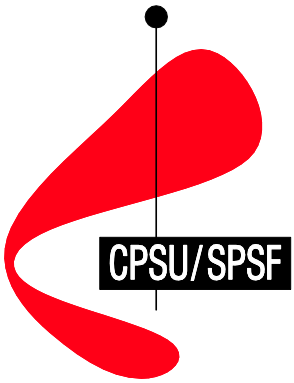

CPSU Submission to the Senate Education, Employment and Workplace Relations Committee

For an enquiry into the conditions of employment of state public sector employees and the adequacy of protection of their rights compared to other employees

"WRESTLING THE SOVEREIGN"

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Chapter 1. **INTRODUCTION**

1.1. Universal attacks on State and Territory public sector workers

1. Over the last three years State and Territory Governments of all political colours have mounted attacks on their respective public sectors purportedly as a method of dealing with economic instability in the aftershocks of the global financial crisis. The CPSU therefore welcomes the opportunity to present an overview of the current industrial circumstances confronting our members in state and territory public sector employment.

2. Although prefigured by the Howard Government federally, the Kennett government in Victoria, and the Court government in Western Australia, the extent of the cuts and mass redundancies are unprecedented in recent history.

    2.1. New South Wales: staff reduction target of 15000 and a 1.2 percent "labour expense cap"

    2.2. Victoria: 4,200 "non service delivery positions" over three years

    2.3. Queensland: 15,000 positions

    2.4. Western Australia: 400 positions in 2011

    2.5. South Australia: Between 2012 and 2016 the number of full time equivalent employees will decrease by 3,893[1]

    2.6. Tasmania: 2,300 over four years

    2.7. Northern Territory: staffing cap on staffing levels over 2010 and ,since the election of the CLP Government on 25 August 2012, 600 job cuts have been announced, a recruitment freeze has been implemented and hundreds of temporary contracts have not been renewed

    2.8. ACT: 180 positions through "natural attrition, reduced contractor expenses and voluntary redundancies"

3. Those cuts have been accompanied by unilateral removal of long held rights of access to industrial tribunals, imposition of cuts by the so called "efficiency dividend", legislated removal of terms and conditions, and wage policies which prescribe upper limits below the national average and insufficient to keep up with inflation.

[1] Source: 2012-13 Budget Paper 1, Budget Overview, p5

4. At the same time, a propaganda campaign has been used by various governments to justify these cuts. The campaign has sought to demonise public sector workers by creating a false dichotomy between "faceless unproductive bureaucrats" and "front line workers" and to denigrate the work of those who are the interface between the government and the citizens of each State and Territory.

1.2. Workplace relations between a Sovereign State (or Territory) Government and its employees

5. The difficulties of public sector workers in these austere circumstances are compounded by the unique nature of the Crown as an employer:

   5.1. The Crown is the employer, legislator and policy determiner. It has the unique ability to amend legislative and regulatory framework to suit its agenda as an employer and an unparalleled ability to unilaterally remove conditions and impose restrictions on bargaining;

   5.2. There is a 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 relatively unlimited capacity to engage in lengthy disputes with its employees, to initiate and fund Court and Tribunal proceeding and engage in strategic delay;

   5.3. The primary decision maker (that is Cabinet, or the relevant Minister or staff from the relevant departments) generally do not participate directly in negotiations. This can be used tactically to facilitate surface bargaining. The studied absence of a decision maker is used to delay or avoid concessions.

1.3. About the CPSU

6. The CPSU is by far the biggest union representing State and Federal system public sector employees in Australia. We are, therefore, in a unique position to make an important contribution to this enquiry.

7. 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"). This submission is filed on behalf of the entire membership of the CPSU including our members in each of the States and the Territories.

8. 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.

9. While most of the SPSF Group members are within the jurisdiction of the various State industrial tribunals, three major groups of our members are in the Federal jurisdiction:

    9.1. employees of the Crown in Right of the State of Victoria and its agencies;

    9.2. general staff in universities; and

    9.3. direct employees of State owned corporations that are constitutional corporations as well as employees of former State government agencies.

10. As the name of the SPSF Group suggests, it is a federation composed of five relatively autonomous State registered unions, known in the SPSF Rules as "Associated Bodies" with the Victorian Branch existing only as a branch of the Federal union. The eligibility rules of the Associated Bodies are essentially mirrored in the SPSF Rules as Branches of the SPSF for New South Wales, Queensland, South Australia, Western Australia and Tasmania. Victoria has no corporate existence other than as a branch of the SPSF.

11. The Associated Bodies of the SPSF are defined as:

    11.1. The Public Service Association and Professional Officers Association Amalgamated Union of New South Wales ("PSANSW");

    11.2. The Public Service Association of South Australia Incorporated ("PSASA");

    11.3. State Public Services Federation of Tasmania [now named the Community & Public Sector Union (SPSFT) Inc Tasmania] ("CPSUT");

    11.4. Civil Service Association of Western Australia Incorporated ("CSA"); and

    11.5. The Queensland Public Sector Union of Employees ("QPSU").[2]

12. Each of the five "Associated Bodies" is registered under their respective State industrial legislation.

1.4. Position of the various constituents of the CPSU and the format of this submission

13. The Associated Bodies, the Victorian Branch of the CPSU SPSF and the PSU Group have differing views on the efficacy of their respective State based statutory

[2] The status of the QPSU and its successor Together Queensland and its relationship with our union is presently a matter of controversy. As a result nothing in this submission addresses matters to do with the State of Queensland or its workers

architecture, and on the difficulties associated with bargaining with the Crown under the *Fair Work Act 2009*.

14. For example, the South Australian and Tasmanian Branches of the CPSU – SPSF have a preference for their State regimes which provide ready access to arbitration following an impasse in bargaining and enjoy a less complex regulation of industrial action.

15. The different position in each State reflects the legislative, political, and historic framework that applies to the regulation of public sector terms and conditions of employment.

16. It should also be noted by the Committee since the decline of the conciliation and arbitration power as a foundation of the current *Fair Work Act* there is no means for the union to initiate a jurisdictional change. The State Government, not the union, has complete control over whether to refer power or not.

17. To accommodate these differences we have configured this submission with separate Chapters for each State and one for the ACT and the Northern Territory which give some detail of the level and extent of the cuts and removal of rights in each of those jurisdictions.

    17.1. Chapters 2 to 7 deal with New South Wales, Victoria, South Australia, Western Australia, Tasmania and the Northern Territory and the ACT respectively.

    17.2. Chapter 8 deals with the specific problems for workers who transfer between the State and Federal public sector as a result of COAG processes.

    17.3. Chapter 9 deals with the new amendments to the Fair Work Act 2009 which extend the transfer of business provisions to State public sector workers. We discuss why this provision does not deal with the growing use of outsourcing by the use of labour hire.

    17.4. Chapter 10 contains a discussion of the common themes that arise from the era of public sector cuts.

    17.5. Chapter 11 contains answers to the various terms of reference of this enquiry.

    17.6. Chapter 12 contains a conclusion and the recommendations sought by the CPSU from this enquiry.

Chapter 2. **NEW SOUTH WALES**

2.1. Workplace Relations under the O'Farrell Government

1. The O'Farrell Government has declared war on the industrial relations system in NSW. The transfer of its industrial relations power to the Commonwealth was given effect by the *Industrial Relations (Commonwealth Powers) Act 2009*. Consequently, private sector workers are now dealt with in the federal industrial relations sphere. Leaving only state public sector employees to predominately remain under the state industrial relations system.

2. Industrial relations policy has become a principal tool for giving effect to the government's fiscal policy. Employee related expenses account for 48% of the total expenses of government (BP2 4-11 (2012-13). The 2011-12 budget papers cite amending the *Industrial Relations Act 1996* to implement the wages policy and the adoption of forced retrenchment as key measures for achieving budget savings. Savings to be achieved through the Labour Expenses Cap introduced in the 2012-13 Budget would not be possible without the leverage provided by the policy approach taken to manage excess employees.

3. 15,000 jobs in the New South Wales public sector are to be cut under this and previously announced measures. These staff reductions have been facilitated by the industrial relations arrangements put in place under the O'Farrell Government.

2.2. Size and composition of the NSW public sector

4. The New South Wales (NSW) public sector is the largest employer in Australia and represents just over 11% of the total NSW workforce. The NSW public sector comprises 332,555 full-time equivalent employees. According to the NSW Treasury, the NSW public sector made up 14.9% of the NSW economy in 2010-2011. NSW general government expenditure on goods and services was $55.8 billion and general government capital expenditure was $7 billion. The state's net worth was $170.4 billion as of June 2012.

5. Almost 30% of the public sector works in health, another 30% of the public sector workforce works in education. Other major services include transport, police and justice, trade, investment and finance, and family services.[3]

[3] Public Service Commission, State of the NSW Public Sector Report 2012

6. Just over 37% of the NSW public sector workforce work outside of Sydney. The Hunter region has the largest proportion of public sector employees outside of Sydney with 9.56%.[4]

7. The NSW Public Service Commission breaks down the NSW public sector in the following manner:

   7.1. The Public Service – based on Schedule 1, Part 1 of the *Public Sector Employment and Management Act 2002* (NSW) (PSEM Act). The Public Service has some key industrial arrangements applying to all Departments and Agencies. It has two divisions: Principal Departments; and other Public Service Divisions.

   7.2. Principal Departments – this includes the Department of Premier and Cabinet, NSW Treasury, the Department of Attorney General and Justice, and the Department of Trade and Investment.

   7.3. Other Public Service Divisions – this includes the Board of Studies, Public Prosecutions, Legal Aid Commission, Fire and Rescue NSW (excluding fire fighters).

   7.4. Special Employment Divisions – based on Schedule 1, Part 3 of the *Public Sector Employment and Management Act 2002*. For example: ancillary groups of staff who are not part of the Public Service but who are employed under Chapter 1A in connection with an agency that, in most cases, also has Public Service staff assigned to it.

