

# COMMUNITY AND PUBLIC SECTOR UNION (CPSU) SPSF GROUP

## **Submission 90 - Community and Public Sector Union (CPSU) SPSF Group - Workplace Relations Framework - Public inquiry**

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## Chapter 1

### General Introduction to the Public Sector question on Issues Paper 5

1. This submission is largely responsive to the public sector bargaining issues raised in the AGPC Issues Paper 5. With some exceptions this submission is designed to answer the question posed by the Commission on page 9 of Issues Paper Five:

**How should WR arrangements in state and federal public services (and any relevant state-owned enterprises) be regulated. In particular to what extent should WR provisions vary with the public and private status of an enterprise?**

2. The Commission should note this section is limited to matters concerning the employment of **State** public sector workers which are either the subject of the Federal or a State workplace relations system.

#### About the CPSU

3. CPSU has a current membership of around 130,000. It is by far the biggest union representing State and Federal system public sector employees in Australia. We are in a unique position to make an important contribution to this enquiry.
4. CPSU, the Community and Public Sector Union (“CPSU”) is composed of two groups; the SPSF Group which represents State public sector workers (“the SPSF”) and the PSU Group which represents Federal and Territory public sector workers (“PSU”).
5. The SPSF Group of the CPSU represents the industrial interests of approximately 90,000 employees of State Governments in departments, agencies, statutory authorities, instrumentalities and State owned corporations, as well as general staff employees of universities.
6. While most of the SPSF Group members are within the jurisdiction of the various State industrial tribunals, four major groups of our members are in the Federal jurisdiction:
  - 6.1. employees of the Crown in Right of the State of Victoria and its agencies;
  - 6.2. general staff in universities;
  - 6.3. employees in private prisons; and
  - 6.4. Direct employees of State owned corporations that are constitutional corporations as well as employees of former State government agencies.

7. As the name of the SPSF Group suggests, it is a federation composed of five autonomous State registered unions, known in the SPSF Rules as “Associated Bodies”. The Victorian Branch exists only as a branch of the Federal union as there is no separate State workplace relations system in Victoria.
8. The eligibility rules of the Associated Bodies are essentially mirrored in the SPSF Rules as Branches of the SPSF for New South Wales, South Australia, Western Australia and Tasmania. Victoria has no corporate existence other than as a branch of the SPSF.
9. The Associated Bodies of the SPSF are defined as:
  - 9.1. The Public Service Association and Professional Officers Association Amalgamated Union of New South Wales (“PSANSW”);
  - 9.2. The Public Service Association of South Australia Incorporated (“PSASA”);
  - 9.3. The Community & Public Sector Union (SPSFT) Inc Tasmania (“CPSUT”);
  - 9.4. Civil Service Association of Western Australia Incorporated (“CSA”); and
  - 9.5. Western Australian Prison Officers Union of Employees (“WAPOU”)
10. Each of the five “Associated Bodies” is registered under their respective State industrial legislation.

### **Position of the various constituents of the CPSU**

11. The Associated Bodies have differing views on the efficacy of their respective State based statutory architecture. The PSU Group and the Victorian branch may also have differing views on the difficulties associated with bargaining with the Crown under the *Fair Work Act 2007* (“FWA”).
12. There are aspects of the New South Wales, South Australian, Western Australian, and Tasmanian state systems which are superior to the Federal regulation.
13. Each of those State regimes provides ready access to arbitration following an impasse in bargaining and enjoys a less complex regulation of industrial action. It follows from this the South Australian, Western Australian and Tasmanian Branches of the CPSU – SPSF have a preference for their State regimes
14. The New South Wales Branch also considers its State system provides a superior framework, however, as we address in detail in Chapter 5 , it is deeply concerned by the manner in which the NSW system has been co-opted by the New South Wales Government.

15. The different position in each State reflects the historical, legislative and political framework that applies to the regulation of public sector terms and conditions of employment.
16. Since the decline of the conciliation and arbitration power as a foundation of the current *FWA* there is no means for a union to initiate a jurisdictional change.
17. The State Government, not relevant unions, have complete control over whether to refer power or not. In those circumstances there seems little point engaging in a hypothetical discussion on a matter that is presently within the absolute control of the State.
18. We therefore do not propose any change from the status quo of the existing demarcation of State and Federal regulation of State public sector workers other than at the margin due to either:
  - 18.1. the uncertainty surrounding which jurisdiction covers statutory corporations in some States; or
  - 18.2. The difficulties arising from the implied intergovernmental immunity.
19. This submission addresses itself to the contents of a good workplace relations system for public sector workers. .

## **Chapter 2 - State public sector employment and the need for a tribunal with greater arbitral power**

### **A comment on the assumptions that underpin the public sector component of Issue paper 5**

#### **Convergence between private and public sector employment**

20. The public sector component of Issue Paper 5 is based on a false assumption that there is divergence between the regulation of public and private sector in the Australian workplace relations system.
21. At page 9 it states:

“Reforms to the WR system applying to the private sector may be accompanied by complementary measures (for example in administrative law, codes of conduct and long held work cultures) to realise the benefits for the public sector”
22. It is hard to escape the negative connotation of the sentence in parenthesis, particularly the reference to “long held work cultures”. The Commission seems to have swallowed whole the apocryphal myth of the lazy public servant protected from the rigours of private sector discipline by arcane bureaucratic discipline procedures and life long employment.
23. This myth needs to be dispelled. If anything the experience of public sector workers over the last twenty years has been a perennial reduction in staff and resources in circumstances of providing services to more and more people. The work culture of public sector workplaces is characterised by vocational zeal for the public good.
24. There is little difference between the codes of conduct and work culture of any large employer and public sector employment.

#### **The State employment statutes**

25. Notwithstanding the convergence between public and private sector employ there remains essential differences in the dynamic of public and private sector employment.
26. The risk to effective public administration and service delivery presented by corruption, nepotism and malfeasance means that public sector employers are rightly beholden to a range of employment regulations that private employers are not.

27. State employment statutes commonly deal with matters such as delegation of authority, selection and appointment requirements, disciplinary processes and appeal mechanisms – all of which support good and transparent governance within public agencies.
28. State employment statutes that deal with these matters include:
  - 28.1. *The Government Sector Employment Act 2013(NSW)*;
  - 28.2. *Public Administration Act 2004 (Vic)*
  - 28.3. *Public Sector Act 2009 (SA)*;
  - 28.4. *State Service Act 2000(Tas)*;
  - 28.5. *The Public Sector Management Act 1994(WA)*;
29. Many of these statutes commonly deal with inter-agency employment matters such as recognition of service, secondment and machinery of government changes.
30. There are sound reasons why these matters should be dealt with in a consistent manner across a public sector workforce and why they should be enshrined in law outside of the bargaining cycle of award or agreement making.
31. In recognising the role of these State employment statutes, we do note however a trend for their operation to increasingly favour managerial prerogative at the expense of employee protection.

### **Public Sector regulation should differ from private sector regulation**

32. The standing of the Crown as employer, legislator and policy determiner further supports the need for differing systems of regulation of employment in the public sector.
33. Sovereign States have the unique ability to amend the legislative and regulatory framework to suit its agenda as an employer. A sovereign State also possesses an unparalleled ability to unilaterally remove conditions and impose restrictions on bargaining.
34. There is a deep disparity between the power of Crown employees and the power of the State. The economic power and resources available to the Crown means it has a virtually unlimited capacity to engage in lengthy disputes with its employees, to initiate and fund Court and Tribunal proceedings and engage in strategic delay.



