**Australian Nursing Federation (Victorian Branch)**

# Submission

# to the

# Senate Education, Employment and Workplace Relations Committees

# on the operation of the Fair Work Act to public sector employees.

## 15 January 2013

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## Context

The Australian Nursing Federation (Vic Branch) is ideally placed to make submission to the Senate Education, Employment and Workplace Relations Committees on the Victorian context of the operation of the Fair Work Act 2009 to Victorian public sector nurses and midwives.

It is noted that the Fair Work Act 2009 applies to Victorian public sector nurses and midwives subject to the terms of State's referral to the Commonwealth. In 1996 Victoria became the first State to refer its power to make laws with respect to industrial relations over to the Commonwealth by enacting the Commonwealth Powers (Industrial Relations) Act 1996. The potential reach of Commonwealth law is further restricted by certain implied constitutional limitations on the capacity of the Commonwealth to pass laws which may affect functions of a State which are critical to its capacity to function as a government.

A second referral was achieved through passage of the Fair Work (Commonwealth Powers) Act 2009 (Vic). The second referral also contains exemptions similar to the ones made in the previous referral, mostly relating to 'core government functions, such as the number, identity, appointment and redundancy of public sector employees, and issues related to essential services employees and the police'.

It follows from the above that the Fair Work Act 2009 has limitations when applied to Victorian public sector employees, resulting in less protection and entitlements than other workers to whom the Fair Work Act 2009 (the Act) applies.

This submission will address in particular the following aspects of the terms of reference:

*(E) state public sector workers face particular difficulties in bargaining under state or federal legislation, and*

*(F) 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; and*

*(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.*

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**SUMMARY OF RECOMMENDATIONS**

1) *The legislation be amended to:*

   a) *recognise the phenomenon of triangular bargaining relationships in the state public sector;*

   b) *require third party strangers who exert influence over a captive bargaining representative to adhere to good faith bargaining obligations; and*

   c) *clarify and fortify the obligations of government entities, who are third party strangers, to provide information relevant to the bargaining process.*

2) *The legislation should provide for an existing agreement to be continued insofar as that agreement deals with matters or claims subject to objection on Re AEU grounds.*

3) *The public interest test be revised so that if a party seeking an interim order cannot satisfy the Tribunal of its argument within two days of the application it be required to satisfy the Tribunal that the public interest positively requires the making of an interim order.*

4) *In circumstances where protected industrial action is terminated on health/safety etc grounds, then existing terms and conditions prescribed by any applicable industrial instrument should not be capable of removal or erosion by the terms of an industrial action workplace determination. A 'no worse off' test should be introduced in respect of the terms of such determinations.*

5) *That s424 be amended to precisely reflect the ILO position and terminology on the meaning of essential services and the nature of the threat to such services necessary to warrant the abridgement or removal of the right to strike.*

6) *Protected industrial action should not be capable of termination on health/safety etc grounds unless Fair Work Australia is satisfied that there exists an effective and enforceable means by which the parties can have determined all the issues in issue giving rise to the protected industrial action concerned*

7) *Amendments to the factors to which a Full Bench is to have regard in making a bargaining related workplace determination to more fairly provide for the compensatory scheme addressed in the ILO literature.*

8) *The repeal of S413(5) particularly on the basis of a controversial, technical, minor or inadvertent contravention*

9) *That the Act be clarified so as to ensure that a 'collective' protected industrial action ballot order can be made in respect of the employees of a single interest authorisation employer and that the votes on the ballot are to be counted as a group rather than employer by employer.*

**CHARACTERISTICS OF THE WORKFORCE REPRESENTED BY THE ANF**

1. The terms of reference acknowledge that there are sectors of the workforce for whom the Fair Work Act 2009 may not apply in totality.

2. In so far as the terms of reference refer to public sector employees, , the submissions below are especially pertinent to the detriment accruing to workers in the health industry and the occupations of nursing and midwifery and, more broadly, to workers in publicly funded enterprises.

3. While the Terms of Reference do not identify differential impacts on women, the submissions below are especially pertinent to the detriment accruing to women, in light of the high proportion of women who work in the nursing sector.