   7.5. NSW Health Service – based on the *Health Services Act 1997* such as: Local Health Networks and the Ambulance Service.

   7.6. NSW Police Force – based on the *Police Act 1990*.

   7.7. Teaching Service – based on the Teaching Services Act 1980 and the Technical and Further Education Commission Act 1990.

   7.8. State Owned Corporations – based on Schedule 1 and Schedule 5 of the *State Owned Corporations Act 1989*. For example, Delta Electricity, Ausgrid, Essential Energy.

   7.9. Other – based on separate industrial arrangements for each agency. For example: fire fighters, ICAC, Parliament and some areas of transportation.

[4] Public Service Commission, State of the NSW Public Sector Report 2012

8. It should be noted that the PSA does not have coverage of employees governed by the *Health Services Act 1997,* and the *Teaching Services Act 1980.*

2.3. Bargaining with the O'Farrell Government

9. Wage setting in the NSW Public Sector operates within a narrow framework that denies public sector workers the basic right to collectively bargain over wages and conditions or to have their wages and conditions determined by an impartial and independent arbiter.

10. A legislative framework has been established by the O'Farrell Government which enables the Government, in its capacity as an employer, to unilaterally determine the wages and conditions of its employees. This arrangement effectively removes for public sector workers the basic right that should be enjoyed by all workers to be able to collectively bargain with their employer over wages and conditions.

11. This situation has been brought about by a range of legislative, regulatory and policy measures introduced by the Government since its election in March 2011.

2.4. The legislated enforcement of wages policy and the diminution of public sector worker rights

12. The current wages policy was adopted in June 2011 and replaced the 2007 wages policy that had operated under the previous Labor Government. This previous policy placed an emphasis on negotiation and enabled a broader approach to identifying savings measures to cover increases above the 2.5%.

13. The Policy the O'Farrell Government adopted:

    13.1. limits any potential to obtain increases above the 2.5% to a narrowly constructed definition of employee related costs; and

    13.2. assigns no value to productivity improvements unless they are directly identified with changes to remuneration and conditions of employment or work practices specifically those matters contained in industrial instruments.

14. Unlike the previous policy, the current wages policy has the force of law which severely limits the capacity of employees to negotiate outcomes that deviate from the policy. It also means the discretion of the NSW Industrial Relations Commission to increase salaries or take into account unique factors is severely constrained.

15. The legislative regime which placed these statutory restrictions on wages and other conditions are detailed below.

2.4.1. Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011

16. The Amendment Act was assented to in June 2011 and immediately came in to operation to enable the making of the *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011.*

17. The PSA challenged the constitutional validity of the legislative provisions. The central provision of the proceedings[5] was s 146C(1) of the Act. The High Court found the legislation to be constitutionally valid.

18. The key provision of the legislative change is set out in the new Section 146C, which is detailed below:

> **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.
>
> (4) This section extends to appeals or references to the Full Bench of the Commission.
>
> (5) This section does not apply to the Commission in Court Session.
>
> (6) This section extends to proceedings that are pending in the Commission on the commencement of this section. A regulation made under this section extends to proceedings that are pending in the Commission on the commencement of the regulation, unless the regulation otherwise provides.
>
> (7) This section has effect despite section 10 or 146 or any other provision of this or any other Act.
>
> (8) In this section:
>
> ***award or order*** includes:
>
> (a) an award (as defined in the Dictionary) or an exemption from an award, and
>
> (b) a decision to approve an enterprise agreement under Part 2 of Chapter 2, and
>
> (c) the adoption under section 50 of the principles or provisions of a National decision or the making of a State decision under section 51, and

[5] *The Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment & Ors* [2012] HCA 58

(d) anything done in arbitration proceedings or proceedings for a dispute order under Chapter 3.

conditions of employment—see Dictionary.

public sector employee means a person who is employed in any capacity in:

(a) the Government Service, the Teaching Service, the NSW Police Force, the NSW Health Service, the service of Parliament or any other service of the Crown, or

(b) the service of any body (other than a council or other local authority) that is constituted by an Act and that is prescribed by the regulations for the purposes of this section.

19. The use of legislative power to facilitate the direct determination of wages and conditions of public sector employees represents a retrograde step which returns NSW public sector workers to a position similar to that which existed prior to the extension of the application of the *Industrial Arbitration Act* to cover employees of the Crown.

20. To appreciate the full scope of the change requires detailed elaboration on each of the key sections of the amending legislation.

What 146C means

21. Section 146C(1) removes all discretion held by the Commission when it comes to consideration of a matter the subject of which deals with an aspect of 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".

22. The broad scope of the power to set policy relating to any aspect of the conditions of employment of public sector employees means that there is no capacity for employee representative organisations to enter into any type of binding agreement or Award with the Government in relation to conditions of employment for public sector employees.

23. The Government having conferred on itself the capacity to unilaterally determine which conditions, if any, are available to be dealt with through the usual mechanisms of the existing state industrial relations system.

24. This constraint needs to be considered in the light of a state industrial relations system that has as its central feature compulsory conciliation and arbitration.

25. Unlike the *Fair Work* arrangements, the statutory bargaining framework and protected industrial action regime are completely absent from the state industrial relations system in NSW. Public sector employees are left with no leverage in the bargaining system and no avenue for seeking redress through the arbitration process where the Government chooses to exclude particular aspects of public sector employee conditions of employment from the purview of the Commission.

26. The operation of this process was recently illustrated in the *SASS Redundancy Case*[6] where the operation of the Government's wages policy, specifically the requirement that policies "regarding the management of excess public sector employees are not to be incorporated into industrial instruments" precluded the making of a redundancy award that met some of the basic Termination Change and Redundancy Test Case standards.

27. Section 146C(2) provides the minister with wide ranging authority to expand the scope of the current arrangements by not only allowing the constraints on the Commission to be set out in a regulation but by also enabling a policy to be applicable by way of reference in a regulation.

28. This mechanism has also operated in the context of the Excess Employee Policy where the details of the policy are entirely at the discretion of the Executive. Unlike the broader wages policy which has had its salient details spelt out in the *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011,* detailed below. The Excess Employees Policy is not detailed in a regulation but it is able to arrogate to itself a range of conditions and entitlements of public sector employees under the undefined ambit of "Excess Employee Policies", which are then excluded from the jurisdiction of the Commission.

29. Part of the justification for the approach taken by the Government was that the system had an implicit check and balance by way of the capacity of the parliament to disallow any regulation. Clearly once a regulation is made that contains a provision that is broad and lacking in specificity, such as the reference to "Excess Employees Policies" dealt with above, the capacity for the parliament to exercise this oversight role is constrained.

30. Section 146C(3) gives any regulation setting out a policy that must be given effect to the power to override and render inoperative provisions of an Award or Order that is inconsistent with the terms of that regulation or policy.

31. In recognition that the arrangements that have been put in place may be used in an unfair or inequitable way. Section 146C(7) provides that "this section has effect despite section 10 or 146 or any other provision of this or any other Act. Section 10 provides that "the Commission may make an award in accordance with this Act <u>setting fair and reasonable conditions of employment</u> for employees." Section 146 sets out the general functions of the Commission:

> **146 General functions of Commission**
>
> (1) The Commission has the following functions:

[6] See below at heading 2.5.2

(a) setting remuneration and other conditions of employment,

(b) resolving industrial disputes,

(c) hearing and determining other industrial matters,

(d) inquiring into, and reporting on, any industrial or other matter referred to it by the Minister,

(e) functions conferred on it by this or any other Act or law.

(2) The Commission must take into account the public interest in the exercise of its functions and, for that purpose, must have regard to:

(a) the objects of this Act, and

(b) the state of the economy of New South Wales and the likely effect of its decisions on that economy.

This subsection does not apply to proceedings before the Commission in Court Session that are criminal proceedings or that it determines are not appropriate.

32. The significant observation to be made is that Section 146(2) requires the Commission to take into account the "public interest" and to take into account the objects of the Act.

33. The Objects of the Act are set out in Section 3:

3 Objects

The objects of this Act are as follows:

(a) to provide a framework for the conduct of industrial relations that is fair and just,

(b) to promote efficiency and productivity in the economy of the State,

(c) to promote participation in industrial relations by employees and employers at an enterprise or workplace level,

(d) to encourage participation in industrial relations by representative bodies of employees and employers and to encourage the responsible management and democratic control of those bodies,

(e) to facilitate appropriate regulation of employment through awards, enterprise agreements and other industrial instruments,

(f) to prevent and eliminate discrimination in the workplace and in particular to ensure equal remuneration for men and women doing work of equal or comparable value,

(g) to provide for the resolution of industrial disputes by conciliation and, if necessary, by arbitration in a prompt and fair manner and with a minimum of legal technicality,

(h) to encourage and facilitate co-operative workplace reform and equitable, innovative and productive workplace relations.

34. The Objects that require the Commission to take into account the need to provide "a framework for the conduct of industrial relations that is fair and just" or to promote "efficiency and productivity in the economy of the State" or to "encourage and facilitate co-operative workplace reform and equitable, innovative and productive workplace relations" are all subordinate to the requirement to give effect to Government policy.

35. The clear intention of the legislative amendments is for Government policy to prevail even when it is not fair or just or even when it is contrary to the public interest.

2.4.2. Industrial Relations (Public Sector Conditions of Employment) Regulation 2011

36. The Government wasted no time in using the regulatory power conferred by the *Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011*. It issued the *Industrial Relation (Public Sector Conditions of Employment) Regulation 2011* on the same day the legislation received Royal Ascent in June 2011.

37. The key elements of the Regulation are set out below:

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 that do not increase employee-related costs by more than 2.5% per annum.

(b) Increases in remuneration or other conditions of employment that increase employee-related costs by more than 2.5% per annum can be awarded, but only if sufficient employee-related cost savings have been achieved to fully offset the increased employee-related costs. For this purpose:

(i) whether relevant savings have been achieved is to be determined by agreement of the relevant parties or, in the absence of agreement, by the Commission, and

(ii) increases may be awarded before the relevant savings have been achieved, but are not payable until they are achieved, and

(iii) the full savings are not required to be awarded as increases in remuneration or other conditions of employment.