## **A tribunal with more robust powers is required when bargaining against the State**

35. The absence of strong or severely limited arbitral powers has significant consequences for public sector workers in the federal system.
36. The New South Wales, South Australian, Western Australian and Tasmanian systems all have a tribunal vested with superior arbitral powers.
37. The capacity of the New South Wales Commission to arbitrate decisions is broader (in a general sense) than the Fair Work Commission but the jurisdiction of the NSWIRC is arbitrarily limited to prevent it from making awards which include terms and conditions for state public sector workers in the manner elaborated in Chapter 5.
38. This places Victorian public sector workers at a significant disadvantage against the significant resources and sovereign power of the State. The powers of intervention in the Fair Work Commission are often insufficient counterweight to the power of large, well resourced employers.
39. The rationale for the previous Federal industrial relations systems based on conciliation and arbitration was to allow parties access to arbitration in place of the dislocation caused by strikes and lockouts. In the current federal system the tribunal is a bystander in a contest between bargaining parties with power to grant procedural rights.
40. The Act sets out good faith bargaining requirements (s228) that must be met by bargaining representatives in the conduct of bargaining. Section 176 sets out who are bargaining representatives and therefore subject to good faith bargaining. The employer is a bargaining representative (s176 (1) (a)); and can appoint a representative to act on their behalf (s176 (1) (d)). An employee organisation is a bargaining representative for its members (s176 (1) (b)). An employee can also nominate a person as their bargaining representative (s176 (1) (c)).
41. Bargaining orders are available where a breach of good faith bargaining can be demonstrated. The good faith bargaining processes are procedural only and expressly do not require a bargaining representative to either “make concessions during bargaining<sup>1</sup>” or compel a bargaining representative “to reach agreement on terms that are included in the agreement”<sup>2</sup>.
42. The only capacity vested in the Fair Work Commission to arbitrate is the power to make a workplace determination. This power can be used by the Commission for a “bargaining related workplace determination” which is provided on the basis of a “serious breach declaration” following a series of failures to comply with good faith

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<sup>1</sup> S228(2)(a)

<sup>2</sup> S228(2)(b)

bargaining orders<sup>3</sup> or an “industrial action workplace determination” which follows the termination of industrial action which has either caused or threatened to cause significant economic harm under s423, or endangering life, personal safety or health under s424.

43. A broader capacity in the Fair Work Commission to order arbitration in circumstances of a failure of, or impasse in, bargaining would avoid this dislocation and would assist in the resolution of disputes. The suite of powers of the Fair Work Commission to deal with bargaining disputes is not sufficient to deal with the range of issues that come before it.
44. The operation of the bargaining system in the FWA has entrenched a war of attrition. In order to progress bargaining claims, bargaining representatives are forced to escalate to more disruptive industrial action in order to either force concessions or to move towards a workplace determination.
45. The capacity of public sector workers to compel concessions through protected industrial action is blunted in most cases because public sector industrial action inevitably gives rise to claims for suspension or termination of the industrial action either because it “causes or threatens significant economic harm” under s423 or “threatens or endangers the life, personal safety or welfare of the population or part of it” under s424 of the FWA..
46. Child protection workers or prison officers quickly fall foul of the “threats to the welfare of the population or part of it” which essentially denudes them of a right to strike which the FWA is designed to confer.
47. The FWA would be greatly improved if the general powers of the Tribunal as previously expressed in *Industrial Relations Act 1988* were reinstated including more broad and general arbitral powers. More particularly the FWA would be improved if a provision similar to s170MX, which was placed in the Federal legislation by the *Industrial Relations Reform Act 1993* to benefit public sector employees, was included.
48. 170MX empowered the Australian Industrial Relations Commission to arbitrate following the termination of a bargaining period once there was an impasse in bargaining for workers “whose wages and conditions were regulated by a paid rates award” (a proxy for public sector employment<sup>4</sup>) where there was “no reasonable prospect of the negotiating parties reaching agreement” (under s170MW (7) of the *Industrial Relations Act 1988* as amended by the *1993 Reform Act*.)
49. A similar provision should available to public sector workers in the FWA

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<sup>3</sup> See s268(1) but note well that no serious breach order has been granted since the Fair Work Act came into operation

<sup>4</sup> A capacity for a public sector specific right of arbitration could be founded on the implementation of the Labour Relations (Public Service Convention) see below

50. The existence of general arbitral powers would lead to fewer and less lengthy bargaining disputes. A tribunal with a broad arbitral power acts as an incentive for the parties to make concessions if the alternative of having the tribunal make the final determination is unattractive.
51. Public sector bargaining within the Federal system, more specifically, bargaining with the Crown in Right of the State, would be facilitated if the power to issue bargaining orders was supplemented by broader powers to arbitrate bargaining disputes beyond the power to make workplace determinations following the termination of protected action.

#### **A note on the ILO Public Sector convention**

52. The Commission should note the International Labour Organisation recognises the unique nature of workplace relations between a Sovereign Government and its employees. The *Labour Relations (Public Service) Convention 1978* (No 151), which Australia is yet to ratify, proceeds on the basis that public sector workers require a multiplicity of methods to deal with dispute over terms and conditions,
53. Article 8 of that Convention states:

“The settlement of disputes in connection with the determination of terms and conditions of employment shall be sought, as may be appropriate to national conditions, through negotiation between the parties or through independent and impartial machinery, such as mediation, conciliation and arbitration, established in such a manner as to ensure the confidence of the *parties involved*.”
54. The CPSU considers greater access to arbitration is required for national system public sector workers. This could be facilitated by the ratification of the Convention. This could be followed by the use of the external affairs power to found federal legislation that allows arbitration for public sector workers in a manner similar to the 1993 Act 170MX.

#### **AGPC PROPOSED RECOMMENDATION**

55. The Commission should recommend the Federal Government amend the FWA to enable the tribunal to arbitrate a bargaining dispute where employees of the Crown in right of the States, its corporations or agencies reach an impasse in bargaining with their employer.
56. The statutory power of the Federal Parliament to take this measure would be facilitated by the ratification of the *Labour Relations (Public Service) Convention 1978* (No 151)

## Chapter 3

### The problem of federal regulation of State public sector workers and workers employed State owned corporations, the implied intergovernmental immunity and the Victorian Referral

57. In Issue Paper 5 the Commission refers (at point 5.5) to this problem on page 8:

“FWA coverage of public sector workers differs between states, territories and different levels of government, States have referred their industrial relations powers to the Commonwealth in varying degrees, and there remains constitutional limitations about the extent to which federal laws can govern certain state government employees. The recent Full Federal Court decision in *Fire Fighters’ Union of Australia v. Country Fire Authority*<sup>5</sup> demonstrates the continuing uncertainty about the constitutional limitation”

58. This refers to the capacity of the Federal Parliament to regulate the employment of State public sector workers and the limit imposed by a constitutional limitation first identified in *Melbourne Corporation v. Commonwealth* (1947) 74 CLR 31

59. The *Melbourne Corporation* limitation has recently been articulated by the Full Federal Court as prohibiting a federal law that has a “practical effect” of a “significant curtailment or interference” with the exercise of a State’s constitutional power.<sup>6</sup>

60. At present the problems that arise from the limitation are limited to public sector workers in the State of Victoria. The regulation of the workplace relations of public sector workers in Victoria have been referred to the Commonwealth (with significant limitations we will discuss below) since 1996.

61. The effect of the limitation on the regulation of the employment of State public sector workers had its classical expression in *Re AEU* (1995) 184 CLR 31.

62. In that case the majority found the limitation had two limbs.

62.1. One limb related to the number and identity of persons it wishes to employ or dismiss:

It seems to us that critical to that capacity of a State is the government’s right to determine the number and identity of persons whom it wishes to employ, the term of appointment of such persons, and, as well, the number and identity of persons whom it wishes to dismiss with or without notice from its employment on redundancy

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<sup>5</sup> *United Firefighters’ Union of Australia v. Country Fire Authority* [2015] FCAFC 1,

<sup>6</sup> *ibid* at para 207 page 62

grounds. An impairment in those respects would, in our view, constitute an infringement of the implied limitation (at 232)

## 62.2. The second limb to the high level of government:

....also critical to a State's capacity to function as a government is its ability to not only determine the number and identity of those whom it wishes to engage at the higher levels of government, but also to determine the terms and conditions on which those persons shall be engaged. Hence, Ministers, ministerial assistants, and advisers, heads of department and high level statutory office holders, parliamentary officers and judges would clearly fall within that group. The implied limitation would protect the States from the exercise by the Commission of power to fix minimum wages and working conditions in respect of such persons and possibly others as well...(at 233).

63. The *Re AEU* iteration of the immunity has been used by Victorian (and other) state governments to strike out matters that have been agreed between the parties.
64. In *Parks Victoria [2013] FWCFB 950* the Full Bench examined the second reading speech and Explanatory Memorandum of the Referral Act and found (on a "purposive" interpretation of the statute) the intention of the Victorian Parliament was to limit the reference to exclude the *Re AEU* matters and that the terms of the implied intergovernmental immunity as expressed in *Re AEU* and the referral act were co-extensive.
65. On the basis of the statutory analogue of the "number and identity" limb of *Re AEU* the Full Bench refused to make a workplace determination with provisions restricting the use of seasonal, fixed term and casual employees, provisions requiring vacancies to be filled on merit and a requirement to invite internal applications to fill vacant or new positions before advertising externally – even though the State had agreed to include those provisions in the bargaining leading up to the workplace determination proceeding.
66. The *UFU Appeal* decision casts significant doubt on the application on the extent of (at least) the number and identify limb of *Re AEU* in an era where the majority of the terms and conditions of Victorian public sector workers are determined by enterprise bargaining.