4. Women make up over 90% of the nurses registered or enrolled in Australia (Australian Institute of Health and Welfare 2011-Nursing and Midwifery Labour Force Survey 2009.).[1]

**BARGAINING AND AGREEMENT MAKING**

***GOOD FAITH BARGAINING***

*5.* Good faith bargaining is integral to the objectives of the Act[2] and central to the policy initiatives underlying its introduction[3].

6. This submission firstly raises deficiencies in the good faith bargaining provisions arising from the way in which public sector health operates in Victoria. Victorian public health services fall broadly into two groups:

[1] 90.4% of the employed nurses in 2009 were women.
[2] s 3 (f)
[3] The Hon Julia Gillard MP - Address to the National Press Club, 17 Sep 2008 http://ministers.deewr.gov.au/gillard/introducing-australias-new-workplace-relations-system Address to the Australian Labour Law Association, 14 Nov 2008 http://ministers.deewr.gov.au/gillard/address-australian-labour-law-association

- Organisations established under the Health Services Act (Vic) with their own Boards of Management, the majority of appointments to those Boards being the prerogative of the State Government.

- Organisations funded to provide public health services, many of whom were historically public sector agencies, but are now considered "non-government organisations", predominantly Community Health Centres.

***Third Party Influence – triangular bargaining as an escape route from good faith bargaining***

7. The good faith bargaining provisions are predicated upon the primacy of bargaining representatives in the bargaining process. The obligation to bargain in good faith attaches to bargaining representatives alone[4].

8. This does not cater for the relatively common situation, in which a third party stranger to the employment relationship, who is not a bargaining representative (a 'third party stranger'), exerts significant influence over one of the bargaining representatives (a 'captive bargaining representative'). In Victoria this applies to the State Government, who operates without the obligations applicable to a Bargaining Representative under the Act, as they are neither the 'employer' nor an appointed bargaining representative – but are actively involved in the bargaining process at all stages.

   A third party stranger may influence bargaining in a number of ways, for example by:

   - refusing to divulge information (such as information about costings) which is crucial to the bargaining process; and/or

   - behaving inconsistently with the desires of the captive bargaining representative; and/or

   - otherwise undermining the bargaining process, in circumstances where the captive bargaining representative self-silences and does not object because of the power imbalance between it and the third party stranger.

[4] s 228

In such cases, the third party stranger and the captive bargaining representative share or co-determine matters governing essential terms and conditions of employment[5].

9. The practical consequence is that the real bargaining occurs, not between the captive bargaining representative and other bargaining representatives, but between the third party stranger, the captive bargaining representative and other bargaining representatives. If, however, the third party stranger acts inconsistently with the tenets of good faith bargaining, it is difficult, under the Act, for other bargaining representatives to challenge this.

10. The broad question of whether genuine bargaining can occur in a situation where one of the parties is unable to reach an agreement with other parties, without the concurrence of a third party stranger, was examined in *Kellogg Brown and Root Pty Ltd and Ors* v *Esso Australia Pty Ltd*[6] . Although this case arose under a different regime (the Workplace Relations Act 2006), prior to the advent of the good faith bargaining provisions, it continues to exert influence.

11. In the *Kellogg Brown and Root Case,* a Full Bench of the Australian Industrial Relations Commission (AIRC) overturned the decision at first instance,[7] which had held that the role played by Esso was antithetical to the achievement of genuine bargaining between contractors and unions. Illustrating the dilemma which continues to confront bargaining representatives today, the first instance decision noted that:

> *"[90] Esso is not the employer. Esso is a stranger to the agreement and yet Esso has ultimate control not only over whether an agreement is made or not made but upon what terms it may be made. The contractors clearly were, at one stage, prepared to consider different options for resolving the impasse with the Unions over the roster proposal. Esso clearly indicated that any resolution which did not deliver a 14/14 roster would not be acceptable to Esso.*

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[5] The phrase is borrowed from decisions of the U.S National Labor Relations Board. Though not precisely comparable, the National Labor Relations Act provides that it is an unfair labor practice for an employer to refuse to bargain collectively with the representative of employees (s 8(5)). This provision has been held to embrace the notion that third party strangers may also be obliged to participate in the bargaining process in the same way as an employer is – see for example *Boire v. Greyhound Corp.*,376 U.S. 473, 481 (1964); *W.W.Grainger Inc* 286 NLRB 94 (1987).