(c) For the purposes of achieving employee-related cost savings, existing conditions of employment of the kind but in excess of the guaranteed minimum conditions of employment may only be reduced with the agreement of the relevant parties in the proceedings.

(d) Awards and orders are to resolve all issues the subject of the proceedings (and not reserve leave for a matter to be dealt with at a later time or allow extra claims to be made during the term of the award or order). However, this does not prevent variations made with the agreement of the relevant parties.

(e) Changes to remuneration or other conditions of employment may only operate on or after the date the relevant parties finally agreed to the change (if the award or order is made or varied by consent) or the date of the Commission's decision (if the award or order is made or varied in arbitration proceedings).

(f) Policies regarding the management of excess public sector employees are not to be incorporated into industrial instruments.

(2) Subclause (1) (e) does not apply if the relevant parties otherwise agree or there are exceptional circumstances.

(3) The ***relevant parties*** in relation to a matter requiring agreement under this clause are the employer and any other party to the proceedings that is an industrial organisation of employees with one or more members whose interests are directly affected by the matter.

7 The guaranteed minimum conditions of employment

(1) For the purposes of this Regulation, the ***guaranteed minimum conditions of employment*** are as follows:

(a) Unpaid parental leave that is the same as that provided by the National Employment Standards.

(b) Paid parental leave that applies to the relevant group of public sector employees on the commencement of this clause.

(c) Employer payments to employee superannuation schemes or funds (being the minimum amount prescribed under the relevant law of the Commonwealth).

(2) The ***guaranteed minimum conditions of employment*** also include the following:

(a) Long service or extended leave (being the minimum leave prescribed under Schedules 3 and 3A of the *Public Sector Employment and Management Act 2002* or the *Long Service Leave Act 1955*, whichever Act is applicable to the employment concerned).

(b) Annual leave (being the minimum leave prescribed under the *Annual Holidays Act 1944*).

(c) Sick leave entitlements under section 26 of the Act.

(d) Public holiday entitlements under the *Public Holidays Act 2010*.

(e) Part-time work entitlements under Part 5 of Chapter 2 of the Act.

8 Meaning of employee-related costs

For the purposes of this Regulation, ***employee-related costs*** are the costs to the employer of the employment of public sector employees, being costs related to the salary, wages, allowances and other

remuneration payable to the employees and the superannuation and other personal employment benefits payable to or in respect of the employees.

9 Meaning of employee-related cost savings

(1) For the purposes of this Regulation, ***employee-related cost savings*** are savings:

(a) that are identified in the award or order of the Commission that relies on those savings, and

(b) that involve a significant contribution from public sector employees and generally involve direct changes to a relevant industrial instrument, work practices or other conditions of employment, and

(c) that are not existing savings (as defined in subclause (2)), and

(d) that are additional to whole of Government savings measures (such as efficiency dividends), and

(e) that are not achieved by a reduction in guaranteed minimum conditions of employment below the minimum level.

(2) Savings are ***existing savings*** if they are identified in a relevant industrial instrument made before the commencement of this Regulation (or in an agreement contemplated by such an industrial instrument) and are relied on by that industrial instrument, whether or not the savings have been achieved and whether or not they were or are achieved during the term of that industrial instrument.

Key features of the 2011 Regulation

38. The key feature of the regulation is the limiting of increases in remuneration or other conditions of employment to 2.5% per annum. The capacity of the Government in its role as an employer to be able to dictate the remuneration and conditions of employment of its employees without those employees having any means to either fairly bargain or seek the intervention of an independent arbitrator is a retrograde step in the history of industrial relations in this country.

39. The amount, which is currently set at 2.5%, is obviously able to be changed and could potentially be set at zero or at a negative rate. This rate is currently justified on the basis that it is equal to the midpoint of the RBA inflation target. In spite of this it contains the risk that the cap will operate to reduce the real wages of public sector employees over time.

40. The cap enables increases above the 2.5% cap but these increases are entirely contingent on the identification of employee related cost savings that fully offset the increase in employee costs. Implicit in this provision is the narrowing of the opportunity for increases to a limited range which necessitates the cashing out of existing conditions.

41. It has the real prospect of limiting the innovation that has occurred in the public sector in relation to the development of new conditions of employment such as lactation breaks and domestic violence leave, neither of which could have been achieved under

the existing arrangements as they would contribute to increases in employee related costs.

42. Clause 6(1)(b) also severely 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 in full to employees as a remuneration increase.

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

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

45. Clause 6(1)(f) prevents policies "regarding the management of excess public sector employees" from being "incorporated into industrial instruments". This provision has significance particularly in relation to possible obligations under International Labour Organisation (ILO) conventions. The Act defines an industrial instrument to mean: an award, an enterprise agreement, a public sector industrial agreement, a former industrial agreement, a contract determination or a contract agreement. The significance of this provision is that it prevents public sector employees from obtaining any legally enforceable rights in relation to redundancy.

46. The broader implications of this provision are considered elsewhere in this submission along with the recent interpretation of this provision by the Industrial Court of NSW.

Meaning of *Employee Related Costs* and *Employee Related Cost Savings*

47. Clause 8 sets out the meaning of employee related costs. It defines them as "the costs to the employer of the employment of public sector employees, being costs related to the salary, wages, allowances and other remuneration payable to the employees and the superannuation and other personal employment benefits payable to or in respect of the employees."

48. Clause 9 defines Employee Related Cost Savings as "savings that are identified in the award or order of the Commission that relies on those savings", and "that involve a significant contribution from public sector employees and generally involve direct changes to a relevant industrial instrument, work practices or other conditions of employment." It then goes on to set out a number of exclusions to the definition, most significant of which is the exclusion of "whole of Government savings measures (such as efficiency dividends)". This provision enables the Government to announce savings measures that may be achieved via employee related cost reductions but none of the consequential savings would be available to fund increases in remuneration. This is exactly the case with the Labour Expenses Cap which was announced in the 2012 Budget.

49. The capacity to take into account staff reductions and its impact on labour productivity in the public sector and for that productivity gain to be recognised through increased salaries is an inequitable feature of the operation of the wages policy entrenched through the regulation. This approach also runs counter to the national agenda around improving productivity and labour productivity specifically. Providing incentives for employees to look for productivity improvements is clearly in the public interest. The current arrangements consciously preclude productivity considerations by narrowing the scope of savings measures that can be considered for obtaining increases above the cap and by overriding the capacity of the Industrial Relations Commission to take into account the objects of the Act in relation improving productivity (Section 3 (h)) as it has in its wage fixing principles.[7]

50. The capacity for the government to narrow the opportunity for employees to achieve increases above the cap, whatever the rate it may be set at, confers on the Government, in its capacity as an employer, an unparalleled asymmetry of bargaining power in its favour.

51. The approach that has been taken by the NSW Government also conflicts with the trend in public administration, consistent with Westminster principles of public sector independence, to remove from government the direct determination of the conditions and salaries of public sector employees. This sentiment is reflected in the existing provisions of the *Public Sector Employment and Management Act*, specifically section 122 which states:

> **122 Director-General not subject to Ministerial control**
>
> The Director-General is not subject to the control and direction of the Minister in:
>
> (a) determining salaries, wages or other remuneration, and other conditions of employment, or
>
> (b) dealing with a dispute relating to an industrial matter.

52. This provision reflects the intention to place at arm's length the salary and condition setting function for the Public Service from the Government and the political process. The logical consequence of the approach that has been taken by the Government in NSW is to draw Public Sector Unions into the political process as there is no independent means for attaining improvements to salaries and conditions under the current arrangements.

53. The arrangements also threaten to undermine the long term capacity of the public sector to maintain its service levels. Australian Bureau of Statistics (ABS) trends suggest a relative decline in public sector wages in relation to the private sector[8]. Over time this

[7] State Wage Case 2010 (No 2) [2011] NSWIRComm 29, principle 8.3
[8] ABS, Wage Price Index Report, September Quarter 2012, catalogue 6345.0, 14 Nov 2012

will cause an imbalance in the labour market with a potential to create a drain of skills away from the public sector into the private sector. This has consequences for retention and turnover. Already there is an apparent problem of a disparity between the public sector wage rates in some IT classifications relative to their market price leading to an increasing reliance on contract staff in this area[9]. The current framework for wage setting in the public sector has no mechanism to correct this situation.

2.4.3. Industrial Relations Amendment (Disputes Order) Bill 2012

54. To further compound the disparity in bargaining power that has been created by the implementation of the Government's wages policy through legislation, the Government have introduced into the parliament a bill to increase the fines for industrial action. The *Industrial Relations Amendment (Disputes Order) Bill 2012* proposes to increase the fines for a contravention of a dispute order from the current maximum of $10,000 to $110,000. The bill currently remains stalled in the Legislative Council but if passed will further constrain the bargaining capacity of public sector workers.

2.5. Redundancy and Redeployment

55. NSW public sector workers have no enforceable rights in relation to termination, change and redundancy.

56. There is no enforceable right to redeployment – where alternative employment is available. Nor is there a right to any fixed payments by way of severance. All benefits currently enjoyed by public sector workers are at the absolute discretion of the employer.

2.5.1. The Excess Employees case and its aftermath

57. The O'Farrell Government announced a new policy in relation to managing excess employees on 22 June 2011 (Memorandum M2011-11). The PSA challenged this policy in the Industrial Court.[10]

58. 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:

(1) The policy removes reference to redeployment being the principal means of managing excess employees.

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[9] NSW Auditor-General's Report, Financial Audit, *Roads and Traffic Authority of NSW*, volume eight, 2011, pg 61

[10] *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Director of Public Employment* [2011] NSWIRComm 152

(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).

