adopted 2011, published 101st ILC Session (2012), *Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – Australia.*
[63] *CFA Digest*, [932].
[64] Clause 6(1)(f) of the regulation states that 'policies regarding the management of excess public sector employees are not to be incorporated into industrial instruments.' An industrial instrument is defined under the *Industrial Relations Act 1999* (NSW) to include a collective agreement.

be refused if the collective agreement has a procedural flaw or does not conform to the minimum standards laid down by general labour legislation. In cases where legislation 'stipulates that approval must be based on criteria such as compatibility with general or economic policy of the government or official directives on wages and conditions of employment' the ILO has advised that such stipulation 'makes the entry into force of the collective or works agreement subject to prior approval, which is a violation of the principle of autonomy of the parties.'[65]

93. In a Direct Request issued to the Australian Government in 2012, the ILO Committee of Experts observed the concerns communicated by the ACTU with respect to the amendments to the *Industrial Relations Act 1996* and subsequent *Industrial Relations (Public Sector Employment) Regulation 2011* and requested that the Government provide its observations on these matters in its next report'.[66]

Equal Remuneration Convention, 1951 (No. 100)

94. The ILO Committee of Experts in 2011 noted the adoption of the *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011* in NSW within the context of Australia's compliance with Convention No. 100. The Committee observed that, while the Regulation provides that equal remuneration for men and women doing work of equal or comparable value is a paramount policy under the wage fixing principles, the regulation then proceeds to provide that increases in remuneration that increase employee-related costs by more than 2.5 per cent per annum can only be awarded where sufficient employee-related costs savings have been achieved to offset fully the increase, though such policy is subject to compliance with the paramount policy (section 6). The Committee asked the government to provide information on '… the implementation of section 5 of the New South Wales public service regulation, and to indicate how it is ensured, in the light of the constraints set out in

[65] ILO, *Freedom of Association and Collective Bargaining: General Survey of the Reports on the Freedom of Association and the Right to Organize Convention (No.87), 1948 and the Right to Organize and Collective Bargaining Convention (No. 98), 1949,* Report of the Committee of Experts on the Application of Conventions and Recommendations, ILC, 81st Session, Report III (Part 4B), Geneva, 1994, [251].
[66] Direct Request (CEACR) – adopted 2011, published 101st ILC Session (2012), *Right to Organise and Collective Bargaining Convention, 1949* (*No. 98) - Australia*

section 6, that the principle of equal remuneration for men and women for work of equal value is fully applied in practice.'[67]

[67] Direct Request (CEACR) – adopted 2011, published 101st ILC Session (2012), *Equal Remuneration Convention, 1951 (No. 100) – Australia.*

Whether state public sector workers face particular difficulties in bargaining under state or federal legislation

95. State governments have at its disposal extensive economic resources that enable it to engage in protracted disputes with public sector employees, making it relatively easy to create endless delays in bargaining until employees give in due to exhaustion. This unequal bargaining power creates particular difficulties for state public sector workers in the bargaining process.

96. The extent to which state public sector workers in the respective state jurisdictions face difficulties in bargaining, including the capacity to take industrial action and access arbitration, has already been addressed above in the context of the extent to which laws in the state jurisdictions comply with Australia's obligations under ratified ILO Conventions.

97. In Victoria, where the state has referred its industrial relations powers to the Commonwealth, state public sector workers also experience difficulties bargaining under federal industrial relations laws. These difficulties are set out in detail in the submissions of our affiliates, including the CPSU/SPSF, the Australian Education Union, and the Australian Nursing Federation.

98. While the collective bargaining regime in the FW Act constitutes a significant improvement on its predecessor, it has proven incapable of adequately addressing situations in which workers and their unions are required to bargain with entities that, by virtue of operating within the confines of government wage policies, simply do not have the capacity or authority to change the fiscal settings that determine key outcomes. Our affiliates in Victoria, for example, have experienced lengthy delays in commencing, negotiating and approval of agreements as a result of pre- and post-bargaining approval processes involving a range of government departments and ministries.

99. As well as difficulties arising out of the FW Act's focus on the single enterprise for bargaining purposes, the good faith bargaining obligations have proven incapable of dealing with situations in which persons or organisations that are not the employer or employer-nominated bargaining representative have effective control over bargaining. [68]

100. The ACTU supports the CPSU/SPSF's submission that the Act be amended to provide for applications to be made to the Fair Work Commission ('FWC') to declare a person/entity a bargaining representative (including for the purposes of the good faith bargaining obligations) wherever it can be demonstrated that the entity has control over the bargaining process and/or outcome.

[68] Good faith bargaining is provided for in s228 of the FW Act and requires bargaining representatives to attend meetings and participate in bargaining at meetings; disclose all information relevant to the bargaining process; and genuinely consider all proposals, and respond to these proposals in a timely fashion.

Whether the Act provides the same protections to state public sector workers as it does to other workers to the extent possible, within the scope of the Commonwealth's legislative powers

The FW Act is fairly limited in the protections it can extend to state public sector workers as compared to workers within the national system. The Act, as it is currently worded, can provide some limited protection to these workers in its transfer of business provisions and general protections. That said, there is some scope within the Commonwealth's legislative powers to provide further protections to state public sector works should the Australian Government implement the legislative options discussed below.