## UFU Appeal

67. The decision was an appeal from a decision of Murphy J who found certain parts of an agreement freely entered into between the UFU and the Country Fire Authority (CFA) under the enterprise bargaining regime in the FWA offended the implied intergovernmental immunity as it was expressed in *Re AEU*
68. The Full Federal Court pointed to the manifest difference between the former award making power of the Australian Industrial Relations Commission, which was the subject of the decision in *Re AEU* which imposed outcomes on the State, and the

FWA enterprise bargaining regime under which the Fair Work Commission approved bargains that had been freely made by the bargaining parties.

69. The kernel of the UFU Appeal decision is contained at paragraphs 207 and 208 of the decision:

...The relevant question is whether those provisions imposed some special disability or burden on the exercise of the powers and fulfilment of the functions of the State of Victoria or the CFA which curtailed the State's capacity to function as a government. In circumstances where the CFA voluntarily agreed to make the enterprise agreement, we do not consider that the provisions offended the implied limitation, in particular we do not consider the State's governmental functions of the Commonwealth imposing on the State of Victoria or the CFA a significant "impairment", "interference", "curtailment", "control" or restriction" so as to attract the implied limitation. In our view, the voluntary nature of the agreement is inconsistent with those concepts, which lie at the heart of the doctrine.

Both the CFA and Attorney General for Victoria also argued that an exception to the Melbourne Corporation principle should not be carved out in respect of enterprise agreements which have been voluntarily entered into by a State or State agency because that would be inconsistent with the constitutional underpinnings of the principle, which should not be avoided by a contractual arrangement. We consider that this argument should also be rejected, primarily because it reverses the relevant question. In our view, the correct question is not simply whether the State of Victoria has voluntarily given the Commonwealth any power. Rather the question is whether the relevant provisions of the FW Act which provided for the making of voluntary enterprise agreements and their approval by the FWA validly applied to the States without offending the Melbourne Corporation principle. For the reasons we have given, we consider the statutory scheme of the FW Act did not involve a significant impairment of the type found to exist in *Re AEU*, which involved the imposition of a binding award in an arbitrated context and in the context of a different statutory regime. We accept that holding a State or its agency to its "determination" for the limited period of an enterprise agreement which had been voluntarily made by the parties has a different quality to the imposition by the Commonwealth of an arbitrated outcome on a State or its agencies which has opposed that outcome.

70. This decision means that State Governments or agencies that are voluntarily entering into agreements (which may have offended one of the limbs of *Re AEU*) are less restricted by the *Melbourne Corporation* principle than if the same terms and conditions were imposed on the State or the agency by an award of a tribunal.
71. This decision reflects an unusual common sense approach by the Federal Court Full Bench. It remains to be seen whether this approach will be taken up by the High Court.
72. The position in Victoria is further complicated by the existence of the referral which makes the statutory position of State public servants worse than the common law position on the implied immunity as recently expressed in the UFU Appeal particularly where agreements are being entered into between the State of Victoria and its employees.

73. The nature of each of the State referrals (including the Victorian referrals) are discussed below

### The patch work of referrals presently operating between the States and the Federal systems

74. Since the Workchoices legislation in 1996 the footprint of the Federal industrial relations system has relied on the corporation's power to regulate national system employers and employees. State sector workers remain in the province of the State in NSW, South Australia, Queensland, Western Australia and Tasmania.

| State or Territory | Who is covered by FWA  | Who is covered by State Laws   |
|--------------------|--|--|
| <b>NSW</b>         | Private sector employees and employees of constitutional corporations  | State public sector workers and local government employees   |
| <b>Queensland</b>  | Private sector employees and employees of constitutional corporations  | State public sector workers and local government employees   |
| <b>SA</b>          | Private Sector employees and employees of constitutional corporations  | State public sector workers and local government workers   |
| <b>Victoria</b>    | All employees have been covered by the federal system since 1996   |  |
| <b>WA</b>          | Employees of constitutional corporations with some additional areas where employers and employees have other connections with the federal system | All other employers, for example: employees of state and local governments, partnerships; sole traders and charities |
| <b>ACT</b>         | All employees  |  |
| <b>NT</b>          | All employees  |  |

75. Most areas of Crown employment within those States are incontrovertibly within the State system. There is a problem for some statutory corporations where it is uncertain whether they are constitutional corporations and therefore within the footprint of the *FWA*

### The vexed question of what constitutes a “trading or financial corporation” under 51(20)

76. The law with respect to what constitutes trading corporation for the purposes of s51 (20) of the constitution is vexed.

77. The case law does not provide a predictable metric to determine whether the relative or absolute amount of trading places a statutory corporation in a State or the Federal jurisdiction. If the level of trading increases from one financial year it could transplant a statutory corporation from one system to another.
78. The High Court was alive to the difficulties around the definition of trading or financial corporation for the purposes of s51 (20) in its consideration of the *Workplace Relations Act 1996* in the *Workchoices decision*<sup>7</sup>. The joint judgement of all justices (other than Kirby J) contained the following invitation:

“The challenge to the validity of the legislation enacted in reliance on the corporations power does not put in issue directly the characteristics of corporations covered by s51 (xx). It does not call directly for an examination of what is a trading or financial corporation formed within the limits of the Commonwealth.

There was no occasion to debate in argument, and there is no occasion now to consider, what kinds of corporation fall within the constitutional expression "trading or financial corporations formed within the limits of the Commonwealth". Any debate about those questions must await a case in which they properly must await a case in which they properly arise.”<sup>8</sup>
79. Until recently decision no High Court litigant has taken up the invitation to give better definition to what constitutes a constitutional corporation.
80. There is currently an appeal to the Full Court of the Federal Court by way of a special case in *CEPU v. Queensland Rail and Another* (B63/2013) where one of the contentious issues is whether Queensland Rail is a trading corporation within the meaning of s51(20). A decision is pending in the matter.

### **The purposive approach to characterising a corporation as “trading or financial”**

81. There are a series of decisions in lower Courts which take into account the purpose for which a corporation was formed in a consideration of whether or not a corporation is a “trading or financial” one.
82. There has been a debate in the lower courts and tribunals whether the purpose for which a corporation was established was a definitive factor in a determination of whether or not the corporation was a trading or financial corporation.<sup>9</sup>
83. For example, in *Aboriginal Legal Service v. Lawrence [No 2]*<sup>10</sup> a majority of the Western Australian Court of Appeal held that the Aboriginal Legal Service (“ALS”) was not a trading corporation. In the leading judgement Steyler J his Honour found

<sup>7</sup> *New South Wales v. Commonwealth* 156 IR 1

<sup>8</sup> *Ibid.*

<sup>9</sup> E.g.; *AWU v. Etheridge Shire Council* (2008) 171 FCR 102, *Shire of Ravensthorpe v. Galea* [2009] WAIRC 01149 (2 November 2009), *Auswest Timbers Pty Ltd v. DSE* (2010) 241 FLR 360,

<sup>10</sup> (2009) 178 FCR 252.



the provision of legal services to indigenous people did not have a “trading” character for a combination of eight reasons<sup>11</sup>. His Honour found the ALS:

83.1. provided “public welfare services” and existed for ‘no other purpose’.  
This was not however, determinative;

83.2. did not engage in any other activity of any significance;

83.3. all its income and property had to be used to promote its objects and could not be distributed to its members;

83.4. did not earn or intend to earn profits;

83.5. was a public benevolent institution.

83.6. did not compete for clients.

83.7. Looking at its funding arrangements, it had successfully tendered for the funding contract with the government but that tender was not based on prices.

83.8. Its services were largely rendered gratuitously to clients.

84. On that basis his Honour found that although “ordinarily, the provision of large scale legal and allied services for reward would have a trading character, it was not so with ALS. It lacked a “commercial aspect”<sup>12</sup>

85. The decision of Stelyer J was adopted by Pullin J (with Le Miere J dissenting)

86. There are many State owned corporations that have been sucked into Federal system even though they have more in common with the Aboriginal Legal Service than with Rio Tinto. Many of these corporations are formed for the purposes of implementing State Government policy rather than trading or making a profit.

87. It is not good policy to wait for the developments in the common law of Australia to give more clarity around the meaning of “trading or financial corporation” for the purposes of s51 (20).