59. In the Excess Employees case the PSA 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.

60. The PSA sought orders declaring that the contract of employment, employment and collateral arrangements and/or related conditions between employers and employees in the public sector who had been declared excess are harsh, unfair, unconscionable and contrary to the public interest.

61. 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.

62. 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.

63. 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. Pertinent to the inquiry, s 56 in its unamended form represented a legislative formalisation of the

standard obligation under the principles established in the Termination Change and Redundancy Case; that an employer in a redundancy situation should take steps to mitigate the impact of the abolition of a position by genuinely exploring alternative employment.

64. 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.

65. The consequence of this change is to limit the requirement to redeploy excess staff to permanent positions only. This means in situations where there may still be work of a temporary nature available, that a redundant employee is capable of performing, there is now no obligation on the employer to offer that work to the employee in preference to forced retrenchment.

66. This point is significant when consideration is given to both the number of voluntary cessations that occur in the NSW public sector each year and the number of employees that are engaged through labour hire firms, a matter dealt with elsewhere in this chapter. The most recent available figures sourced from the NSW Public Sector Workforce Profile show that there were 26,594 separations in 2010 of which some 11,024 were by resignation or retirement.[11]

67. Rather than availing itself of the ample opportunities for redeployment in the sector, the Government has chosen to shirk its responsibilities as an employer and force retrenchments on employees who could reasonably be expected to be found alternative work.

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

[11] NSW Public Sector Workforce: 2010 Snapshot and Snapshot tables, page 18

> 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.

69. This provision further erodes the capacity for public sector employees to obtain enforceable rights in relation to redundancy by closing off the unfair contracts jurisdiction.

2.5.2. The SASS redundancy case

70. The recent decision in the *SASS Redundancy Case*[12] illustrated the operation of the Government's wages policy. Specifically the requirement that policies "regarding the management of excess public sector employees are not to be incorporated into industrial instruments" precluded the making of a redundancy award that met some of the basic Termination Change and Redundancy Test Case standards.

71. The Commission wrestled the jurisdictional issue and determined it is precluded from varying the Award to include enforceable award provisions to regulate redundancy protections for SAS staff. The Commission's primary powers to make and vary an Award are derived from s 10 and s 17 of the *Industrial Relations Act* (the Act) respectively. Section 21 of the Act requires certain conditions are to be provided in awards; including employment protection provisions. However the powers of the Commission are restricted by s 146C of the Act.

72. When making or varying any award, s 146C requires the Commission to give effect to any policy on conditions of employment that is declared by regulation.

73. Boland J, President [at 94] states: in my opinion, cl 6(1)(f) declares, for the purposes of s 146C of the Act, a policy. That policy is that "policies regarding the management of excess public sector employees are not to be incorporated into industrial instruments".

74. The limitation on the Commission given the purposes underlying cl 6(1)(f) is that it may not make an award or order inconsistent with the provisions of the policy. That does not prevent the Commission exercising its conciliation and arbitration powers in a dispute situation provided no award or order is made inconsistent with the policy.

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[12] *Re Crown Employees (School Administrative and Support Staff) Award* [2012] NSWIRComm 127

75. In essence, the Commission is constrained by cl 6(1)(f) of the Regulation from incorporating policy regarding the management of excess public sector employees into an award.

76. In obiter dictum, His Honour identified the exclusion of long-term temporary employees from the Managing SAS Staff Policy to be unreasonable if not discriminatory. His Honour [at 103] stated "the purpose of a redundancy payment is to compensate for the loss of transferrable benefits and for the hardship and inconvenience of losing employment: *Westfield Holdings v Adams* [2001] NSWIRComm 293. I cannot imagine the loss of employment by a long-term temporary employee is any less of a hardship or inconvenience than it is for a permanent employee".

77. The point is salient, in a statement from Christine Jones, a 61 year old woman employed since 1986, [at 15] "as a single parent I rely heavily on the wage I receive from performing these duties to meet the financial commitments of my household. If a redundancy was made available should my job be abolished it would provide me with some financial security to give me extra time to find further employment. This is particularly the case as I do not qualify for the aged pension till I am 65."

78. In further obiter, His Honour [at 105] raised the issue of consultation, noting the policy does not impose any obligation on the Government to consult with employees or their representatives in the event the Government contemplates a change to the policy.

79. His Honour [at 106] noted the Award does not contain what might be regarded as a standard award provision regarding the introduction of change, which was inserted in many awards following the seminal decision of the Australian Industrial Relations Commission in the 1984 *Termination, Change and Redundancy Case:* (1984) 8 IR 34 and (1984) 9 IR 115. The decision provides for notice of termination, consultation on major change and pending redundancies and severance arrangements for employees whose jobs become redundant.

80. The recent decision exemplifies the operation of the Government's wages policy and its constriction on the independent Industrial Relations arbiter.

2.6. The rise of insecure employment, use of labour hire and privatisation

81. NSW public sector employers have used outsourcing and privatisation as a means to reducing costs. Employee related costs constitute almost 50% of the budget. Contracting out, the extensive use of labour hire and privatisation have been used to reduce employee related cost and used as a mechanism to avoid the payment of award entitlements or to reduce applicable award conditions.

82. Prisons, Community Services and TAFE are all recent examples of the diminution of public sector worker rights through contracting out, extensive use of labour hire and

privatisation. The primary purpose for work to be transferred out of the public sector is for public sector employers to reduce their costs by reducing the conditions of employees.

83. Public sector Awards and Agreements cease to generally apply once a transfer of work from a NSW Public Sector Employer to a Federal System Employer occurs. This enables the public sector employer to continue to enjoy the benefits of savings made by reductions in direct employee costs despite the functions continuing to be delivered to and paid for by the tax payer. While in limited circumstances specific individual employees may enjoy the retention of conditions and salary levels on transmission, other employees of the national system employer are able to be engaged on inferior conditions to that which previously applied to the category of work prior to its transfer to the private sector (national system) employer.

2.6.1. Temporary employment

84. Many public sector workers are trapped in temporary positions that continue as temporary with no ability for the employee to gain permanency or some or all of the benefits of permanency including access to severance payments on termination.

85. The *Public Sector Employment and Management Act 2002* regulates the employment of Departmental temporary employees in the NSW public service. Section 27 allows for the appointment of Departmental temporary employees. It is important to note that the Act also states that the usual basis for employment of staff is to be the employment of permanent officers.

86. The Act states that Departmental temporary employees may be employed for the following reasons:

(a) for the duration of a specified task or project;

(b) to carry out the duties of a position that is temporarily vacant;

(c) to provide additional assistance in a particular work area;

(d) in connection with the secondment or exchange of staff;

(e) to undertake a traineeship or cadetship; or

(f) for any other temporary purpose.

87. The maximum period for which a Departmental temporary employee may be employed at any one time is 3 years.

88. Section 31 of the Act states that a long term temporary employee who has had continuous employment for 2 years maybe be appointed permanently. There is a range of criteria that a long term temporary employee must meet before they can be appointed permanently.

89. Section 32 also allows for the appointment of special temporary employees who are employed by a "political office holder".

2.6.2. Labour Hire – C100

90. In early 2011, the PSA sought information under the *Government Information (Public Access) Act 2009* pertaining to the extent of the use of agency staff in the NSW public sector. The report was prepared by the Department of Services, Technology and Administration (DSTA) and showed that in 2009-2010 a total of $385,246,021 was spent on agency contract staff. This equates to approximately 5,682 FTE jobs, paid at the NSW public sector average annual total gross earnings of $67,791.[13] Data supplied by DSTA shows that in 2009–2010 a total of 10,372 labour hire staff were engaged across the NSW public sector with a total of 6,103,960 hours worked by labour hire staff.

91. The data for the 2010–2011 financial year showed that the total amount spent by the NSW public sector in 2010–2011 on labour hire staff increased dramatically to $468,057,260. The data also showed that in the same year 11,976 labour hire staff were engaged by the NSW public sector, with 7,031,982 hours worked.

92. The data for the 2011–2012 financial year showed the total amount spent by the NSW public sector has expanded in the period to $492,270,285. The number of labour hire staff engaged increased to 15,943. A slight reduction has been recorded in relation to the number of hours worked by labour hire in the period to 6,830,604 hours.

[13] *NSW Public Sector Workforce: A 2010 Snapshot and Snapshot Tables*

	2009-2010	2010-2011	2011-2012
Amount spent on labour hire staff	$385,246,021	$468,057,260	$492,270,285
Number of labour hire staff engaged	10,372	11,976	15,943
Hours worked	6,103,960	7,031,982	6,830,604

Procurement Guidelines with respect to labour hire

93. There are strict procurement guidelines that an agency must follow to engage labour hire staff. These guidelines are outlined in the document *Contract 100 – Contingent Workforce Contact* (*Contract 100*).

94. *Contract 100* states that NSW Government Agencies "may have a requirement" to hire "contingent labour" in the following situations:

- To replace personnel for short periods
- To engage personnel quickly
- To obtain personnel with particular skills
- To cover unexpected vacancies
- To work on projects
- To meet the need for extra personnel during busy periods
- To meet recruitment needs in changing times
- To cover unexpected increases in workloads

95. These requirements do not differ from those in the *Public Sector Employment and Management Act 2002* that regulate the employment of temporary and casual staff in the NSW public sector. The Association is of the strong view that the use of labour hire staff is not necessary considering that the PSEM Act allows for the employment of casual staff.

Inferior pay rates on outsourcing by labour hire

96. *Contract 100* refers to Personnel Pay Rate bands for pricing a job, as well as providing minimum and maximum rates. *Contract 100* also states that Suppliers are obligated to comply with minimum award pay rates were they exist.