[6] PR955357 – 31 January 2005

[7] Kellogg Brown and Root Pty Ltd & Ors, PR951725 7 September 2004

*[91] It is not in the public interest that the freedom of the parties to negotiate and reach agreement is nullified by the involvement of a party which stands outside the process."*

12. This analysis was rejected on appeal. A Full Bench of the AIRC considered the context in which Esso's role should be seen, including the fact that it operated the relevant facilities, had its own employees at these facilities and was obliged to reimburse contractors for increases in labour costs. The Full Bench said:

> *"Given these considerations we are unable to attribute to Esso's involvement in the negotiations the characterization which the Commissioner gave to it. Furthermore we do not regard Esso's role in this case as unusual. Other examples can be found in contemporary industrial relations of head contractors and indeed Governments reserving a right to influence or even to control the outcome of negotiations between their contractors or agencies and the employees of the contractors or agencies. Nothing in Part VIB prohibits conduct of this type, provided there is no coercion."* [8] [emphasis added]

13. As the Full Bench decision noted, the bargaining arrangement is not unusual. Nor is it our submission that there is anything intrinsically objectionable about such arrangements. However, the Full Bench's decision pre-dated the introduction of good faith bargaining obligations, so a question must now arise as to how such 'triangular bargaining' arrangements co-exist with such obligations. This is especially critical because good faith bargaining is predicated on a measure of transparency and free flow of relevant information during the bargaining process, as well as an assumption that bargaining representatives are representing the wishes of those who appointed them, rather than the wishes of a third party stranger.

14. The analysis in the *Kellogg Brown and Root Case* is being applied by Fair Work Australia with little allowance for the changed emphasis in bargaining protocol. Its influence may be observed in the case of *Australian Nursing Federation v Victorian Hospitals' Industrial Association*[9]. There, the Australian Nursing Federation (ANF) was the bargaining

[8] PR955357 at [30]
[9] [2012] FWA 285 - 10 January 2012

representative for relevant employees, while the Victorian Hospitals Industry Association (VHIA) was the bargaining representative for relevant employers.

15. It was common ground that the VHIA and the Victorian Department of Health shared a strong commonality of interest in the bargaining process, that the Department of Health was an active participant at all the bargaining meetings and conciliation proceedings for a new enterprise agreement and involved itself in developing proposals put by the VHIA at bargaining. The Department of Health was also recognised in a Memorandum of Understanding, as having a place at the bargaining table, in recognition of its role as manager and funder of public health. The VHIA and Department of Health shared the same law firm for the purpose of the enterprise negotiations, with the Department of Health paying the legal costs[10].

16. The ANF was unsuccessful in a bid to secure orders that the VHIA was not able to bargain in good faith because it was beholden to the wishes of the Department of Health and was therefore unable to bargain effectively. While the case may, on one view, be confined to the particular facts, the conceptual and practical difficulties remain.

17. The confusion generated by triangular bargaining is illustrated by the fact that the Fair Work Ombudsman itself characterised the VHIA as the bargaining representative, not of the employers who appointed it, but of the Victorian Government[11].

18. If a third party, who is not a bargaining representative and is therefore a stranger to the bargaining process established by the Act, is able to influence the negotiating process, without being bound by the good faith bargaining standards of behaviour and may employ any means (short of "coercion[12]") to achieve its ends, that has troubling implications for the survival and value of good faith bargaining. Our concerns include those set out below:

    a. The other (non-captive) bargaining representative and those whom it represents is at a disadvantage. It is denied the benefit of a level of transparency which is contemplated by the Act and which would be a usual incident of the bargaining process.

[10] See at pars 72 and 74 of the decision
[11] Letter from Fair Work Ombudsman to ANF – 23 November 2011 "you are ultimately bargaining with the Victorian Government and ... primary responsibility for the conduct of the dispute rests with them and their bargaining representative the Victorian Hospitals Industrial Association..."
[12] See above the extract from the Full Bench decision in PR955357

b. The third party stranger is untrammelled by the good faith bargaining requirements of s.228. Nor does there appear to be a clear 'accessory liability' provision which attaches to a third party stranger who may engage in conduct which results in the captive bargaining representative breaching s 228.

c. Triangular bargaining arrangements generate inconsistency in approach. Bargaining under the Act should, as a matter of principle, be clearly regulated and capable of application to all bargaining models.

