
SUBMISSION OF THE VICTORIAN GOVERNMENT

In response to:

Commonwealth Senate Committee on Education, Employment, and Workplace Relations 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.

February 2013

INTRODUCTION

The Victorian Government has referred most of its industrial relations powers to the Commonwealth, most recently via the *Fair Work (Commonwealth Powers) Act 2009* (Vic) (**Referral Act**). The result is that the majority of public sector workers in Victoria are covered by the *Fair Work Act 2009* (Cth) (**FW Act**). The FW Act does not apply to Victorian Members of Parliament, judicial officers or public service executives.

The Referral Act included important limitations to referral of power that are necessary to preserve the State's capacity to function as a Government. These are intended to reflect the limitations on the Commonwealth's powers articulated by the High Court in *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 and other cases.

The Victorian Government rejects any suggestion that these necessary exceptions and exclusions have resulted in public sector employees in Victoria enjoying reduced conditions or entitlements compared with employees to whom the entirety of the FW Act applies, or that these exceptions and exclusions undermine the protection of their rights in employment.

It appears that the Fair Work Act Review Panel shared this view. In preparing its report, *Towards more productive and equitable workplaces* (June 2012), the Panel made no recommendations in this area, despite being asked specifically to do so.

For example, at least two organisations, the Australian Nursing Federation (Victorian Branch) (**ANF**) and the Community and Public Sector Union (**CPSU**), have made submissions to this Inquiry calling for substantial changes in respect of public sector bargaining that relevantly mirror much of what they submitted to the Fair Work Act Review Panel, but which the Panel, by implication, rejected.

It is regrettable that, the Commonwealth having appointed the Panel to review the FW Act, and the Panel having had before it all the issues raised in the many submissions it received, public sector stakeholders are, with this Inquiry, confronted with a process which appears to duplicate much of the effort, coverage and expense associated with the FW Act Review.

As with employees in the private sector, the vast majority of public sector workers are entitled to bargain for collective agreements under the FW Act, take protected industrial action in support of their wage and condition claims and have their disputes heard and determined by the Fair Work Commission.

As the Victorian Government made clear in its response to the Fair Work Act Review, there continues to be challenges working under the FW Act and the Victorian Government, despite the foregoing, is disappointed that the Fair Work Act Review Panel made limited recommendations to effectively promote productivity and flexibility, and that the Commonwealth Government is yet to utilise inter-governmental consultation arrangements to address concerns about the operation of the FW Act.

The Victorian Government strongly believes that a workplace relations system that enables responsive and flexible markets to promote productivity and competitive practices is key to improving economic growth and well-being.

The Victorian Government remains concerned about the lack of consultation by the Commonwealth with States on reforms to address concerns about the Fair Work system. As part of Victoria's 2009 referral arrangements, a new *Inter-Governmental Agreement for the National Workplace Relations System for the Private Sector (IGA)* was executed by Victoria, other referring States, and the Commonwealth. The IGA mandates consultation on proposed changes to the FW Act and related legislation through a Ministerial Council and associated groups of senior government officials. These governance arrangements provide a vital mechanism for jurisdictions to advocate State interests in relation to the operation of the Commonwealth laws.

The Victorian Government is concerned about recent instances where the Commonwealth has introduced Bills into the Commonwealth Parliament that would change the Commonwealth legislation or significantly impact upon State laws, without sufficient prior consultation. The Victorian Government was consulted on the Fair Work Amendment Bill 2012, which implemented the "first tranche" of amendments in response to the FW Act Review panel recommendations, only a short time before it was introduced into Commonwealth Parliament. Similarly, the Victorian Government was advised of the Commonwealth's amendments to the *Fair Work (Registered Organisations) Act 2009* six days before they were introduced into the Commonwealth Parliament. Further, the *Building Code 2013* was announced by Workplace Relations Minister Bill Shorten on 30 January 2013. It came into effect 1 February 2013. There was no consultation with the Victorian Government or industry.

The Victorian Government again calls on the Commonwealth to continually assess the operation of the FW Act and the Fair Work system more broadly, as it effects the States and Territories, to ensure that all Victorians, including those in the public sector, can enjoy productive, flexible and efficient workplaces.