97. The CPSU (SPSF) NSW Branch has obtained the Personnel Pay Rate bands for each of the sixteen Suppliers, and it is clear that these rates do not directly correlate to the

salary rates for public sector workers paid under the *Crown Employees (Public Sector – Salaries 2008) Award.* [14]

98. In many cases the Personnel Pay Rates provided are less than what a casual public servant paid under the *Crown Employees (Public Sector – Salaries 2008)* would expect to be paid. For example: the maximum rate for an administrative assistant engaged through Randstad is the equivalent of what a casual public servant engaged as a Step 4 General Scale Clerk, which is the minimum rate for a twenty year old clerk in the public service. Likewise, an accountant can expect to be paid anywhere from the equivalent of a casual Step 11 General Scale Clerk to a casual Grade 7 Clerk rate of pay. A permanently employed qualified accountant employed by the NSW public sector would expect to be paid at, at least Clerk Grade 7 level.[15]

99. In addition, there does not seem to be any fair and transparent process in determining at which Personnel Pay Rate a person is paid. It seems to be purely arbitrary.

[14] Public Service Association, *Submission to the Independent Inquiry into Insecure Work in Australia,* Attachment C, 20 January 2012
[15] Id at Attachment D

Chapter 3. **VICTORIA**[16]

3.1. Composition and size of Victorian public sector[17]

1. The Victorian public sector is divided into public service bodies, and public entities operating in the wider public sector. The diversity of the Victorian public sector is reflected in the diverse range of legal forms that exist. Victorian public sector organisations outside of the public service are public entities. This is a term defined by s. 5(1) of the Public Administration Act 2004. Public entities can be established under:

   - specific enabling legislation (agency-specific enabling legislation);
   - legislation that creates multiple entities (sector-specific legislation);
   - broader enabling legislation, such as the *State Owned Enterprises Act 1992*, or as Corporations Act companies separate from the *State Owned Enterprises Act*;
   - the direction of a Minister or departmental secretary, although these type of entity are often advisory bodies, and do not have a basis in legislation.

2. At June 2012, the Victorian Public Sector employed 266,575 people, representing nine per cent of the Victorian labour force (ABS Cat. No. 6291). The 37 Victorian Public Service bodies (11 departments and 26 authorities and offices) accounted for 14 per cent (or 38,650) of this workforce, with the remaining 86 per cent (or 227,925) working for the 1,780 public entities that employed staff. The Victorian Public Sector is a major employer in regional and rural Victoria, with approximately one-third (31 per cent) of its workforce working outside metropolitan Melbourne, amounting to 11 per cent of the regional and rural workforce.

3. In December 2011 the Victorian Government introduced a public service staffing reduction of some 3,600 non-service delivery positions over 2012–15 to be achieved through voluntary redundancies and the non-renewal of fixed term contracts. Staff in what the Government defined as essential service delivery areas—for example teachers, police, nurses and childcare workers—were exempted from the reduction. The Government also stated that it would reduce its employment of contractors and consultants. A further 600 job losses were announced in the 2012-13 Budget.

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[16] For details of Victoria's industrial arrangements see *Independent Report of the Victorian Industrial Relations Taskforce. Part 1: Report and Recommendations,* State of Victoria, 2000.

[17] Fact Sheet #5. State Services Authority (November 2012).
http://www.ssa.vic.gov.au/images/stories/product_files/252_FactSheet05.pdf

3.2. Independent Review of State Finances

4. In January 2011 the Victorian Government set up a review into state finances known as the Vertigan Committee. Its terms of reference were:

Victoria's finances

- The development of a comprehensive financial management plan for the State's finances which will be periodically reviewed and which should include:
    - clear short and long-term financial objectives and strategies; and
    - potential expenditure reforms informed by trends over the last decade.
- The outlook for the Victorian budget beyond the forward estimates period including:
    - the potential impact of future demographic change on Victorian public finances and options to address emerging pressures; and
    - stress testing the Victorian budget to examine the potential impacts of a range of economic and fiscal shocks.

Debt management

- The creation of a State debt management plan, including potential strategies to repay debt and provide a buffer for future economic shocks.

Service delivery and infrastructure

- The efficiency and effectiveness of agency approaches to service delivery.
- The use of benchmarking and performance information to drive results.
- The use of/potential for private sector involvement in service delivery (where appropriate/relevant) including through the use of market-based instruments or other service delivery reforms.
- Infrastructure funding, management and delivery of previous infrastructure projects, and, if these are to be found to be deficient, factors that may have contributed to the current situation and possible remedies, including:
    - an assessment of possible actions to maximise competition for tenders, reduce costs for the projects and increase transparency.
- Possible cost savings through the identification of existing waste in expenditure and potential for efficiency gains.

Public sector governance

- Improved governance of Victorian public sector departments and public bodies:
    - reforms or improvements to the efficiency, effectiveness, financial, operational and other performance and accountability of government departments and public bodies.

5. Victorian Treasurer, Kim Wells, released the review's interim report in April 2011[18]. The Report argued that Victoria's finances went into structural deficiency under the former Government. Wells' media release on the report said "…Victoria faces an expected $4.65 billion revenue shortfall over the forward estimates compared to what

[18] *Interim report of the Independent Review of State Finances*, Victorian Government, April 2011

was forecast in the 2010-11 Budget Update published in December."[19] The Report argued that the state's finances were unsustainable, debt needed to be reduced, and infrastructure investment funded from recurrent budget. The Review's final report was to be provided to Government in February 2012. To date this has not been made public. CPSU believes that the Review has provided the rationale for the cuts to public service implemented since late 2011.

6. In March 2012 the Government established a Better Services Implementation Taskforce to oversee the implementation of structural changes to the public service including the staffing reductions and outsourcing. This was established to implement the recommendations of the Vertigan Committee Report.

7. In its 2012–13 Budget the Government introduced further staffing reduction of some 600 positions resulting from savings to be made in individual program areas. In June 2012 the Government indicated that since December 2011 public service staffing had been reduced by 910 positions through attrition and non-renewal of contracts, and in September 2012 the Government stated that 2,600 voluntary redundancies had been applied for.[20]

8. Two further reports were released in December 2012, the Mid year Financial Update (14/12/12) and the Securing Victoria's Economy (21/12/2012) both of which detail further structural changes to the public service including privatisation and outsourcing, both with potentials for further job losses.

3.3. The 1996 industrial relations referral

9. 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, which commenced operation on 1 January 1997, are found in Part XV and Schedule 1A of the *Workplace Relations Act 1996 (Cth).*

10. Not all Victoria's industrial law matters were referred to the Commonwealth. Victoria retained law making powers over workers' compensation, occupational health and safety, apprenticeships, long service leave and some public sector matters. Relevantly, the public sector exclusions are in the Appendix below.

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[19] The Hon Kim Wells MP Treasurer Media release, Wednesday 27 April 2011, Interim report of the Independent Review of State Finances

[20] 'Public sector staffing reductions in the states and territories', Flag Post, Information and research from Australia's Commonwealth Parliamentary Library, September 12, 2012

11. These exclusions have been drafted having regard to the implied limitations in the Australian Constitution applying to the exercise of Commonwealth legislative power over the States. The limitation was first identified by the High Court in the *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31, which requires that the legislative powers of the Commonwealth not be exercised in a manner which discriminates against States or destroys or curtails the exercise of the States or their continuing to function as such. In *Victoria v The Commonwealth* (1996) 187 CLR 416; and *Australian Education Union Australian Nursing Federation; Ex parte Victoria* (1995) 184 CLR 188 (Re.AEU), the implications of the limitation were dealt with.

12. 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.

13. 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.

3.4. The 2009 Referral[21]

14. In June and July 2009, the *Commonwealth Fair Work (State Referral and Consequential and Other Amendments) Act 2009 (Cth)* came into force. The Act facilitates 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.

15. 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 FW Act beyond their scope under the Commonwealth's existing legislative powers, chiefly corporations, so as to cover individuals in that jurisdiction who simply employ, or are employed by, others in the private sector.

16. 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)* – that was primarily predicated on the conciliation and arbitration power whereas the *Fair Work Act* is primarily predicated on the corporations power. In the absence of a new referral, the

[21] Andrew Lynch, 'The Fair Work Act and the Referrals Power — Keeping the States in the Game', (2011) 24 Australian Journal of Labour Law

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.

17. 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 (see Appendix 1) mean that there are significant gaps in the protections afforded to Victorian public sector workers under the *Fair Work Act.*

3.5. CPSU Victorian public sector industrial instruments

18. As at January 2013, CPSU SPSF Vic Branch has 39 industrial agreements with separate Victorian public sector employers. These include Victorian public service departments and agencies, statutory authorities, and state owned businesses. Terms and conditions of employment in the Victorian public service are regulated by the *Victorian Public Service Workplace Determination 2012 (AG895510).* This instrument covers the 11 departments and 26 authorities and offices that comprise the Victorian public service.

3.6. A commentary on wages policy, control of agencies and so called "productivity bargaining"

19. Unlike the private sector, a public sector employer is subject to Government control. The state gets numerous opportunities to exercise control over the conduct of bargaining whilst denying the opportunity for these to be considered as part of the bargaining process including:

    19.1. Budget. Most public sector agencies are solely dependent on the State Government budget for their income.

    19.2. Budget cycle. A 12 month budget cycle commencing September each year enables the state to make numerous changes during the nominal 3 to 4 year period of an enterprise agreement.

    19.3. Income generation. Control over an agency's capacity to raise income by setting fees and charges or determining the circumstances if or where changes can apply.

    19.4. Service standards. Determining whether a service will be free or require payment of an entry charge e.g. arts and cultural institutions, national parks.

    19.5. Electoral cycle. Funding and programs subject to political change due to electoral cycle or political change in government policy.

20. Victoria largely achieves compliance with its pay policy by the control it exercises over public entities which are treated as separate employers for bargaining, but whose independence of action is subject to state control. Statutory requirements to consult or comply with ministerial directions, control of budgets are the principle means used.

21. Like previous Victorian governments, the current Baillieu Government has published public sector workplace relations policies including pay policy.[22] Following the 2010 Victorian election, the public sector unions were advised that existing industrial relations policies would remain unchanged until reviewed. A notable exception was the introduction of a new pay policy. This provided for an annualised wage increase of 2.5% pa. The application of this policy to the entire Victorian public sector without any regard to the particular needs of each area has led to much industrial disputation during the latest bargaining round, which commenced in 2011.