d. An unfair competitive advantage accrues to those employers who are able to circumvent the good faith bargaining provisions by a simple interposition of a third party stranger into the equation. While other employers have to adhere to the good faith bargaining principles or face an application for a bargaining order [13] with the accompanying prospect of litigation, the triangular bargaining arrangement provides a refuge from good faith bargaining requirements, for both the captive bargaining representative and the third party stranger. In time, this will result in a split system of bargaining, with some employers having to comply with the good faith bargaining requirements and others able to circumvent them. This will ultimately devalue good faith bargaining as a concept.

e. If the bargaining process involves a workforce with inferior bargaining power (for example, a workforce with a high representation of lower paid women – such as nursing) this gives the employer an unfair advantage against a vulnerable sector of the workforce. It is not difficult to envisage labour hire organisations and their clients taking advantage of this.

f. Where the third party stranger is a government, there is an added layer of unfairness, because it can attempt to resist provision of relevant material by relying upon public interest immunity, the threshold for which is relatively easy to satisfy [14].

g. A third party stranger may exert influence which, while falling short of 'coercion', is completely incompatible with the tenets of good faith bargaining.

***Proposal***

19. The solution would be for the legislation to:

[13] A bargaining order under s 230 of the Act.
[14] See for example *ANF v VHIA* [2011] FWA 8971

- recognise the phenomenon of triangular bargaining relationships;

- require State Governments who are third party strangers who exert influence over a captive bargaining representative to adhere to good faith bargaining obligations; and

- clarify and fortify the obligations of government entities, who are third party strangers, to provide information relevant to the bargaining process.

***ARBITRATION***

***The effect of Re AEU***

20. The Act needs to be modified to take into account the practical effect, on State public sector employees, of the doctrine of inter-government immunity articulated in *Melbourne Corporation* v *The Commonwealth*[15] in *Re Australian Education Union & Ors*; *Ex parte the State of Victoria & Anor*[16]. In brief, that doctrine precludes the making of Commonwealth laws which would place special burdens or disabilities on a State, or which would operate to destroy or curtail or interfere with the continued existence of the State or its capacity to function as a government.

21. Where States have referred industrial powers to the Commonwealth, these limitations are reflected in the referral legislation. Fair Work Australia is correspondingly limited in what it can include in an industrial instrument which applies to employees of the State or of agencies of the State. (e.g. s5(1) *Fair Work (Commonwealth Powers) Act 2009* (*Vic).)*

22. The scope of that part of the *Re AEU* doctrine which precludes the making of industrial instruments prescribing the number or identity of State employees (in so far as that might be interpreted as an exercise of Commonwealth power to control the States or as an interference in the State's autonomy or integrity) is the subject of much debate.

23. Unfortunately, the very availability of a jurisdictional argument based on *Re AEU* operates, in practice, as a disincentive for certain employers to engage in genuine bargaining for an

[15] (1974) 74 CLR 31
[16] (1995) 184 CLR 188

enterprise agreement. This is because, from the outset, the bargaining process is inevitably coloured by the proposition that Fair Work Australia may not have power to include certain matters in a workplace determination[17]. If an employer wishes to achieve a minimalist model of industrial regulation, there is little point in its engaging in the bargaining process.

24. Thus, for example, if :

- a current enterprise agreement contains matters which are beyond the scope of Fair Work Australia to include in a workplace determination because of *Re AEU;* and/or

- a union proposes inclusion or continued inclusion of such a matter in a new enterprise agreement but an employer no longer wishes such a matter to be included in a new enterprise agreement; then

- it is more attractive for that employer to engage in surface bargaining (see below) and to engineer a situation which would result in 'last resort arbitration' and the making of a workplace determination.

25. This is especially so in light of the observations below, concerning the relative ease with which an employer in the health industry might be able to secure an order under s424 for termination of protected industrial action. Once such an order is made, it obviously facilitates establishment of the prerequisites for securing an industrial action related workplace determination.

***Proposal***

26. In some cases objection to the maintenance of key terms in an existing industrial agreement has been advanced on the basis of *Re AEU*. Such objection by the State results in no agreement being able to be reached (whatever the legal merit of the application of the *Melbourne Corporation*/*Re AEU* principle to an agreement). Further, it is then argued on the basis of *Re AEU* that no arbitration is available in respect of the term or terms claimed. This is the case even if the claim pertains to the employment relationship in the relevant sense.