88. In circumstances where the workplace relations of a State’s employees has not been referred to the Commonwealth it would make sense if the jurisdiction of the FWA was limited by the inclusion of a more limited definition of “trading or financial corporation” to exclude State government entities that have not been formed for the purposes of trade or finance. These entities tend to be bound by government policies and should be regulated by the State systems in which most public sector workers are regulated.

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<sup>11</sup> *ibid* 337–8 [70]–[72]

<sup>12</sup> *Ibid* at p.338 [74].

89. The unpredictability and uncertainty as to the meaning of trading and financial corporation adds to compliance costs and lack of clarity for both employees and employers.

### 1996 Victorian Referral

90. On 11 November 1996, the Victorian Government announced its decision to refer to the Commonwealth various matters of industrial law. Later that month the Parliament of Victoria enacted the *Commonwealth Powers (Industrial Relations) Act 1996 (Vic)*. Federal provisions dealing with Victorian industrial law commenced operation on 1 January 1997.
91. Not all Victoria's industrial law matters were referred to the Commonwealth. Referring States retained the right to legislate on a range of non excluded matters including law making powers over workers' compensation, occupational health and safety, apprenticeships and long service leave.
92. Victoria's referral specifically excluded a range of public sector matters. These exclusions have been drafted having regard to the *Melbourne Corporation* limitation as expressed in *Re AEU* and *Victoria v The Commonwealth* (1996) 187 CLR 416.
93. Between 1996 and 2005 there were amendments to the Victorian referral dealing with the application of minimum terms and conditions. Federal awards were given the status of common rule.
94. Before the 2007 Federal Election, the Federal Labor Party announced its Forward with Fairness policy, promising that if elected it would rely on all its constitutional powers to legislate national industrial relations laws.

### The 2009 Victoria Referral<sup>13</sup>

95. In June and July 2009, the *Commonwealth Fair Work (State Referral and Consequential and Other Amendments) Act 2009 (Cth)* came into force. That Act facilitated the creation of a national workplace relations system by allowing the Commonwealth to receive industrial relations matters referred to it by the States. All States and Territories, apart from Western Australia, signed a multilateral inter-governmental agreement by 11 December 2009.
96. The basic effect of a state's referral is to extend the definitions of 'national system employee' and 'national system employer' in ss 13 and 14 respectively of the FWA beyond their scope under the Commonwealth's existing legislative powers.

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<sup>13</sup> Andrew Lynch, 'The Fair Work Act and the Referrals Power — Keeping the States in the Game', (2011) 24 *Australian Journal of Labour Law*

97. Victoria and the Commonwealth made an interim bilateral IGA in 11 June 2009 and the state enacted legislation effecting a text-based referral effective from 1 July. Victoria made a second referral through passage of the *Fair Work (Commonwealth Powers) Act 2009 (Vic)*. The second referral was considered necessary because the initial referral related to legislation – the *Workplace Relations Act 1996 (Cth)* – was primarily predicated on the conciliation and arbitration power whereas the FWA is primarily predicated on the corporations power. In the absence of a new referral, the Victorian Government was concerned that the reorientation of constitutional foundations in the legislation meant Victorian employees who are not employed by a constitutional corporation would be excluded from the Fair Work regime.
98. The second referral is text-based and gives the Commonwealth the authority to legislate with respect to Victoria’s entire private sector workforce. 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. The exclusions mean that there are significant gaps in the protections afforded to Victorian public sector workers under the FWA.
99. As we have seen from the *Parks Victoria* case<sup>14</sup> the Victorian referral holds back both limbs of *Re AEU* from the Commonwealth reference. This means that the statutory position of referred Victorian public sector workers is worse off when making enterprise agreements than if they were reliant on the Australian common law position reflected in the UFU appeal decision

### **The problems arising from federal regulation of trading corporations and the immunity**

100. The jurisprudence on the meaning of the term “trading corporations” together with the patch work of different referrals in Australia leads to added compliance costs for state owned corporations in those States other than Victoria who have only referred constitutional corporations and private sector employers.
101. The uncertainty of the extent of the implied intergovernmental immunity and the extent of its application to State sector workers in the Federal system is uncertain.
102. The opacity of the language of the High Court in *Re AEU* decision has led to years of disputation as to the extent of the power of the Federal law to regulate Victorian public servants.
103. This uncertainty has been compounded by the UFU appeal which suggests the *Re AEU* expression of the limits of the immunity may be limited to circumstances

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<sup>14</sup> At paragraphs 62 to 64

where terms and conditions are imposed on the States. This uncertainty will not be settled until the High Court has ruled definitively on the matter.

104. As a matter of policy it is not ideal that the basic minimum standards available to private sector employees through the NES are not available as of right to public sector workers in the Federal system because of the implied intergovernmental immunity.
105. In those circumstances the Commission should make the following recommendations:

### **AGPC Recommendations**

106. Outside of the general referral in Victoria the jurisdiction of the FWA should include a more limited definition of “trading or financial corporation” to exclude State government entities that have not been formed for the purposes of trade or finance. These entities tend to be bound by government policies and should be regulated by the State systems in which most public sector workers are regulated.
107. The current State of the Victorian referral is problematic. The Commission should recommend the Victorian Government;
  - 107.1. modernise the Victorian referral consistent with the UFU appeal decision; and
  - 107.2. enact legislation so that those parts of the NES which the Federal parliament cannot legislate by reason of the Melbourne Corporation principle are available to State employees who are employed by a national system employer (e.g. basic redundancy entitlements)

## Chapter 4

### The unique problem of the assessment of productivity in the public sector

108. Issue Paper 5 makes the following observation about the necessity of differentiating between reforms aimed at productivity increases in the private sector against those in the public sector<sup>15</sup>

Reforms might need to take into account of the fact that outputs and productivity improvements are less easily measured and consequently less transparent than the public sector. Accordingly, arrangements in the WR system aimed at improving productivity in the private sector might not always be easily transferable to the public sector.

109. We agree with this statement.
110. The standard economic definition of productivity is defined as “a ratio between the output volume and the volume of inputs”. In other words, it measures how efficiently production inputs, such as labour and capital, are being used in an economy to produce a given level of output.
111. Assessment of productivity entails a comparison of inputs and outputs. Such an assessment is straight forward in a private sector environment like manufacturing where the outputs are capable of empirical measurement. In general such an assessment is more difficult for service industries.
112. The difficulty of measuring productivity in private sector service industries is compounded in measuring productivity of services in the public sector. The assessment of productivity of public sector workers and the existence of a metric for the measurement of their productivity is a matter of controversy.
113. The term ‘productivity’ is often referred to in discussions about Australia’s economic prosperity, with ‘productivity’ being defined as “the efficiency with which an economy transforms inputs (such as labour and capital) into outputs (such as goods and services).”<sup>16</sup> Improvements in productivity are seen as a way to provide economic and social prosperity for the nation as a whole. However, while economists provide a cogent analysis of productivity on a nation wide level, the definition of a worker’s or workplace productivity is proving much more elusive.

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<sup>15</sup> Page 9 paragraph 1

<sup>16</sup> Australian Bureau of Statistics (2010), ‘Productivity’, *Measures of Australia’s Progress*, cat. no. 1370.0, viewed 25 February 2015, <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1370.0~2010~Chapter~Productivity%20and%20progress%20%285.5.1%29>

114. A productivity assessment is straight forward in a private sector environment like manufacturing where the outputs are capable of empirical measurement. In general such an assessment is more difficult for service industries in which qualitative aspects of the output produced are less tangible,
115. This difficulty is compounded in the provision of services by the public sector in which outputs have a significant qualitative aspect and the economic impact of outputs is diffuse, non-immediate and separated from the point of production. For example: how does one assess the productivity of a child protection officer? Is it the number of children in protection? The number not in protection? The social and economic circumstances of the client? Is it the long term economic impact of effective child protection policies?
116. Comparable examples are extensive and pertain to both direct service delivery by agencies and the development of policy, legislation, and regulation.
117. In recent times the Office of National Statistics in the United Kingdom has attempted to measure productivity for part of the public sector.<sup>17</sup> The report concludes there is no agreed measure of productivity for public sector work.
118. The Commonwealth Department of Finance and Deregulation's *Report of the Review of the Measures of Agency Efficiency* notes that while there is currently no agreed way of measuring productivity in the public sector, there are indicators that Australia is reasonably efficient in comparison with other jurisdictions. The report notes that Australia compares favourably with other countries in terms of input and output efficiency according to the European Central Bank methodology – seventh in a study of 23 industrialised OECD countries in 2000.<sup>18</sup>
119. The productivity of public sector workers is vexed on both a micro and macro level, due to the unique character of the sector:
  - 119.1. **Complex and long-term goals:** Productivity measurements involve assessing direct outputs, and as David Hetherington notes in the recent paper *Social innovation, public good: new approaches to public sector productivity*<sup>19</sup>, politicians have embraced the adoption of direct output measures because it allows them to make tangible electoral promises against which they can be judged – for instance, reducing waiting lists for services. The issue with measuring public service productivity in this way, Hetherington argues, is that these outcomes are only a “narrow and interim measure of the desired final outcome.”<sup>20</sup>

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<sup>17</sup> Atkinson T *Atkinson Review: Final Report: Measurement of government output and productivity for the National Accounts* (2005, Palgrave MacMillan, Basingstoke)

<sup>18</sup> Commonwealth of Australia, Department of Finance and Deregulation, (2011) '*Review of the Measures of Agency Efficiency report*', p 18.