22. Ultimately new policies, to replace the 2010 version, were issued in August 2012 without consultation. An updated version was issued in December 2012, again without consultation or formal notification. The policy states: (p7)

> "There is no ceiling or limit on wage outcomes. However, genuine enterprise agreement outcomes in excess of the wage guideline rate must be fully offset by genuine productivity gains linked to workplace reform achieved as part of agreement negotiations. These gains must be bankable, i.e. they must generate savings that will be available to fund any outcome in excess of the wage guideline rate."

23. Victoria, like other state governments, has adopted a particularly narrow approach to productivity gains. In 2011 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.[23] It questions the value of assessments of productivity and the attachment of wage rises to this concept in the public sector.

24. 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 productivity.

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[22] Public Sector Workplace Relations policies, Department of Treasury and Finance, December 2012. http://www.dtf.vic.gov.au/CA25713E0002EF43/pages/public-sector-industrial-relations-public-sector-workplace-relations-policies. Note policy initially issued in August 2012 was amended in December 2012

[23] Hancock, Healy, Mavromaras, Sloane and Wei, National Institute of Labour Studies Brief Report to the CPSU (2011) Public Sector Pay and productivity, (2011, Flinders University, Adelaide). A copy of this report is attached to this submission as Attachment 1

One predominantly designed for the manufacturing sector that does not reflect the longitudinal basis of public sector work. This is compounded further where academic research questions whether public sector productivity is capable of adequate measurement using this model that was not designed to measure public sector work. The research highlights the conundrum facing the bargaining parties where a static policy application requires that agreements can only be secured by assent to trade offs of conditions for wage rises. This is concessional bargaining. It is not bargaining around productivity.

25. Productivity improvements occasioned by new technology, continuous improvement, budget "efficiency dividends", redundancy, or legislative reform are not able to be taken into consideration in bargaining as the State government refuses to move from its mantra of cash at bank savings. Even when changes are identified there has been no agreement about the value that should be attributed to the changes for the purposes of increases above the so called 2.5% guideline rate. From December 2012, Victoria's updated pay policy now requires agencies to have regard for pending increases to the superannuation guarantee and to discount the increase on offer in wages by the commensurate increase in the superannuation levy.

3.7. Victorian state employees in the federal system

3.7.1. Good Faith Bargaining[24]

26. Victorian public sector employers are required to have their management logs of claim approved by the Victorian Government prior to the commencement of bargaining. The policy[25] requires approval 6 to 9 months before the nominal expiry date of an existing agreement to be renegotiated. There is no apparent penalty on a public sector employer who fails to meet these timelines. Employees though are significantly disadvantaged as effective negotiations are unable to commence. Further, the policy prevents pay increases being backdated until agreement has been reached in the workplace.

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[24] Note: ANF submission deals with this too. See http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=eet_ctte/public_sector_employees/submissions.htm

[25] Public Sector Workplace Relations policies, Department of Treasury and Finance, December 2012. http://www.dtf.vic.gov.au/CA25713E0002EF43/pages/public-sector-industrial-relations-public-sector-workplace-relations-policies

27. Following conclusion of negotiations, the in principle agreement (IPA) must be approved by the Victorian Government. Pre and post bargaining approval processes include:

- Relevant portfolio Department for particular public sector agency
- Department of Treasury and Finance
- Department of Premier and Cabinet
- Treasurer
- Minister for Finance

None of these entities are the employer under the *Fair Work Act*.

28. CPSU has had cases where up to 12 months delay has occurred from IPA being reached in the workplace and final sign off by the Victorian Government prior to commencement of approval processes required under the Fair Work Act.

29. 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 (GFB). The employer is a bargaining representative (s176(1)(a)); and they 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)).

30. Bargaining orders are available from the Fair Work Commission where a breach of GFB can be demonstrated. However the Act provides no remedy in circumstances where a person or organisation has effective control over bargaining and is not the employer or a nominated representative of the employer. CPSU proposes that the Act be amended to provide for applications to be made to the FWC to declare a person/entity to be a bargaining representative where it can be demonstrated that the entity has control of the bargaining outcome. This would make that entity subject to the GFB requirements. Excessive delays in bargaining processes may be a breach of GFB, in which case bargaining orders could be sought.

3.7.2. Bargaining representatives

31. CPSU's experience with bargaining in the Victorian public service during 2011-12 highlights an additional problem with role of bargaining representatives. The VPS is one employer – the State of Victoria. However, the VPS comprises 11 departments and 26 authorities and offices. Since at least 2004 the industrial instruments regulating employment have taken the form of core terms and conditions of employment applicable to the entire VPS; and additional Departmental/agency specific

arrangements. The *VPS Determination 2012* has 13 separate appendices dealing with agency specific arrangements. The document is comprehensive and represents the outcome of bargaining over time.

32. The Act establishes a regime where a union has the same bargaining status as individual employees, although it is the default representative for all its members. There is a requirement for an employer who agrees to bargain to issue a "Notice of Representational Rights". This provides the mechanism for individual bargaining representatives to participate in negotiations (s178). In the case of the VPS, ultimately some 20 bargaining representatives were appointed. Only two sought to represent more than one individual. The others represented themselves. Mostly the bargaining representatives were interested in single issues or limited matters. None provided a comprehensive claim or draft agreement for negotiation.

33. VPS bargaining proceeded for many months via direct negotiations with the employer, and ultimately to conciliation proceedings before FWC. The individual bargaining representatives were informed of all these proceedings. No individual representative attended any conciliation proceedings. Bargaining was terminated in December 2011[26]. The Act then provides for a 21 day period, known as the ***post industrial action negotiating period*** (s266(3)), to try and resolve outstanding issues. None of the VPS individual bargaining representatives attended these proceedings despite being informed of them.

34. When agreement could not be reached the matter proceeded to the making of an ***industrial action related workplace determination*** (s266). S267 sets out the terms of a workplace determination; in particular the determination can only comprise:

- agreed terms (s267(2)
- matters at issue (ie issues outstanding after the 21 day post-industrial action negotiating period (s267(3))
- core terms (s272)
- mandatory terms (273)

35. Victoria's submissions on these matters took the position that there were no 'agreed terms' within the meaning of the Act (see s274) as not all the bargaining representatives had agreed to the terms agreed between the principle negotiating parties i.e. CPSU and State of Victoria. This is despite the fact that these bargaining representatives had taken no role in the negotiation process or Tribunal proceedings that had produced a draft document.

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[26] PR518480

36. In our submission there needs to be a process in the Act for a bargaining representative to formally advise the Tribunal of their continued interest in a matter and an obligation to participate in proceedings in order to maintain their status as a bargaining representative. The current Act sets up a scenario whereby an individual employee can nominate themselves as a representative; participate or not in negotiations; and even have their single issue resolved, but still retain a bargaining representative status many months later when a matter proceeds to formal hearing. In our view the 20 odd bargaining representatives in the VPS must have been totally bewildered, and overwhelmed, by the legal process and documents that ultimately were exchanged between the parties in the lead up to the making of the *VPS Determination 2012*!

3.7.3. Arbitrating bargaining disputes

37. The only capacity vested in the Tribunal to arbitrate a workplace determination following a failure of bargaining is either 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 bargaining orders[27] 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.

38. An example of the problems associated with the limited avenue of access to arbitration is provided in the case of bargaining for a new agreement with Parks Victoria. The bargaining between the CPSU, AWU, and ASU and Parks Victoria lasted for eight months following the nominal expiry date of the last enterprise agreement in May 2011.

39. As a result of the impasse between the bargaining representatives, the three unions made application to Fair Work Australia to deal with a bargaining dispute. During the period of the negotiation the employer did not move from a salary offer of 2.5% per annum, the removal of performance pay, and extending fixed term employment terms out to five years. The bargaining dispute was heard by Fair Work Australia under s240 which, as a result of its limited powers, could do nothing to progress the impasse between the bargaining representatives.

40. The limitations on the capacity of either the bargaining representatives to seek, or the FWC to order, bargaining representatives into arbitration meant that, in circumstances of an impasse between the competing claims of bargaining representatives, the only method of settlement available to the parties was an escalation of industrial action to compel an employer to make concessions or to trigger the termination of the industrial

[27] See s268(1) but note well that no serious breach order has been granted since the Fair Work Act came into operation

action, as a first step to a workplace determination. Bargaining was terminated on 11 July 2012 following a potential escalation of industrial action involving non response to emergency situations.[28]

41. A broader capacity in the Tribunal 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 Tribunal to deal with bargaining disputes is not sufficient to deal with the range of issues that come before it in bargaining disputes. Public sector bargaining and 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.

3.8. A note on the ILO Public Sector convention

42. The Committee should note that the International Labour Organisation recognises 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.

43. 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."

44. The CPSU considers greater access to arbitration is required for federal system public sector workers. This could be facilitated by the ratification of the Convention, followed by the use of the external affairs power to found federal legislation that allows arbitration for public sector workers

[28] PR518480

Chapter 4. **SOUTH AUSTRALIA**

4.1. About the PSASA

1. The Public Service Association of South Australia (PSA) is the largest public sector union in South Australia and represents employees from South Australian government departments, statutory authorities, universities and some outsourced enterprises providing services on behalf of the State Government.

2. The PSA also has extensive knowledge of the Federal jurisdiction due to having the same membership and offices as the Community and Public Sector Union (CPSU), South Australian Branch of the State Public Services Federation Group. The PSA has over 15,000 members, the majority coming under the State Industrial Relations jurisdiction and covered by the *Fair Work Act 1994 (SA).* As the PSA has members in both the State and Federal jurisdictions, this has provided the opportunity to compare both systems in terms of the adequacy of protection of workers' rights.

3. The PSA's submission contends that the State industrial jurisdiction and the *Fair Work Act 1994 (SA)* provide a framework which has afforded state public sector employees good protection. It has remained accessible and flexible to ensure the PSA is able to effectively represent its members.