27. In circumstances where, for example:

[17] Workplace determinations may be made in circumstances described in ss 261 and 262 (low paid workplace determinations); 266 (industrial action related workplace determinations) and 269 ( bargaining related workplace determinations).

- *Re AEU* is relied upon by a state negotiating party (or an agency of the State) as an impediment to bargaining and agreement making;

- *Re AEU* is also relied upon by that party to avoid arbitration of issues and claims in dispute which would otherwise be capable of a inclusion in a determination; and

- the dispute is intractable in the sense that, for example, protected industrial action has been suspended or terminated and no further protected industrial action is able to be undertaken (see below in relation to Section 413(5));

then the legislation should provide for an existing agreement to be continued insofar as that agreement deals with matters or claims subject to objection on *Re AEU* grounds.

28. This proposal is advanced because *Re AEU* introduces an element peculiar to the Australian context that undermines the compensatory scheme of compulsory arbitration introduced on public interest grounds in the case of essential services (as contemplated by the ILO), designed to compensate employees for the loss of their right to strike. This issue is discussed further below.

**INDUSTRIAL ACTION**

***Orders to terminate, suspend or stop Industrial Action***

29. The right to take industrial action underpins the system of collective bargaining established by the Act. That right should be accessible to participants on as fair and balanced a basis as possible.

30. However, unions in the public health industry operate under a severe disadvantage. This is because, under s 424(1) of the Act;

> *(1) FWA must make an order suspending or terminating <u>protected industrial action</u> for a proposed enterprise agreement that:*
>
> *(a) is being engaged in; or*
>
> *(b) is threatened, impending or <u>probable</u>;*
>
> *if FWA is satisfied that the protected industrial action has threatened, is threatening, or <u>would threaten</u>:*

(c) *to endanger the life, the personal safety or health, or the welfare, of the population or of part of it; or*

(d) *to cause significant damage to the Australian economy or an important part of it (emphasis added).*

31. Such is the breadth of this wording that its practical effect is to dilute the capacity of workers in the public health industry to take protected industrial action. The underlined words demonstrate that, in essence, all that is required to satisfy the sub-section is *'protected industrial action that is probable and which would threaten the welfare of part of the population'*.

32. The upshot is that the words of the Act encourage employers to apply for suspension or termination of industrial action even where the industrial action is more a matter of inconvenience. It was never intended that this be the case:

> *"1709. It is not intended that these mechanisms be capable of being triggered where the industrial action is merely causing an inconvenience. Nor is it intended that these mechanisms be used generally to prevent legitimate protected industrial action in the course of bargaining.[18]"*

33. The reference to 'welfare', in particular, opens the way for employers to apply for suspension or termination of protected industrial action on relatively flimsy grounds, almost as soon as it commences, where the public health industry is concerned**.** This is strategically significant, because Fair Work Australia must, as far as practicable, determine the matter within 5 days[19]. The effect is to divert a union's resources away from the pursuit of protected industrial action, to defending itself via time consuming and costly litigation, usually against an employer which is well-resourced and/or frequently supported by Government funding.

34. The problem is illustrated by the decision of a Full Bench of Fair Work Australia in *VHIA v ANF*[20] . No earlier decision of FWA or its predecessor identified the difficulty with Victorian nurses' industrial action taken in 2000, 2001, 2004 and 2007 such that it endangered life, health or safety etc as found in s424. Yet, in this decision the Bench by way of analysis of the effect of

[18] Explanatory Memorandum, Fair Work Bill 2008.
[19] s 424 (3)

[20] [2011] FWAFB 8165

the industrial action did little more than recite the statutory formulae provided by Section 424. Even then it formulated its conclusion in a variety of ways by reference to the formulae.

35. The inclusion of reference to 'welfare' in the health safety etc description of the essential services in s424 goes beyond the long-standing meaning of essential services accepted by the International Labour Organisation (ILO) upon whose internationally recognised principles the scheme of the Act in this regard is modelled. The scope of the ILO's reference to essential services in this context is confined to:

> *"the existence of a clear and imminent threat to the life, personal safety or health of the whole or part of the population."*[21]

36. There is no reason for the statutory test in s424 to extend beyond that provided in the ILO by the inclusion of reference to "welfare" or to the questions of past, probable or likely future threats when the language "clear and imminent threat' meets the purpose.