(A) 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 (the Act) applies

As the Committee would be aware, Victoria referred most of its industrial relations powers to the Commonwealth in 1996. This referral was remade in 2009 via the Referral Act. As a result, the FW Act applies to the vast majority of public sector workers in Victoria. Put differently, in the context of the referral there is no distinction in the protections available to public sector employees under the FW compared with private sector employees.

The Victorian Government notes that there are important limitations on the scope of this referral that are essential limitations to preserve the State's capacity to function as a Government, and are largely identical to the exclusions set in the original 1996 referral (see *Commonwealth Powers (Industrial Relations) Act 1996 (Vic)*). For example, matters pertaining to the number, identity and appointment of public sector employees are expressly excluded from the referral.

The referral of legislative power to the Commonwealth Parliament is intended to reflect the limitation on Commonwealth power embodied in principles enunciated by the High Court in a number of decisions: *Re Australian Education Union*; *Ex parte Victoria* (1995) 184 CLR 188; *Victoria v Commonwealth* (1996) CLR 416; and *Austin v Commonwealth* (2003) 215 CLR 185.

In addition there are limited exceptions to this coverage that are necessary and appropriate exceptions. For example, the FW Act does not apply to Victorian Members of Parliament, judicial officers or public service executives.

While Victoria has referred most of its industrial relations powers to the Commonwealth, Victoria retains the power to legislate on the referred subjects (although State laws which are inconsistent with Commonwealth laws based on the referral will be invalid under s.109 of the Constitution).

(B) 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 Organisation (ILO) conventions ratified by Australia.

The Victorian Government does not consider this term of reference relevant to public sector workers in Victoria. This is on the basis that the content of Victorian public sector agreements are governed by the FW Act with limitations (reflecting the Melbourne Corporation principle) subject to exclusions in the Referral Act.

(C) 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.

The Victorian Government does not consider this term of reference relevant to public sector workers in Victoria. This is on the basis that the content of Victorian public sector agreements are governed by the FW Act with limitations. The limitations were identified initially by the High Court in the *Melbourne Corporation v the Commonwealth* (1947) 74 CLR 31 (referred to as the Melbourne Corporation principle) and are now subject to exclusions in the Referral Act.

The Victorian Government is currently reviewing provisions in light of the recent decision *Parks Victoria v The Australia Workers Union and others* (2013) FWCFB 950, which was handed down by the Full Bench of the Fair Work Commission on 11 February 2013. The decision identified a number of clauses that should not be included in a workplace determination because of the operation of the *Fair Work (Commonwealth Powers) Act 2009 (Vic)* and the constitutional limitations explained in *Re AEU*. Further work will be undertaken by the government regarding the full implications of this decision.

(D) Whether the current state government industrial relations frameworks provide protection to workers as required under the ILO conventions ratified by Australia.

The Victorian Government does not consider this term of reference relevant to public sector workers in Victoria. This is on the basis that the content of Victorian public sector agreements are governed by the FW Act with limitations (reflecting the Melbourne Corporation principle) subject to exclusions in the Referral Act.

(E) Whether state public sector workers face particular difficulties in bargaining under state or federal legislation.

The vast majority of public sector workers in Victoria negotiate enterprise agreements under the framework established by the FW Act, subject to some necessary and appropriate constitutional limitations (the Melbourne Corporation principle). Limitations relate to matters pertaining to the number, identity and appointment of public sector employees (excluded from the referral). These limitations can and are being dealt with under State legislation and policies and are necessary to preserve the State's capacity to function as a Government. These are the only matters whereby public sector employees are treated differently to private sectors employees.

As stated, the Victorian Government rejects any suggestion that these necessary exceptions and exclusions have resulted in public sector employees in Victoria enjoying reduced conditions or entitlements compared with employees to whom the entirety of the FW Act applies, or that these exceptions and exclusions undermine the protection of their rights at work.

As with employees in the private sector, the vast majority of public sector workers are entitled to bargain for collective agreements under the FW Act, take protected industrial action in support of their wage and condition claims and have their disputes heard and determined by the Fair Work Commission.