<sup>19</sup> David Hetherington (2013) '*Social innovation, public good: new approaches to public sector productivity*' (Per Capita Research Paper, Per Capita Australia Ltd).

<sup>20</sup> Hetherington *ibid.* at p 6.

Public sector services are usually aiming to achieve long-term and complex goals, for instance better child welfare outcomes, or a well-educated society. Achievement of these goals cannot necessarily be measured over the short-term as productivity measurements are usually reported, rather, they need to be measured over the course of a generation. Similarly, public sector objectives are complex and so cannot necessarily be readily broken down into discreet, easy-to-measure outcomes. Measuring productivity through direct outcomes is incompatible with the long-term and complex goals that are unique to the public sector.

119.2. **Interconnectedness of the sector:** The current measures of what are called “productivity outcomes” in the public sector fail to recognise the interaction and interconnectedness between government agencies. Public service delivery depends on a matrix of actors, but as Hetherington notes, burdening public sector agencies with direct productivity outcomes may distort the behavior of those agencies leading to unintended consequences for others. Disadvantaged people in our society may interact with government agencies through their lives (child protection, housing, corrective services, and federal agencies such as Centrelink) – all of which should be working together towards the best outcomes for those citizens. Productivity targets encourage agencies (and sections or departments within agencies) to primarily strive to achieve their productivity targets, which may inhibit cooperation to achieve the best possible outcomes. An example of this is the false dichotomy between so called ‘front line services’ and ‘back room functions.’ Governments tend to cut ‘back room’ staff while asserting that it will not have an impact on the ‘front line’ – in reality, much of the administrative workload that the ‘back room’ workers used to perform is pushed onto ‘front line’ workers, which can be at the expense of service delivery outcomes to clients. Similarly, we have seen governments around Australia introduce mandatory sentencing laws and fund extra police and increase prison budgets as part of a ‘tough on crime’ agenda, while not recognizing the flow-on effect this law has to other areas such as parole, probation, and post-release welfare support services, which do not tend to receive the additional resources they require to deal with the effects of these laws.

119.3. **Societal good:** The recent Fair Work Australia report entitled ‘*An overview of productivity, business and competitiveness and viability 2011*’<sup>21</sup> points out that official productivity estimates do not measure the well being or living standards of the community. The report states that “productivity measures alone are not a good measure for evaluating public policy because productivity is not the sole determinant of community wellbeing and that policies aimed at improving productivity can have positive or negative impacts on the non-productivity

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<sup>21</sup> Dr. Samantha Farmakis-Gamboni and Kelvin Yeun, ‘*an overview of Productivity, business competitiveness and viability*’ Fair Work Australia Research Report 1/2011, Melbourne Australia.

determinants of community wellbeing”.<sup>22</sup> The House of Representatives Standing Committee on Economics report *Inquiry into raising the productivity growth rate in the Australian economy* also makes this point.<sup>23</sup> The Committee notes that community wellbeing has many dimensions that include environmental capital (amenity, biodiversity and air quality), social capital (social attachments, community involvement and safety) and per capita income (consumption and saving, funding of social activities and funding of institutions, such as law and order), and that “productivity only directly contributes to improvements in wellbeing by increases in per capita income.”<sup>24</sup> The Committee agrees that productivity improvements can be important in ensuring that aspect of community wellbeing; however “the ultimate objective of government policy is community wellbeing and not productivity.”<sup>25</sup> Therefore, when it comes to evaluating policies to improve productivity, “it is important to understand what impact the policies will have on all factors that affect community wellbeing.”<sup>26</sup> For instance, is a ‘productivity saving’ on occupational health and safety investigators good for environmental and social capital aspects of community well being? How can we measure the value of community safety, or public health?

120. Public services outcomes should not be measured in the same way as private sector outcomes because they are inherently different. Public services are unpriced, consumed collectively by the community, delivered in cooperation by a matrix of actors, and are aimed at improving community wellbeing over the long-term. An assessment of productivity of the workers who implement public policy requires a sophisticated and multi faceted approach.
121. Governments have tended to adopt a fallacious notion of public sector productivity and efficiency, epitomized by the adoption of the blunt instrument of the ‘efficiency dividend’.
122. The ‘efficiency dividend’ reduces the administrative budgets of government agencies by a certain percentage each year on the assumption that ‘efficiencies’ will be found to do the same work with fewer resources. As noted by the Centre for Policy Development in their recent report *False Economies: Unpacking Public Service Efficiency*: “While the efficiency dividend may have provided budgetary savings and spurred administrative imagination, evidence shows that it has had a number of unintended negative outcomes and is not effective in achieving

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<sup>22</sup> *ibid* at p 145

<sup>23</sup> Commonwealth House of Representatives, Standing Committee on Economics (2010), *Inquiry into raising the productivity growth rate in the Australian economy*  
[http://www.aph.gov.au/parliamentary\\_business/committees/house\\_of\\_representatives\\_committees?url=economics/productivity/report.htm](http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=economics/productivity/report.htm)

<sup>24</sup> *ibid.* p. 141

<sup>25</sup> *ibid.* p. 142.

<sup>26</sup> *ibid*



efficiencies while maintaining the delivery of quality public services.”<sup>27</sup> Even with the simplistic application of productivity outcomes to the public sector, if productivity is a measurement of inputs and outputs, then surely a reduced level of output in the form of public services means that the efficiency dividend measures have failed to improve productivity in the sector.

123. The Centre for Policy Development suggests that instead of an emphasis on measuring productivity in the public sector, perhaps the emphasis could be put on innovation in the sector over the long term. A focus on innovation would require sufficient resources to enable the implementation of new ideas – the opposite of the constraints placed on government agencies by the ‘efficiency dividend.’ The Centre for Policy Development notes that: “in surveys on public sector innovation award entrants, a lack of resources was the most commonly identified obstacle to innovation.”<sup>28</sup>
124. Governments have also endeavoured to tie wage rises to simplistic notions of productivity that are incompatible with the *raison d'être* of the public sector. The CPSU commissioned a report conducted by the National Institute of Labour Studies that analyses the academic and other research on public sector pay and productivity.<sup>29</sup> It questions the value of assessments of productivity and the attachment of wage rises to this concept in the public sector.
125. The current wages policy of many State governments is to bargain around so called ‘cash at bank productivity’ which amounts to wage rises secured by the removal of terms and conditions. It is a failure of the present federal bargaining system that employers can refuse wage rises on the basis of a barren conception of so called “productivity”, which has the effect that agreements can only be secured by assent to trade offs of conditions for wage rises.
126. It follows that productivity in the public sector is a complex issue. Employers in the public sector cling to a notion of productivity that is either not consistent with the standard economic notion of productivity or not reflective of the contested nature of productivity assessment of productivity in public sector. The current fashion amongst public sector employers for bargaining associated with “efficiency dividends” (which are cover for the removal of terms and conditions) and so called productivity bargaining do nothing to promote the efficiency or effectiveness of the public sector.

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<sup>27</sup> Christopher Stone (2014) ‘*False Economies: Unpacking public service efficiency*’ (Centre for Policy Development). [Cpd.org.au/2014/06/False-economies](http://cpd.org.au/2014/06/False-economies)

<sup>28</sup> *Ibid.* p. 51.

<sup>29</sup> Hancock, Healy, Mavromaras, Sloane and Wei, *National Institute of Labour Studies Brief Report to the CPSU Public Sector Pay and productivity*, (2011, Flinders University, Adelaide).

127. A robust argument can be made that productivity (in the sense of a raw assessment of inputs against outputs) of itself may be a poor measure for the efficient delivery of services in the public sector.
128. Any measure of productivity in the public sector must take a holistic view, incorporating the unique character of the public service and that its aims are geared towards better outcomes for our society.