37. It is instructive to note that the Full Bench referred to above relied upon its assessment of the potential impact of industrial action, assuming that it continued for a period of time. It should be noted that the industrial action concerned was expressly designed and undertaken to avoid falling foul of the s424 trigger for termination or suspension.

38. The ILO learning on the question of a threat to essential services such as to justify a restriction or removal on the right to strike is conveniently set out in "Freedom or Association" (5th Edition 2006) International Labour Organisation paragraphs 570 – 594.

39. In the case of suspected unprotected industrial action, s 420 requires that an application under s 418 for the stopping of industrial action be determined within 2 days after the application is made. If Fair Work Australia is unable to determine the application within that period it must make an interim order that the industrial action stop, not occur or not be organised (as the case may be)[22] unless it would not be in the 'public interest' to do so[23].

40. Where the applicant employer is the government or a government agency, the 'public interest' argument will necessarily tend to favour it. It is in an ideal position to assert that it would not be contrary to the 'public interest' to make an interim order. From a strategic

[21] Digest of decision and principles of the Freedom of Association Committee of the Governing Body of the ILO (2006) paragraph 581
[22] s420 (2)
[23] s420 (3)

perspective, especially in view of the compressed time frame within which the decision must be made, a public sector employer therefore has little to lose by the making of an application under s 419. Even if it is subsequently decided that the action was in fact protected industrial action, the issuing of the interim order operates to impede the momentum of the industrial action and thus the bargaining power of the union.

***Proposals***

41. It is proposed that the public interest test be revised so that: if a party seeking an interim order cannot satisfy the Tribunal of its argument within two days of the application it be required to satisfy the Tribunal that the public interest positively requires the making of an interim order. Such an approach is consistent with the usual onus placed on an applicant for interim orders. The mere allegation by way of a public sector health employer's application that industrial action is unprotected is open to abuse given the reverse onus established by the provisions. Furthermore the existence of the present statutory regime is, and has been, influential in Fair Work Australia granting orders on the basis that the scheme of the Act tells in favour of orders to be granted unless the contrary can be established.

42. It is also proposed that, in circumstances where protected industrial action is terminated on health/safety etc grounds, thereby depriving public sector employees of their limited capacity to take industrial action, then existing terms and conditions prescribed by any applicable industrial instrument should not be capable of removal or erosion by the terms of an industrial action workplace determination. A 'no worse off' test should be introduced in respect of the terms of such determinations.

43. It is proposed that s424 be amended to precisely reflect the ILO position and terminology on the meaning of essential services and the nature of the threat to such services necessary to warrant the abridgement or removal of the right to strike.

44. **Furthermore, protected industrial action should not be capable of termination on health/safety etc grounds unless Fair Work Australia is satisfied that there exists an effective and enforceable means by which the parties can have determined all the issues in issue giving rise to the protected industrial action concerned**. This proposal would ensure that the entire dispute was capable of resolution. It may be that a moving party should be required to provide enforceable undertakings as to its adoption and participation in means of determining all the issues in dispute before an order terminating protected

industrial action could be made. Fair Work Australia might be satisfied that all matters will be determined by means of agreement, workplace determination, consent arbitration or a combination of these means.

45. Such an approach ensures that the removal of the right to industrial action in the public interest can only occur in circumstances where there is available a means to resolve the issues in dispute in which the parties have confidence. This is peculiar to the public sector in as much as no other employer enjoys the limitations on arbitration enjoyed by the State Government. Such an approach is consistent with the international treaty obligations related to the removal of the right to take industrial action on public interest grounds in the area of essential services.

46. The ILO's learning on the question of compensatory guarantees in the event of the removal of the right to take industrial action in essential services is conveniently summarised in "Freedom of Association" paragraphs 595 – 614 (see above).

47. A consistent theme in the material on this issue is the need for employees deprived of the right to strike to have appropriate guarantees to safeguard their interests. Those guarantees require:

    - the confidence of all the parties in the arbitral process such that it is seen as reliable, impartial and rapid; and

    - that the arbitral process itself be adequate, impartial and speedy and the outcome implemented rapidly and completely.

48. In the absence of proposals such as those set out in this submission, the appropriate balance between the right to strike and the compensatory guarantee for the removal of that right will not be achieved.

49. The presence of the *Re AEU* factor as a consequence of Australian Constitutional arrangements demands special attention as proposed in order to secure the appropriate balancing of interests.