The Victorian Government strongly rejects any suggestion that public sector employees face particular difficulties in bargaining when both the direct employer of those employees and the portfolio agency with responsibility for that workforce are engaged in negotiations. No public sector agencies in Victoria have been found to have breached the good faith bargaining obligations in the FW Act as a result of the involvement of departmental or agency representatives. In fact, employee representatives (including the Australian Nursing Federation (**the ANF**)) have previously sought and encouraged the direct participation of departmental representatives in negotiations. Further, the concept of "captive" bargaining representatives mischaracterises the nature of the relationship of public sector employers with the Government. Here, the Victorian Government refers the Committee to the decision of Commissioner Jones in *Australian Nursing Federation v Victorian Hospitals' Industrial Association* [2012] FWA 285.

On the contrary, recent experience shows that delays to bargaining outcomes come primarily from four sources:

1. Ambit claims that ignore the financial impact on taxpayers and the public, and which would be fiscally unsustainable even if accepted (e.g. nurses log of claims seeking pay increases totalling 18.5 per cent over four years and 8 per cent up front, current teachers negotiations where the AEU's log of claims was estimated to cost around \$14 billion); and
2. A willingness to take either unprotected industrial action or protected industrial action that jeopardises the public welfare. Examples include: *Victorian Hospitals' Industrial Association v Australian Nursing Federation* [2012] FCA 149 (28 February 2012); *Victorian Hospitals' Industrial Association v Australian Nursing Federation* [2011] FWAFB 8165 (15 December 2011); *Parks Victoria v CPSU & Ors* [2012] FWA 5890 (11 July 2012).

3. Public sector employee organisations are often at the great advantage, compared to most private sector bargaining representatives, of being able to draw significantly on members' financial resources to fund expensive advertising campaigns. Among other things, by committing such a substantial amount of members' resources and fashioning messages around their public positions, such advertising campaigns risk diminishing the willingness of those organisations to embrace the compromises necessary to reach consensus at an earlier stage in negotiations.
4. It is the practice of many public sector employee organisations to resort to media during the course of bargaining in a way that often impedes rather than assists discussions. Government negotiators are often at the great disadvantage of having to assume that their discussions with public sector organisations will not only be made public, but represented unfairly and in the most adverse light. Public sector employee organisations whose practices are to exploit media opportunities during bargaining must appreciate that such practices tend to hamper and delay bargaining outcomes.

The Victorian Government strongly rejects any suggestion that some categories of employees in the public sector are disadvantaged by the operation of section 424 of the FW Act. Such suggestions ignore the fact that the Fair Work Commission cannot issue suspension or termination orders under section 424 of the FW Act unless the Commission is satisfied that protected industrial action has threatened, is threatening or would threaten to endanger life or the personal safety, health or the welfare of the population or part of it. These thresholds are reasonable and appropriate given the risk to public health and safety posed by some forms of protected industrial action in the emergency or essential services sectors. The Victorian Government notes that public sector employers in these sectors are also constrained in terms of the options open to them to respond to protected action by employees as they are also subject to section 424 of the FW Act.

On this issue, the Victorian Government condemns the actions of any employee organisation in resorting to unprotected and unlawful industrial action to pursue their bargaining claims. Industrial action of this nature is dangerous and reckless and can undermine the safe delivery of important services to the community. The Victorian Government notes that the Fair Work Ombudsman is yet to complete its investigation into alleged breaches of the FW Act by the ANF arising from negotiations for a new agreement to cover public sector nurses in Victoria last year. Specifically, the Fair Work Ombudsman is investigating whether the ANF and/or its officials and members breached section 421 of the FW Act, which makes it an offence to contravene an order of Fair Work Australia (now the Fair Work Commission) to stop unprotected industrial action.