### **Recommendation for the AGPC**

129. The Commission should look with scepticism on employer demands for “one size fits all” amendments to either State or Federal workplace relations statutes that focus on “productivity bargaining” or making “increases in productivity” as a condition precedent to the making of collective instruments which are either awards of a tribunal or agreements.
130. The Committee should recommend Fair Work Commission to conduct an enquiry into the complexities of productivity in the public sector with the view to developing a more appropriate measurement for productivity in the sector.

## Chapter 5 Statutory Limits on Bargaining in NSW

### Political context in NSW

131. On 26 March 2011 a Conservative coalition government was elected in New South Wales with a large majority in the lower house. As the Commission would be aware a new election will be held in New South Wales shortly after the date for the filing of submissions to this enquiry.
132. The public sector has borne the brunt of the O'Farrell/Baird government's fiscal policy with over 21.5 billion estimated to be cut from employee and program spending from 2011/12 to the end of the current forward estimates
133. Industrial relations legislation has been a principal tool in giving effect to the government's fiscal policy.
134. The pernicious manner in which these laws operate is relevant to this enquiry. These laws construct a workplace relations system which disempowers the collective bargaining capacity of employees and bestows unique rights upon the State, as compared to other employers, to place regulatory limits on the rights of NSW public sector workers.
135. The suite of legislation, subordinate legislation and policy by which the limitations on the rights of public sector workers are imposed is through:
  - 135.1. *Industrial Relations Act 1996*
  - 135.2. *Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011*
  - 135.3. *Industrial Relations Amendment (Public Sector Conditions of Employment) Regulation 2011*
  - 135.4. *State Revenue and Other Legislation Amendment (Budget Measures) Act 2014*
  - 135.5. *NSW Public Sector Wages Policy 2011*
  - 135.6. *Managing Excess Employees Policy*
136. The combined effect of this suite of legalisation is to prohibit unions from achieving pay increases above those set by Government policy, to prescribe the manner in which all Awards are to be determined, and to the limit the matters upon which Awards can bestow enforceable entitlements upon employees.

137. The New South Wales State, being both legislator and employer, has overreached its authority and conferred upon itself powers exercised by no other employer in Australia.
138. The setting of wages and conditions should be either as agreed between the parties or set by an independent umpire such as the NSW Industrial Relations Commission where employers do not unilaterally determine the limits of wage increases.
139. The exceptionalism of the NSW government as employer/legislator is unjustified and serves the agenda of the government while stripping away wages, conditions and industrial rights of its workforce.
140. The NSW Public Service should be regulated to achieve an even playing field for both employer and employee, free from the political influence of the government.
141. The following outlines the statutory limits imposed by the NSW government on its workforce.

#### **Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011**

142. The Amendment Act became law on June 2011. On the day of its assent subordinate legislation was passed under that Act by the making of the *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011*.
143. The PSANSW challenged the constitutional validity of the legislative provisions. The central provision of the proceedings<sup>30</sup> was s 146C (1) of the Act. The High Court found the legislation to be constitutionally valid.
144. The key provision of the legislative change is Section 146C:

#### **146C Commission to give effect to certain aspects of government policy on public sector employment**

- (1) The Commission must, when making or varying any award or order, give effect to any policy on conditions of employment of public sector employees:
  - (a) that is declared by the regulations to be an aspect of government policy that is required to be given effect to by the Commission, and
  - (b) that applies to the matter to which the award or order relates.
- (2) Any such regulation may declare a policy by setting out the policy in the regulation or by adopting a policy set out in a relevant document referred to in the regulation.
- (3) **An award or order of the Commission does not have effect to the extent that it is inconsistent with the obligation of the Commission under this section (emphasis added).**

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<sup>30</sup> *The Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment & Ors* [2012] HCA 58

## What 146C means

145. Section 146C(1) removes all discretion held by the NSW Industrial Commission to consider any subject matter which is dealt with in a Government Policy that has been declared by the regulations. It mandates that “the Commission must... give effect to any policy on conditions of employment of public sector employees”.
146. The broad scope of the power to set policy on any aspect of the conditions of employment means that there is no capacity for the PSANSW to enter into any type of binding agreement or Award with the Government in relation to matters determined by declared government policies.
147. The Government has conferred on itself the capacity to unilaterally determine which conditions can be dealt with through either bargaining or arbitration.
148. Section 146C(2) provides the minister with wide ranging authority to expand the scope of the current arrangements by two mechanisms:
- 148.1. allowing the constraints on the Commission to be set out in a regulation; and
  - 148.2. by enabling a limitation to a term and condition by reference to this regulation in a government policy
149. Section 146C(3) gives any regulation setting out a policy the power to override and render inoperative provisions of an Award or Order that is inconsistent with the terms of that regulation or policy.

## Industrial Relations (Public Sector Conditions of Employment) Regulation 2011

150. Pursuant to the above provisions, the Government issued the *Industrial Relation (Public Sector Conditions of Employment) Regulation 2011* (the 2011 Regulation) on the same day the legislation became law.
151. The key elements of the regulation are as follows:

### **4 Declarations under section 146C**

The matters set out in this Regulation are declared, for the purposes of section 146C of the Act, to be aspects of government policy that are to be given effect to by the Industrial Relations Commission when making or varying awards or orders.

### **5 Paramount policies**

The following paramount policies are declared:

- (a) Public sector employees are entitled to the guaranteed minimum conditions of employment (being the conditions set out in clause 7).
- (b) Equal remuneration for men and women doing work of equal or comparable value.

**Note.** Clause 6 (1) (c) provides that existing conditions of employment in excess of the guaranteed minimum conditions may only be reduced for the purposes of achieving employee-related cost savings with the agreement of the relevant parties.

Clause 9 (1) (e) provides that conditions of employment cannot be reduced below the guaranteed minimum conditions of employment for the purposes of achieving employee-related cost savings.

## **6 Other policies**

(1) The following policies are also declared, but are subject to compliance with the declared paramount policies:

- (a) Public sector employees may be awarded increases in remuneration or other conditions of employment, but only if employee-related costs in respect of those employees are not increased by more than 2.5% per annum as a result of the increases awarded together with any new or increased superannuation employment benefits provided (or to be provided) to or in respect of the employees since their remuneration or other conditions of employment were last determined.”

## **Wage Outcomes of Collective Bargaining**

152. The principal feature of the regulation is the limiting of increases in remuneration or other conditions of employment to 2.5% per annum.

153. Under these laws the New South Wales Government can dictate the remuneration and conditions of employment without its employees having any means to either fairly bargain or to seek the intervention of an independent arbitrator

154. There is nothing to prevent the regulation from being amended to a rate below 2.5%. Similarly there is no compensation envisaged in the event the price level exceeds 2.5%.

155. The legislation allows increases above the 2.5% cap but in very limited circumstances. Any such increase is contingent on the identification of employee related cost savings that fully offset the increase in employee costs.

156. ‘Clause 6(1) (b) constrains the timing of the awarding and payment of increases in excess of the 2.5% cap. It also enables employees to be short changed where the full value of savings achieved need not be passed on to employees as a remuneration increase.

157. Clause 6(1) (d) requires all matters the subject of proceedings to be resolved and prevents further claims to be made during the term of the Award.

158. Clause 6(1) (e) constrains the capacity of the NSW Commission to order back dating of payment.

159. The strictures imposed by the Act and Regulations led to the PSA accepting salary increases of 2.5% on behalf of public sector workers in 2011 and 2012.<sup>31</sup>

160. The result of these measures is that bargaining for any wage rises above the cap is limited to trade offs on existing conditions rather than incorporating discussion of a more holistic approaches to productivity or innovation that may result in more lasting and long term benefit to society

### Further Regulatory Amendments

161. In March 2012 the Federal Government passed legislation to increase the mandatory employer contribution rate to an employees' superannuation fund (pension account). The Act set out a series of incremental increases from the then rate of 9% through to 12% commencing 1 July 2013, completing 1 July 2019.<sup>32</sup>

162. On 1 May 2013, the NSW Government announced its intention to absorb the first incremental increase of 0.25%, and all increases thereafter, into the 2.5% wages cap. In response, the PSA opposed the enforceability of this position within the terms of the regulation as it was then constructed.