51. The foregoing proposals:

a. provide a balance between the removal in the public interest of the capacity to take protected industrial action on essential services grounds and, on the other hand, the legitimate interests of those whose industrial rights to take industrial action have been attenuated or removed; and

b. address the unfairness referred to above by which a public health employer declines to bargain and relies upon the taking of industrial action in a sensitive public sector area of employment such as nursing, has the action terminated and thereby gains access to a workplace determination through the vehicle of the public's welfare, in order to secure the removal of existing terms and conditions unable to be achieved by bargaining.

52. Against this background it is also apparent that the factors to which a Full Bench is to have regard in making a bargaining related workplace determination as set out in s275 are not neutral. On the contrary, a number of the factors identified favour the employer and in particular the State as an employer and likely provider of the underpinning essential services that have resulted in the termination of protected industrial action. Compensatory arbitral arrangements established for employees prevented from taking industrial action refer, for example, to the 'public interest'. They also refer to conduct during bargaining and the improvement of productivity and incentives to continue to bargain at a later time. These factors in the real world are more readily associated with the position and interests of employer provider of essential services.

53. While the factors identified in s275 may have the appearance of impartiality and fairness, they are weighted against the interests of employees employed in an essential service by government, who have had their right to strike removed. Such a position is inconsistent with the ILO principles referred to above. The factors identified in s275 need to be amended to more fairly provide for the compensatory scheme addressed in the ILO literature.

**REQUIREMENTS FOR PROTECTED ACTION**

54. One of the requirements for the taking of protected industrial action is contained in s413 (5). In brief, the provision requires that there have been no contravention of orders that relate to industrial action in respect of the proposed agreement.

55. The obvious example of the effect of the provision is that in the event a bargaining representative or employee contravened a s418 order, then protected industrial action can never again be taken in respect of the agreement concerned.

56. This provision gives rise to difficulties in cases of:

    a. disputes over whether or not there has been a contravention of a relevant order; and

    b. inconsequential, inadvertent or minor contraventions alleged in respect of a relevant order.

57. The difficulties illustrated by the ANF's dispute with the State of Victoria/VHIA in circumstances where:

    a. the Tribunal made orders under Section 418 (see VHIA v ANF [2011] FWA 827) This order was made following the suspension of industrial action by a Full Bench (see VHIA v ANF [2001] FWA FB 8165);

    b. claims were made that ANF and/or its members contravened the s418 order by employers and the Fair Work Ombudsman;

    c. the ANF maintained no such contravention by members had occurred;

    d. a Full Bench quashed the s418 order and issued another order (see VHIA v ANF [2011] FWA FB 8101); and

    e. there is doubt as to the effect of the quashed s418 order and whether or not there were contraventions of the order in any event.

    In these circumstances the ANF's dispute remains unresolved, the suspension of its protected industrial action has ended (see VHIA v ANF [2011] FWA FB 8165), but because of s413(5) none of the many thousand of nurse employee members are ever able again to take protected industrial action in relation to the proposed agreement concerned.

***PROPOSAL***

58. S413(5) should be repealed. There are sufficient mechanisms under the Act to secure observance of orders without a provision which is likely to operate to frustrate bargaining in an intractable dispute, particularly on the basis of a controversial, technical, minor or inadvertent contravention by, for example, a single employee of any order 'relating to the agreement or a matter that arose during bargaining'.

58. The issues raised in the forgoing proposals direct attention to the inadequacy of the present legislation in addressing intractable disputes such as the current dispute involving the ANF that have the following, not uncommon, ingredients:

    a. a state government employer or public sector agency employer raising *Re AEU* objections to claims;

    b. protected industrial action in the nursing or health industry capable of being suspended or terminated on a relatively low threshold;

    c. triangular bargaining with no capacity for legal and captive employers to bargain without third party direction, yet there being no access to bargaining orders against the third party;

    d. surface bargaining and reliance on the ease of termination of industrial action under s424 to achieve a workplace determination; and

    e. the ease of removal of employees' rights to undertake industrial action, whether because of the sensitive nature of their industry or because of the contravention of orders and the absence of a compensatory arbitral alternative capable of dealing with all matters in dispute and in which al parties can have confidence.