Also, in contending that the Fair Work Commission is liable to make orders under section 424 of the FW Act on "relatively flimsy grounds", the ANF's submission (at [33]) vastly understates the concern of the Full Bench of Fair Work Australia (as it was then known) about the threat the ANF's industrial action posed to patients in Victoria in late 2011. In *Victorian Hospitals' Industrial Association v Australian Nursing Federation* [2011] FWAFB 8165, the Full Bench stated:

"[56] Overall, we consider that the impact of the protected industrial action has been to adversely affect the quality and timeliness of the treatment that can be provided to patients, especially those in Emergency Departments and those requiring surgical procedures. In our view, **the impact is of such a nature as to cause more than just inconvenience to these people but to endanger their safety or health or their welfare.** Furthermore we consider that this adverse impact on the users of the Victorian public health system will be aggravated as the industrial action by the ANF and its members continues to be implemented with the aim of reducing the capacity of the system through **bed closures, cancellations of operating sessions and other bans.**

[57] In reaching these conclusions, we note that considerable efforts are being made by hospitals to minimise the adverse effects of the industrial action on their operations and, in particular, on patient treatment and care. However given the size and wide coverage of the public health system in Victoria, and the likely cumulative effect of the industrial action in reducing over time the capacity of the system, there is a limit to what can be achieved through such measures. There is also only limited capacity to use the resources of private hospitals. **We have taken into account the expressed intention of the ANF that the industrial action will be implemented in such a way as not to endanger anyone's life, personal safety or health, or their welfare. However the evidence before us as to the actual and likely consequences of the industrial action across the public health system and for those using the system, has demonstrated that the action being taken is endangering the safety, health or welfare of patients. Further, we are not persuaded that the ANF's exemption and notification processes are working in practice.** The evidence from the hospital administrators was that there has been confusion about the processes and that there have been at least delays in the admission or transfer of patients due to the processes with relevant adverse consequences." [Emphasis added]

(F) 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.

In light of Victoria's referral of powers to the Commonwealth, the Victorian Government does not consider this term of reference relevant to public sector workers in Victoria.

(ii) 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.

The Commonwealth's power to act in this area is limited by the constitutional implications recognised in *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188.

It is a matter for the States to determine the extent to which they wish to refer industrial relations powers to the Commonwealth in respect of their public sector workforces, noting the limitations which preserve the State's capacity to function as an independent unit of the federation.

While Victoria has referred most of its industrial relations powers to the Commonwealth, Victoria retains the power to legislate on the referred subjects (although State laws which are inconsistent with Commonwealth laws based on the referral will be invalid under s.109 of the Constitution).

The Victorian Government does not consider that there is any sound policy rationale, backed up by clear evidence, which indicates that the scope of Victoria's referral to the Commonwealth under the Referral Act should be extended.

The Victorian Government remains concerned about the lack of consultation by the Commonwealth with states on reforms to address concerns about the Fair Work system. As part of Victoria's 2009 referral arrangements, a new *Inter-Governmental Agreement for the National Workplace Relations System for the Private Sector (IGA)* was executed by Victoria, other referring States, and the Commonwealth. The IGA mandates consultation on proposed changes to the FW Act and related legislation through a Ministerial Council and associated groups of senior government officials. These governance arrangements provide a vital mechanism for jurisdictions to advocate State interests in relation to the operation of the Commonwealth laws.

The Victorian Government is concerned about recent instances where the Commonwealth has introduced Bills into the Commonwealth Parliament that would change the Commonwealth legislation or significantly impact upon State laws, without sufficient prior consultation. The Victorian Government was consulted on the Fair Work Amendment Bill 2012, which implemented the “first tranche” of amendments in response to the FW Act Review panel recommendations, only a short time before it was introduced into Commonwealth Parliament. Similarly, the Victorian Government was advised of the Commonwealth’s amendments to the *Fair Work (Registered Organisations) Act 2009* six days before they were introduced into the Commonwealth Parliament. Further, the *Building Code 2013* was announced by Workplace Relations Minister Bill Shorten on 30 January 2013. It came into effect 1 February 2013. There was no consultation with industry.

In its submission to the Commonwealth’s Fair Work Act Review, the Victorian Government urged the Commonwealth to consider changes to the FW Act to establish mechanisms that will better assist employers and employees to resolve disputes and settle enterprise agreement negotiations without resorting to industrial action.

The Victorian Government again calls on the Commonwealth to continually assess the operation of the FW Act and the Fair Work system more broadly, as it effects the States and Territories, to ensure that all Victorians, including those in the public sector, can enjoy productive, flexible and efficient workplaces.