4.2. Size and composition of the South Australian Public Sector

4. The South Australian public sector is comprised of a wide range of public entities. This diversity is also reflected by the range of legal forms that exist. Public sector entities can be established under:

   4.1. specific enabling legislation (agency-specific enabling legislation), such as the *WorkCover Corporation Act 1994*;

   4.2. legislation that creates multiple entities (sector-specific legislation);

   4.3. broader enabling legislation, such as the *Public Corporations Act 1993.*

5. The South Australian public sector is comprised of 58 public sector agencies, 9 public financial corporations and 15 non-financial corporations.

6. At June 2012, the South Australian public sector employed 103,649 people, representing 12.7% of the state's work force.

7. The South Australian Public Sector is also a significant employer in regional and rural South Australia, with 20.7% of its workforce working outside metropolitan Adelaide.

8. Terms and Conditions of South Australian Public Sector Employees are contained in:

8.1. Public Sector Act 2009 and Regulations;

8.2. SA Public Sector Salaried Employees Interim Award 2013;

8.3. South Australian Public Sector Wages Parity Enterprise Agreement Salaried 2012;

8.4. South Australian School and Pre-school Education Staff Enterprise Agreement 2012; and

8.5. Commissioners Standards and Determinations.

4.3. Recent decisions of the SA Government effecting the SAPS: Efficiency Dividend, public sector job cuts and Commission of Audit

9. The Government has imposed an efficiency dividend to agencies, this has increased from 0.25% to 1% a year from 2013–2014 to deliver extra savings amounting to $129.9 million a year by 2015/2016.[29] The number of public sector employees will be reduced by a further 1,000 over 3 years (2013–14 to 2015–16) to deliver savings of $86.6 million a year by 2015–16. Between 2012 and 2016 the number of FTE's will decrease by 3,893. Ministerial Office Budgets will be reduced by 15%. In addition, the McCann Review of Non-Hospital Based Services released in October 2012 anticipates an efficiency dividend of 3%.

10. The Opposition Liberal Party has publicly stated if elected, they will establish an Audit Commission into the Public Sector.

4.4. The relative merits of the statutory architecture for industrial relations in South Australia

11. The PSA of South Australia favours retaining the benefits of the South Australian state industrial relations jurisdiction, which has been both effective and timely in the resolution of issues.

12. PSA has found ease of access to the South Australian Industrial Relations Commission a major benefit in allowing for the resolution of disputes. Voluntary Conferences in particular play a very useful role and can be convened quickly and with the minimum of formality.

13. The PSA has recently negotiated an Enterprise Agreement covering over 35,000 public sector workers who overwhelmingly endorsed the agreement (in excess of 95% of

[29] *State Government Budget Paper 1*, 2012/2013.

employees voting in favour of the proposed agreement). Significantly one of the features of the agreement was no loss of conditions of employment and job security for the term of the agreement.

4.5. The State as legislator and employer

14. The only significant controversial issue that has arisen is that of the employer also being the Government of the state, and its ability to use legislation to benefit it as the employer.

15. Specific reference to this matter within Enterprise Agreements has dealt with concerns to a significant degree and provided a mechanism for resolution of issues. Specifically, the agreement contains an enforceability clause which allows parties to the Agreement to utilise the South Australian Industrial Relations Commission in the event that there is a dispute as to the provisions of the Agreement.

16. Both the PSA and the State Government were satisfied with the outcome of the Agreement. Some subsequent Enterprise Agreements have included specific reference to the ability of the IRCSA to deal with similar disputes. The basic problem continues where the Government as the employer can agree to matters, then act differently as the Government in parliament.

17. Another example of the problems associated with the Crown's ability to remove conditions unilaterally through legislation occurred in circumstances concerning the 2010 State Budget legislation. The South Australian Government negotiated an Enterprise Agreement for its salaried workforce which was approved by the Industrial Relations Commission of SA (IRCSA) in January 2010. The Agreement included protection of existing employment conditions.

18. In September 2010 the Government, through Budget legislation introduced by the Treasurer, removed Recreation Leave Loading and reduced Long Service Leave entitlements, despite the Government having agreed to protect conditions of employment.

19. The IRCSA declined to deal with the matter, effectively stating that as Parliament had passed the Budget legislation it could not be overturned. The matter was taken to the High Court by the Public Service Association of SA. The High Court determined that the matter could be dealt with by the Supreme Court of SA.

4.6. The work of the South Australian Tribunal

20. It is worthwhile examining some of the detail contained within the *Annual Report on the work of the Industrial Relations Court and Commission of South Australia*,[30] particularly since the operation of the national industrial relations system introduced by Federal and State legislation effective from 1 January 2010.

21. The report states:

> It remains the case that the changes then made to the scope of the State Commission have had a limited impact on the overall workload of members in terms of that jurisdiction. The level of activity in specific areas of jurisdiction exercised by the Commission has varied slightly but not in any significant respect…. In particular, the advent of the Local Government sector and the transition to the Commonwealth jurisdiction of small unincorporated businesses has not resulted in any significant change in the number of applications associated with enterprise agreements or unfair dismissal claims compared with last year.[31]

22. This is consistent with the PSA's view that the transition to a national industrial relations system has not significantly, or detrimentally, affected state public sector workers, or indeed their access to the State Industrial Relations Commission.

23. Further, the *Annual Report* found:

> Disputes concerning workload and related issues, especially for medical and nursing staff in Health SA, were a significant feature of State public sector disputes. The protracted enterprise bargaining disputes in the public sector which have been mentioned in recent annual reports have diminished, partly due to the bargaining cycle and partly due to the successful negotiation of enterprise agreements between the parties.
>
> Consistent with comments in the previous annual report, most disputes were relatively confined in nature and there were negligible days lost due to industrial disputation. The overall level of disputes in the context of over

[31] *Sixth Annual Report on the work of the Industrial Relations Court and the Industrial Relations Commission*, 2011-2012., at p.12

110,000 employees within the State jurisdiction tends to confirm predominantly harmonious employment relationships.[32]

24. Experience over many years has shown that both State and Federal jurisdictions can be positive or negative at various points in time, depending upon the composition of the Parliament and the contents of the relevant legislation.

25. State or Federal are not inherently better or worse than each other, but rather each can have benefits or disadvantages at particular points in time.

26. Any changes or transfer of jurisdiction will inevitably will take time and resources which could negate any perceived benefit. It would be more effective ensuring the existing systems working effectively and efficiently.

27. One area for potential examination by the Committee is to deal with situations where employees move between jurisdictions. In situations where a public sector function moves to the Commonwealth Government or the private sector then jurisdiction moves from the State to the Federal jurisdiction, with the reverse occurring when functions move to the SA Public Sector.

28. A mechanism for dealing with employee entitlements during the transfer process when such transfers occur would be useful as currently each of the State or Commonwealth Commissions can only deal with matters that are within their jurisdiction, not on the basis that employees in future will come under their jurisdiction.

29. The South Australian State Public Sector has faced significant job cuts in recent years and there are mechanisms in place to ensure any issues relating to the impact on conditions of employment. Award or Enterprise Agreement provisions are able to be addressed within the State jurisdiction.

30. The PSA contends that the *Fair Work Act 1994 (SA)* provides state public sector workers with more adequate protection and entitlements than workers under the *Fair Work Act 2009 (Cth).*

[32] *Sixth Annual Report on the work of the Industrial Relations Court and the Industrial Relations Commission*, 2011-2012., at p.17.

Chapter 5. **WESTERN AUSTRALIA**

5.1. The Western Australian Public Sector

1. All the information contained in this introductory section has been sourced directly from the *State of the Sector 2012*, published by the WA Public Sector Commission.

2. The current WA public sector structure is outlined in the table below. Some independent statutory office holders, such as the Auditor General and the Commissioner, have a statutory obligation to report directly to Parliament. As these office holders are generally supported by an administrative organisation, they are counted in the figures below.

5.1.1. Public sector structure and number of entities as at 30 June 2011 and 30 June 2012

Description	Examples	30 June 2011	30 June 2012
Departments Primarily responsible for providing policy advice and administrative support to ministers. Departments are established, divided, abolished and renamed under section 35 of the PSM Act.	Department of the Attorney General Department of the Premier and Cabinet Department of Commerce	37	37
SES organisations Established under a written law to perform statutory functions, and generally responsible through a board to a minister. SES organisations are specified in Schedule 2 of the PSM Act.	Rottnest Island Authority Botanic Gardens and Parks Authority Tourism WA	41	40
Non-SES organisations Established under a written law to perform specific statutory functions, generally responsible through a board to a minister.	Forest Products Commission Swan River Trust Western Australia Sports Centre Trust Legal Aid Commission	30	29
Statutory boards and committees Established under law to perform statutory functions such as guidance and direction for an organisation; regulation, registration and appeal; coordination of policies and projects; and advisory functions.	Road Safety Council Building Services Board Swan River Trust	33	156

5.1.2. Employee Numbers

3. At the end of June 2012, 156,892 employees representing 122,939 FTE were employed by the 125 public sector entities that report workforce data to the WA Public Sector Commissioner.

5.1.3. Employee occupations

4. Since 2007, the WA public sector has collected occupation data based on the Australian and New Zealand Standard Classification of Occupations (ANZSCO). ANZSCO is a skill-based classification of occupations, developed as the national standard for organising occupation-related information for purposes such as policy development and review, human resource management, and labour market and social research. The classification includes all jobs in the Australian workforce.

5. When compared with the WA workforce as a whole, the WA public sector workforce has a higher proportion of "Professionals", "Community and Personal Service Workers", and "Clerical and Administrative Workers". The profiles of the two workforces by ANZSCO defined "major occupational groups" are set out in the table below.