**POINTS ABOUT THE SINGLE INTEREST EMPLOYER AUTHORISATION PROCESS**

59. A question has arisen as to whether a 'collective' protected action ballot order can be made by reference to a list of employers who are the subject of a single interest employer authorisation, subject to the employer being named in accordance with s281A. This is

particularly relevant in Victoria where the public health sector is made up of over 140 separate employers.

60. The language of the Act seems to indicate that 'an employer' or 'the employer' is to be the subject of a protected action ballot order. Attention is directed to the following:

    a. s440, s443(1)(b), s445(b),s451(2) and s452(3) all use the expression 'the employer of the employees who are to be balloted';

    b. the Explanatory Memorandum at paragraphs 1766 and 1770 adopts the same language; and

    c. the Explanatory Memorandum at paragraphs 1770 to 1773 adopts more problematic language in referring to 'the particular employer to which the application for a protective action ballot relates'; as well as 'the relevant employer' and 'the affected employer'. The latter reference 'the affected employer' is also used in paragraph 1780 of the Explanatory Memorandum.

61. On the other hand:

    a. S23(b) of the Acts Interpretation Act deals with the issue of plurals;

    b. the scheme of the Act is that employers that are the subject of a single interest declaration and authorisation are able to 'bargain together for a proposed enterprise agreement' (see Section 247(3)) and the Explanatory Memorandum at paragraph 1035);

    c. paragraph 1037 of the Explanatory Memorandum says that the term 'relevant employer' [sic 'relevant employers'] in s247(2) is 'used to describe the employers that will be covered by the agreement' the same term 'relevant employer' is used in the Explanatory Memorandum in paragraphs 1770 to 1773 referred to above;

    d. in determining when an enterprise agreement is made in the case of a proposed single enterprise agreement that is to cover two or more employers it is made 'when it is approved by the majority of employees (**taken as a group**) who will be covered by

the agreement'(emphasis added) who cast a valid vote for the agreement (emphasis added; see Explanatory Memorandum paragraph 749 and s182(1));

e. however, the Explanatory Memorandum at paragraph 1033 makes it clear that each employer is 'treated as a separate employer' (eg for the purpose of the pre approval steps in Clause 180);

f. the scheme of the Act generally provides for single interest employers to be able to bargain together and be party to a single enterprise agreement. Importantly a protected action ballot application is not excluded in respect of multiple employers under a single – enterprise agreement, unlike a multiple enterprise agreement; see Section 172(3) and Section 437(2). A protected action ballot is in relation to 'an agreement' being the same agreement the subject of the single interest employer for authorisation; and

g. Section 423(2) and Section 426(2) refer to employee protected industrial action in respect of a proposed enterprise agreement described as 'the agreement' and in doing so refer to 'the employer, **or any of the employers**, that will be covered by the agreement'. Protected industrial action can only be taken in respect of a single agreement with more than one employer if it is a single – enterprise agreement (see 172(2)). Although, it could be a joint venture rather than a single interest employer authorisation type agreement; see Section 172(5)(a).

62. The result is that there is considerable uncertainty as to whether the bargaining together provided for by the Act for employers by s247 (3) also extends to the employers of those employees taking protected industrial action by way of a collective protected industrial action ballot.

63. In the event that a 'collective' protected industrial action ballot order was issued a question arises as to whether the counting of the ballot numbers is to be taken as a group or is to be taken employer by employer. As already noted in the case of a proposed single-enterprise agreement that will cover two or more employers that are single interest employers, the agreement is made under Section 182(1) when it is 'approved by a majority of the employees (taken as a group) who will be covered by the Agreement' (see Explanatory Memorandum paragraph 749). There is, however, no guidance on the same issue in respect of the counting of a protected action ballot. S459 provides that the industrial action is authorised if at least

50% of 'employees on the roll of voters for the ballot' vote and more than 50% of valid votes approve the action. Again in the preparation of the roll of voters the expression 'the employer of the employees who are to be balloted' is adopted. See Section 452(3).

***Proposal***

64. It is proposed that the Act be clarified so as to ensure that a 'collective' protected industrial action ballot order can be made in respect of the employees of a single interest authorisation employer and that the votes on the ballot are to be counted as a group rather than employer by employer.

65. We note that given the factors in s247(4) the issue raised above will be confined to particular sectors and groups of workers such as the public health sector.

Australian Nursing Federation – Victorian Branch

15th January 2013