163. On 17 June 2013 in *Re Crown Employees Wages Staff (Rates of Pay) Award 2011 & Ors (No 1)* [2013] NSWIRComm 53, the Full Bench of the Commission ruled in favour of the PSA, deciding that increases of up to 2.5% were available to employees as the remuneration cap pertained only to costs awarded by the Commission itself, and not to employee related costs compelled by Commonwealth Government legislation,

164. On 6 May 2014 in *Secretary of The Treasury v Public Service Association & Professional Officers' Association Amalgamated Union of NSW* [2014] NSWCA 138, the Court of Appeal in the Supreme Court of New South Wales upheld the Government's appeal of the Commission's June decision and ordered the subsequent direction issued by the Commission on 17 December 2013, that the full 2.5% be paid, to be quashed. Consequently on 17 June 2014, the State Revenue and Other Legislation Amendment (Budget Measures) Act 2014 was passed by both houses of parliament under the pretext of a Budget supply bill. Schedule 5, Part 5.2 Clause 6 of this Act contains the regulatory amendments previously disallowed by the upper house pertaining to superannuation;

### Diminution of Entitlements Pertaining to Employees Made Redundant

165. On 22 June 2011 the Coalition Government announced a new policy in relation to management of excess employees (Memorandum M2011-11).<sup>33</sup>

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<sup>32</sup> <http://www.comlaw.gov.au/Details/C2012A00022>

<sup>33</sup> Excess Employee policy

166. The 2011 policy contains a number of features that constitute a significant departure from the earlier policies regarding the management of displaced employees. The features of the 2011 policy include that:

- (1) The policy removes reference to redeployment being the principal means of managing excess employees.
- (2) An employee is to be declared excess by their agency immediately they no longer have a substantive position and must, upon being declared excess, be given two weeks to choose between accepting an offer of voluntary redundancy or pursuing redeployment (clause 4.1).
- (3) An excess employee must be made one (and one only) offer of voluntary redundancy with the voluntary redundancy package comprising 4 weeks' (or 5 weeks') notice, severance payment of 3 weeks per year of service up to a maximum of 39 weeks and an additional payment of up to 8 weeks' pay (clause 5). No provision is made for job assist payments or job search leave.
- (4) Excess employees who decline the voluntary redundancy offer are entitled to a three months' retention period during which they may be placed in any suitable position without advertising and are to be provided with priority access to redeployment opportunities. Redeployment means permanent placement in a funded position (clause 6).
- (5) An excess employee who accepts a temporary secondment or assignment during the retention period will continue to be employed for the remaining period of the secondment or assignment (clause 6.2.1). Access to priority assessment or direct placement without advertising will only apply during the retention period.
- (6) If an excess employee is placed in a position at a lower grade, they are to be entitled to salary maintenance at their former grade for a period of three calendar months (clause 6.4).
- (7) If an excess employee is not redeployed at the end of the three months' retention period, they will be forcibly retrenched. The severance payment upon forcible retrenchment is the statutory minimum payment under the Employment Protection Regulation 2001 plus 4 weeks' (or 5 weeks') salary in lieu of notice (clause 7).

167. The PSANSW challenged this policy in the Industrial Court.<sup>34</sup>

168. The PSANSW case sought declaratory relief in relation to contracts of employment of public sector employees who had been declared excess, to determine:

- Whether government policies relating to the management of excess employees formed part of the contracts of public sector employees who had been declared excess; and
- Whether the services of any of the employees may only be lawfully dispensed with in accordance with s 56 of the *PSEM* Act.

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<sup>34</sup> *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Director of Public Employment* [2011] NSWIRComm 152



169. The Industrial Court found in favour of the Association's application, finding the arrangement to be 'unfair' under s 105 of the Industrial Relations Act 1996. Subsequently the Government responded to this judgment by introducing The *Public Sector Employment and Management Amendment Bill 2012*. This bill effectively nullified the outcome of the judgment as it may have applied to similar cases in the future.
170. Significantly, it amended s 56 to remove the requirement that excess officers could not be retrenched while there was 'useful work' available in a department. This removed the common obligation on employers in a redundancy situation to any take steps to mitigate the impact of the abolition of a position by genuinely exploring alternative employment.
171. The key amendment is set out below:

**56 Excess officers of Departments**

- (1) If the appropriate Department Head is satisfied that the number of officers employed in the Department or in any part of the Department exceeds the number that appears to be necessary for the effective, efficient and economical management of the functions and activities of the Department or part of the Department.
  - (a) the Department Head is to take all practicable steps to secure the transfer of the excess officers to on-going public sector positions, and
  - (b) the Department Head may, with the approval of the Commissioner, dispense with the services of any such excess officer who is not transferred to an on-going public sector position.
- (2) An officer does not cease to be an excess officer merely because the officer is engaged (on a temporary basis) to carry out other work in a public sector agency.
- (3) In this section: on-going public sector position means a position in a Department, or in any other public sector service, that is not temporary.

172. To compound the injustice the government also inserted in the *PSEM Act* a new section 103A which states:

Division 2 of Part 9 of Chapter 2 of the *Industrial Relations Act 1996* (Unfair contracts) does not apply to contracts of employment of members of staff of any public sector agency that are alleged to be unfair for any reason relating to excess employees, including the following:

- (a) when and how members of staff become excess employees,
- (b) the entitlements of excess employees (including with respect to redeployment, employment retention, salary maintenance and voluntary or other redundancy payments),
- (c) the termination of the employment of excess employees.

173. The effects of these changes were worsened upon the commencement of the *Government Sector Employment Act 2013* which replaced the *PSEM Act* as the underpinning legal structure for public sector employment in the state on 24 February 2014. The jurisdictional exclusion of excess employees from the unfair contract provisions of the Industrial Relations act was maintained under section 74 of the Act.

## AGPC Recommendation

174. The Commission in its Issue Paper 5 asked the question “to what extent should workplace relations provisions vary with the public and private enterprise”. This should not include the power of a State sector employer to unilaterally impose wage outcomes and terms and conditions on its employees abusing its power as an employer and legislator. This approach treats public sector employees in New South Wales as second class citizens and offends Australia’s international obligations in relations to freedom of association and collective bargaining<sup>35</sup>.
175. Under s 8(j) of the *Productivity Commission Act 1998* (“AGPC Act”) the AGPC, “in the performance of its functions, the Commission must have regard to the need for Australia to meet its international obligations and commitments.” The NSW legislative package referred to in this Chapter offends Australia’s international labour obligations and should be, on that basis, the subject of criticism by the AGPC
176. The AGPC should recommend that no public sector workers in Australia should be the subject of targeted legislation which specifically restricts the capacity of public sector works to bargain or seek awards for certain terms and conditions or prohibits the pay rises open to them through those avenues

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<sup>35</sup> The CPSU, ACTU and PSANSW has filed a Complaint to the Freedom of Association Committee of the International Labour Organisation complaining that the legislation discussed here offends ILO conventions

## Chapter 6

### Matters arising from other Issues Papers

#### Issue Paper 3 – Dispute settlement and FWA conciliation and arbitration

177. In Issue Paper 3:

177.1. at pages 1 to 3 the AGPC gives some analysis of the current Federal processes for the settlement of bargaining and industrial disputes. At the top of page 1 the Commission articulates its “overarching concern” as to “the extent to which bargaining arrangements allow employers and employees to genuinely craft arrangements suited to them - a broad issue for stakeholders in this inquiry”

177.2. at pages 13 it raises the issue of limited conciliation and arbitration and asks the question “to what extent should there be changes to the FWC’s conciliation and arbitration powers”

178. We refer to paragraphs 32 to 53 of this submission under our previous section entitled “Private Sector regulation should differ from public sector regulation”. In that section we critique the current bargaining and dispute settling regime:

178.1. Public sector workers have significant and unique problems negotiating with a Sovereign State;

178.2. This requires a dispute settlement regime where the Federal (or other) tribunal has strong compulsive powers in relation to conciliation and a broad ability to compel arbitration should an impasse be reached in bargaining, or in any other dispute, between the State and its employees;

178.3. Under the current bargaining regime of the FWA the Fair Work Commission is a bystander limited to granting procedural rights. This role does little to ameliorate the power imbalance between public sector workers and their employer,

179. It follows we consider there should be changes to the FWA to enhance the compulsory powers of conciliation and to allow compulsory arbitration in a broader range of circumstances.

#### A short note on the independence of the Commission

180. Given the politicisation of workplace relations, the contestable nature of the work of the Fair Work Commission, and its role to act in the public interest, it is vital the independence of the Fair Work Commission should be secured.