Transfer of business

101. The ACTU welcomed the *Fair Work (Transfer of Business) Act 2012.* We believe these amendments go some way in protecting the terms and conditions of employment of workers in Queensland, New South Wales, South Australia, Tasmania and Western Australia where they transfer from a state public sector employer to the national workplace relations system as a result of a transfer of business.

102. We note, however, that some state public sector workers continue to lack adequate protections of their rights and entitlements during certain transfers of business. In Western Australia, employees that move between employers in the state system or from a national system employer to a state employer do not have any mechanism through which to have their prior conditions of employment recognised.

103. In addition, there is still some ambiguity around what constitutes a 'connection' between and old and new employer that acts as a condition for a transfer of business to take place under section 311 of the FW Act. This is a particular concern given the rising trend for government services to be contracted out through labour hire arrangements, with the outsourced jobs typically offering inferior pay rates and conditions than comparable positions within the public sector. In New South Wales, for example, figures obtained by the Public Service Association indicate that the use of labour hire staff in the state public sector grew from 11,976 in 2010-11 to 15,942 in 2011-12, a more than 30% increase. At the same time around 15,000 public sector jobs have been, or are being, made redundant. The similarity in these figures is instructive, making it reasonable to draw a link between the

outsourced positions and the positions being made redundant. In instances where a position is made redundant as a result of a government decision to outsource the work of a particular section within a department, it may be possible to demonstrate that a connection exists between the old employer and the new employer and that a transfer of business has therefore taken place. However, there may be some occasions where the connection is less direct; for example, in instances where the public sector employer engages a contractor through a labour hire company for a particular task or small segment of work. In such instances it can be harder to prove a direct connection between the public sector employer and the labour hire company, even though historically such work would have been performed in house. The ACTU would suggest that the government provide further clarification on this matter, perhaps with consideration towards changing the legislation around transfers of business to account for less direct forms of connection through labour hire arrangements.

Redundancy

104. State public sector workers are not afforded protections equivalent to other workers under the NES standard on notice of termination and redundancy pay. The ACTU supports the CPSU's recommendation that, for clarity and certainty, the Commonwealth government urge the state of Victoria to amend its referral to the Commonwealth to include these matters and that the Commonwealth should legislate on this matter to the full extent of its constitutional power to regulate Victorian state employment.[69]

General Protections

105. For state public sector workers, coverage of the general protections regime in the FW Act is an important issue. While there may be some freedom of association type cases where the general protections apply because they affect the functions, activities or relationships of a trade union, in other cases the application of the general protections to state public sector workers is less certain. To ensure the protection of these fundamental rights to the fullest extent possible, the ACTU recommends that the Australian Government take steps to extend these protections to state public sector workers. The manner through which this may be achieved is detailed below, in our response to the final term of reference.

[69] CPSU/SPSF Submission, p.82.

Noting the scope of states' referrals of power to support the Act, what legislative or regulatory options are available to the Commonwealth to ensure that all Australian workers, including those in state public sectors, have adequate and equal protection of their rights at work?

106. The ACTU notes that there are a number of different heads of constitutional power upon which the Commonwealth could validly extend its legislative power so as to afford greater protection to state public sector and other workers and promote national consistency of rights and entitlements, including but not limited to the external affairs power (section 51 (xxix)); and the conciliation and arbitration power (s.51(xxxv)).

General Protections

107. To the extent that the general protections reflect freedom of association-type obligations under ILO conventions ratified by Australia, there is the capacity to expand the coverage of these protections through reliance on the external affairs power in the Australian Constitution, as our federal industrial laws have done consistently in relation to unlawful terminations.

108. In addition, the Australian government could rely on the conciliation and arbitration power in the Constitution to establish an agreement-making stream and to broaden the coverage of modern awards. This would apply in instances where industrial disputes involve more than one state; for example, if state public sector workers in both Queensland and New South Wales became involved in an industrial dispute over restrictions to termination, redundancy and organisational change provisions, this would arguably extend the dispute across state lines and therefore provide the Commission with jurisdiction to resolve the dispute by the extension of a modern award, or by accessing a pathway to resolve a dispute through the making of an agreement. The general protections regime could then be amended so as to provide for coverage of conduct involving or affecting a person who is covered by an award or agreement made in reliance on these powers.

Ratification of ILO conventions concerning public sector workers

109. The ACTU believes consideration should also be given to ratification of ILO conventions in relation to bargaining and dispute resolution in the public sector so as to facilitate the

formulation and adoption of measures that adequately address the unique challenges faced by public sector workers bargaining against the state, including through providing greater access to conciliation and arbitration. This includes the *Labour Relations (Public Service) Convention 1978 (No. 151).*

110. The Commonwealth should work cooperatively through COAG to develop nation-wide agreements on minimum standards and processes for all workers, particularly around consultation, dispute resolution, major organisational change and entitlements.

111. The Commonwealth could also consider introducing a legislative mechanism to recognise the existence of a joint employment relationship in instances where two or more parties have functional control over a work arrangement. For example, where a state government contracts out a job to a private sector employer, but continues to direct the work of any employees within that arrangement, a joint employment relationship could be said to exist. Where a joint employment relation exists, there is precedent to suggest that the state public sector employer would be covered by the national system on the basis of their connection with a constitutional corporation. This relies on a similar interpretation of the Commonwealth's corporations power as that which allows for employees to be covered by the national system on the basis of their connection to a constitutional corporation. A similar precedent applies to the federal regulation of employee representatives on the basis of their indirect connection to a constitutional corporation through the employees they represent.