181. The AGPC should reject any submission made to place Commission members on fixed term contracts.
182. The continuation of tenure is vital to the performance of the statutory role of Commission members. Tenure is necessary to ensure Commission members undertake their duties with independence and free from political interference.

#### **Issue paper 4 – Anti Bullying provisions**

183. At pages 4 and 5 of Issue Paper 4 the Commission deals with the new anti-bullying regime in the FWA. It asks the question (amongst others) “What are the impacts, disadvantages and advantages of the anti-bullying provisions of the FWA for employers and workers”.
184. A major flaw in the legislation is the exclusion of State employees employed by national system employers, such as employees of the Crown in right of the State in Victoria.
185. Under the new subsection 788FD (1) workers are only covered by the national anti-bullying laws if the bullying occurs while the worker is working at a ‘constitutionally-covered business’.
186. A ‘constitutionally-covered business’ is defined in subsection 789FD(3) as either: ‘a person conducting a business or undertaking (PCBU) who is: a constitutional corporation, the Commonwealth, a Commonwealth authority, a body corporate incorporated in a Territory, or the business or undertaking is conducted principally in a Territory or Commonwealth place.’
187. This does not include persons employed by the Crown in Right of Victoria.
188. There is no logic to the inclusion of Commonwealth Government employees and the exclusion of Victorian Government employees.
189. The internal administrative processes and policies within the Victorian Government are not sufficient and may not, in some circumstances, be conducted with the level of independence and impartiality when compared to a Federal statutory process undertaken by the FWC.
190. It follows there is a major flaw in the FWA anti-bullying procedure. Victorian public sector workers suffer a significant disadvantage in being excluded from its operation.
191. The AGPC should recommend the definition of “constitutionally covered business” in the FWA be amended to include the Crown in Right of the State of Victoria and its agencies.

## Issue Paper 5 – Transfer of Business provisions

192. The *Fair Work Amendment (Transfer of Business) Act 2012* created parallel provisions for state public sector employees to those contained in Part 2-8 of the Act, in circumstances of transfer of business between a non-national system state public sector employer and a national system employer.
193. We support the intended operation of these provisions and consider they provide important safeguards for state public sector employees.
194. Prior to the 2012 Amendment, state public sector employees were not protected by the FWA transfer of business provisions
195. This enabled actions by state employers such as those outlined in *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v NSW Department of Education and Communities [2012] NSWIRComm 96*
196. The events leading to this proceeding involved the NSW Government corporatizing (and therefore transferring to the federal system) what was previously a state public sector entity. Despite the “new” employer enjoying substantial beneficial use of the “old” employers’ assets, not to mention the NSW Government maintaining ministerial share-holder control, transferring employees were not entitled enforceable provisions that required the maintenance of their pay and conditions
197. The importance of effective safe guards for state public sector employees in transfer of business matters is demonstrated by the implementation of the *National Disability Insurance Scheme (NSW Enabling) Act 2013*.
198. Under this law the NSW Government has given itself the capacity to transfer state public sector employees on a non-voluntary basis to the non-government sector without such a transfer constituting a retrenchment, redundancy or termination of employment.
199. The construction of this Act is underpinned by provisions of the FWA with the FWA prevailing to the extent of any inconsistency.
200. This provides additional clarity with the respect to coverage and enforceability of “transferring arrangements”, as created by the (Enabling) Act, upon employment within the national system.
201. In their current form the transfer of business provisions do however leave workers exposed to potentially disadvantageous arrangements.

202. As outlined in chapter 5, state governments who have retained control of workplace laws for the purpose of their own employees have been able to use their powers as legislator to restrict the allowable terms and conditions of awards.
203. Where the transferable entitlements of employees are linked to the transfer of copied State awards there is the evident inequity that certain crucial aspects of the total employment arrangement, such as redundancy pay, may be argued not to be transferable due to their exclusion under state law.
204. Furthermore, the current provisions do not account for the extent of work transferred between state-government and private sector national system employers by the use of contingent labour arrangements.
205. Under section 768 AD (1) of the FWA for a transfer of business to have occurred, a person must have transferred, along with the work, between the state employer and a “new employer”. Section 768 AD (3) defines the connection between state employer and the “new employer” by outsourcing, as only having only occurred when the transferring work is performed by one or more transferring employees.
206. In situations in which a vacant role is filled by a labour hire employee (legally employed by the “new employer”) not previously employed by the state employer, no transfer of business can be deemed to have occurred, despite the work clearly being transferred, or outsourced, between employers.
207. This inability for transfer of business provisions to apply to labour hire employees allows employees performing the same work being the subject of vastly different conditions of employment. This provides an incentive to state governments to undermine the conditions that prevail across their workforce by engaging contract employees.
208. Section 768BG provides for consolidation orders to be made in relation to non-transferring employees. This section intends to facilitate equitable employment conditions for employees undertaking the same work within the same employer. The reliance of this section on a transferring employee (employee A) to exist for a copied state instrument to be made in the first instance however, prevents the provisions from being applied to labour hire employees in these circumstances.
209. It follows we consider the transfer of business provisions are drafted too narrowly to cover many transfers of work or employees from a State employer. This, in many circumstances, defeats the purpose of the most recent amendments
210. The AGPC should recommend that:
  - 210.1. all prevailing terms and conditions of employment should be captured by the transfer of business provisions. The effect of this would be that, in addition to the

transfer of copied state awards, all terms and conditions of employment that are the subject of the National Employment Standard should be transferable.

The scope of the transfer of business provisions should be broadened so that they apply to the situation of labour hire in the State sector context. The provisions should enable consolidation orders to apply to all employees that undertake work transferred from State sector employment including labour hire employees undertaking work previously performed by State sector workers.

## **Chapter 7 Conclusion and suggested recommendations/executive summary**

**How should WR arrangements in state and federal public services (and any relevant state-owned enterprises be regulated). In particular to what extent should WR provisions vary with the public and private status of an enterprise?**

211. On the basis of the proceeding Chapters we consider that the following recommendations should be made by the AGPC:

### **The meaning of “trading and finance” corporations should be more limited in the limited referral States.**

212. The jurisdictional footprint of the federal system should be more limited for States that have not referred their public sector workforce.
213. The FWA should include a definition of “trading or financial corporation” to exclude State government entities that have not been formed for the purposes of trade or finance. These entities tend to be bound by government policies and should be regulated by the State systems in which most public sector workers are regulated.

### **The Victorian Referral**

214. The current State of the Victorian referral is problematic. The AGPC should recommend the Victorian Government:
- 214.1. modernise the Victorian referral consistent with the UFU appeal decision; and
- 214.2. enact legislation so that those parts of the NES which the Federal parliament cannot legislate by reason of the *Melbourne Corporation* principle are available to State employees who are employed by a national system employer (e.g. basic redundancy entitlements)

### **Tenure for Commission members should continue**

215. Commission appointments should continue to be tenured positions. Tenure is vital for members of the Fair Work Commission to attract persons of high calibre to future appointments, to ensure independence and to protect the Commission from political interference.

### **Broader arbitral powers in the Federal Act**

216. The Federal Government should amend the FWA to enable the tribunal to arbitrate a bargaining dispute where employees of the Crown in right of the States, its corporations or agencies reach an impasse in bargaining with their employer.

### **Productivity**

217. The AGPC recognises the difficulties associated with the assessment of public sector productivity.



218. No “one size fits all” amendments should be made to either State or Federal workplace relations statutes that focus on “productivity bargaining” or making “increases in productivity” as a condition precedent to the making of collective instruments as awards or agreements.
219. Fair Work Commission should conduct an enquiry into the complexities of productivity in the public sector with the view to developing a more appropriate measurement for public sector productivity

### **Particular restrictions on the bargaining and other rights of public sector workers**

220. No public sector workers in Australia should be the subject of targeted legislation which specifically restricts the capacity of public sector workers to bargain or seek awards including certain terms and conditions or which prohibits them from seeking pay rises through agreement or award making processes.

### **Anti Bullying provisions**

221. The definition of “constitutionally covered business” in the anti bullying provisions of the FWA should be amended to include the Crown in Right of the State of Victoria and its agencies.

### **Transfer of business provisions**

222. All prevailing terms and conditions of employment should be captured by the transfer of business provisions. In the public sector context this means that in addition to the transfer of copied state awards, all terms and conditions of employment that are the subject of the National Employment Standards should be transferable.
223. The scope of the transfer of business provisions should be broadened so that they apply to the situation of labour hire in the State sector context. The provisions should enable consolidation orders to apply to all employees that undertake work transferred from State sector employment including labour hire employees undertaking work previously performed by State sector workers.