5.1.4. Distribution of WA public sector employees compared with the WA workforce by headcount in ANZSCO major groups, June 2012

ANZSCO major groups	WA public sector	WA workforce
Managers	6.3%	12.2%
Professionals	45.4%	20.2%
Technicians and Trades Workers	4.1%	17.3%
Community and Personal Service Workers	20.9%	9.3%
Clerical and Administrative Workers	17.4%	13.5%
Sales Workers	0.4%	8.4%
Machinery Operators and Drivers	0.6%	9.0%
Labourers	5.0%	10.1%
Total	**100.0%**	**100.0%**

6. Based on information provided by public sector entities, the 20 ANZSCO defined 'occupational groups' that have the highest levels of representation within the public sector are set out in the table below.

5.1.5. ANZSCO occupational groups with highest levels of representation in the WA public sector, June 2012.

Occupations (ANZSCO groups)	Headcount	FTE	Median age (years)	% below age 25	% age 25–44	% age 45 and over
Registered Nurses	13 311	10 384	42.7	6.1%	49.7%	44.3%
Primary School Teachers	12 381	8 718	44.5	4.6%	46.6%	48.8%
Education Aides	12 285	7 090	45.2	5.7%	43.5%	50.7%
Secondary School Teachers	8 434	6 408	45.5	3.7%	45.2%	51.1%
Police	5 762	5 550	39.6	8.2%	61.6%	30.1%
General Clerks	5 347	4 336	45.5	12.9%	35.9%	51.2%
Commercial Cleaners	4 486	2 363	50.2	3.9%	30.9%	65.3%
Other Clerical and Office Support Workers	3 905	2 334	46.4	8.0%	37.2%	54.9%
Vocational Education Teachers (Australia) / Polytechnic Teachers (NZ)	3 501	2 543	50.9	0.7%	31.0%	68.4%
Nursing Support and Personal Care Workers	3 302	2 594	50.6	6.7%	27.9%	65.4%
Early Childhood (Pre-primary School) Teachers	2 919	1 961	41.6	6.0%	54.0%	40.0%
Generalist Medical Practitioners	2 815	2 432	32.5	4.4%	82.9%	12.7%
Contract, Program and Project Administrators	2 775	2 539	44.5	3.4%	47.9%	48.7%
School Principals	2 394	2 102	52.8	0.5%	27.8%	71.6%
Welfare Support Workers	2 349	1 947	47.6	4.3%	38.8%	56.8%
Prison Officers	2 194	2 073	48.7	0.5%	36.2%	63.3%
Office Managers	2 106	1 785	50.7	1.5%	29.9%	68.7%
Inquiry Clerks	1 738	1 435	42.5	14.7%	39.8%	45.5%
Other Information and Organisation Professionals	1 709	1 475	45.3	3.9%	45.3%	50.8%
Medical Technicians	1 666	1 346	41.9	9.5%	46.1%	44.4%

5.1.6. Age and gender profile in the WAPS

7. The sector has an ageing workforce, primarily attributable to the ageing of the 'baby-boomers' generation born between 1946 and 1964. There is a greater proportion of this age group in the public sector than is found in the private sector, evidenced by the differences in the median age for the two sectors. In June 2012, WA public sector employees had a median age of 45.4 years compared with the WA workforce median age of 40.1 years.

8. The WA public sector comprises women (69.6%) and men (30.4%). Women comprise a significantly higher proportion of the public sector workforce compared with 43.8% in the total Western Australian workforce.

5.2. Jurisdiction and role of the Western Australian Industrial Relations Commission (WAIRC).

9. The WAIRC is established under the *Western Australian Industrial Relations Act 1979* (WA) "the Act". The latter has the jurisdiction to deal with any "industrial matter", as that term is defined in s7 of the Act.

10. After *WorkChoices*, the WAIRC lost jurisdiction (subject to minor exceptions) over National System employers and employees, as those terms are defined under *Fair Work Act 2009* (Cth) (FWA). In consequence the WAIRC has experienced a decline in workload since 2006.

11. The constituent base of the WAIRC now consists of the WA public sector (excepting trading corporations, such as the Water Corporation), sole traders, some trusts, unincorporated associations and incorporated associations that do not trade.

12. The WA Department of Commerce (DOC) has reviewed the size of the current user base premised upon relevant ABS information. Using this data, coverage is determined from two sources, each providing statistical estimates. They are: employee pay settling methods and identification of the legal structure of the employer. Premised on the first source, 21.7 % of the state's workforce (or 262,000 employees) are within jurisdiction. However, this analysis does not conclusively determine the position of 12.4% of the workforce, or 150,000 employees. The second source, type of legal organisation (TOLO), estimates 23.8% (288,000) of the workforce are employed by unincorporated businesses and 12.4% (150,000) by the State Government. Therefore it concludes 36.2% of the workforce (or 438,000) could be within WAIRC jurisdiction. Regardless of which method is chosen, the WAIRC has coverage of a significant proportion of the WA workforce.

13. Pursuant to ss 32, 44 the WAIRC has broad powers of conciliation and arbitration and parties can be summoned to appear before the Commission. Notwithstanding the latter,

the WAIRC has limited powers regarding WA public sector matters. As detailed below, some industrial matters the subject of a public sector standard (PSS) under the *Public Sector Management Act 1994* (WA) fall outside the jurisdiction of the WAIRC. Those matters are dealt with by administrative review, where an employee claims a breach of a PSS. This regime is underutilised and carries little confidence among WA Public sector employees, as the recommendations of the reviewer are unenforceable. WA public sector Unions have lobbied to amend the Act to have such matters fall within the jurisdiction of the WAIRC.

14. The Act was subject to an extensive review in 2009, conducted by Mr Steven Amendola, a Melbourne based Barrister.[33]. He recommended a significant overhaul of the Act, including (but not limited to) the greater use of statutory individual contracts, more individual access to the tribunal, the removal of compulsory conciliation and arbitration powers and even an option to abolish the WAIRC.

15. The current State Government introduced the *Labour Relations Legislation Amendment and Repeal Bill 2012* (the Bill / LRRA) in late 2012. Its aims (in current form) appear less radical than the Amendola recommendations, although it does seek to limit Union right of entry to workplaces and remove unfair dismissal rights for employees in the WA small business sector. The Bill is now subject to a consultation phase, providing for stakeholder submissions.

5.3. Concise summary of the public sector cuts of the Barnett Government

16. Since it was elected in 2008, the Barnett led Liberal-National Coalition government has embarked on an agenda of cutting the public service. As WA Senator Louise Pratt pointed out in late 2012, however, *"While the Queensland and New South Wales governments have recklessly cut funding in large, sweeping blows, the situation in WA has been death by a thousand cuts." (Senate Debates 9/10/12).*

17. In the 2009-10 financial years, the Barnett Government enforced an arbitrary 3% 'efficiency dividend' cut to all government agency budgets. The Barnett Government also introduced voluntary redundancy programs in 2009, 2010, and 2011. In the 2012–13 budget the government imposed another 2% cut to agency budgets (excluding the Department of Education and Department of Health, which faced a 1% cut) and a ceiling on FTE staffing levels to be set at 2011–12 levels. In April 2012 then Treasurer Christian Porter announced a freeze on public sector recruitment. In addition to this, the government announced a further 1.5% cut to agency budgets in September 2012. In each subsequent year funding cuts will increase by 1%; in 2015–16 each agency will

[33] Steven Amendola, *'Review of Western Australian Industrial Relations System',* 2009. <http://www.commerce.wa.gov.au/LabourRelations/PDF/Misc/AmendolaAttachments.pdf - 2012-12-10>.

need to find 6.5% of cuts. These cuts have manifested in reductions in services to the WA community. For example:

18. **Disability Services Commission:** It was announced in November 2011 that the positions of all Community Social Trainers (34 workers) would be abolished in January 2012. Community Social Trainers assist adults with intellectual disabilities and their families by giving them the skills and networks that enable them to stay living independently in the community. This important work helps clients to maintain their freedom and their dignity. Existing clients were directed to the not-for-profit sector, despite having long term relationships with their case officers. Some clients have been receiving ongoing care by the same Community Social Trainer for the last 30 years. There is no comparable service in the not-for-profit or private sector, leaving about 250 families without this valuable service.

19. **Forest Products Commission:** In 2010 Minister Terry Redman announced plans to privatise the Commission's tree planting and sharefarming services, but no buyer was found. The Government subsequently abolished the Forest Products Commission. Seventy five regional jobs were lost, with the impact felt by small regional towns. One effect of the closure was the reduction of casual staff employed at the Manjimup seedling nursery. The nursery previously employed Disability Service Commission clients, and as the seedling demand decreased these people lost their jobs.

20. **Landgate:** As a Statutory Authority, Landgate maintains the State's official register of land ownership and survey information and is responsible for valuing the State's land and property for government interest. In 2011 there were 85 voluntary severances – almost 10% of the workforce. One effect of the reduction in FTE is that the turnaround time for registering transactions against a Certificate of Title has almost doubled from 6.03 days in October 2011 to 11.55 days in February 2012. This can delay business transactions and building developments.

21. **Department of Agriculture and Food:** In the 2010-11 budget FTE levels in the Department of Agriculture and Food were reduced by 150. The hardest hit areas have been land management and biosecurity - land management funding was reduced by 39% in the 2010-11 state budget, and biosecurity faced a reduction of $3.4 mill. There are grave concerns over the reduction of the biosecurity budget, which led to funding for the Starling Eradication Project to be slashed by 66% in the 2010-11 budget. Starlings are a bird pest that could potentially establish wild populations in WA's primary production regions, feeding on grain and horticulture crops (such as grapes and olives), competing with stock for feed and spreading diseases. Starlings are a huge threat to WA's industries, in particular the South West wine industry, and so the slashing of this important program may have dire consequences.

22. The Barnett Government has also effectively cut services by keeping some agency budgets static. WA's population is the fastest growing in the country, growing by

almost 1,000 people per week. Yet our public services are remaining static, despite the fact that they need to service a rapidly increasing population. The Department for Child Protection (DCP), for example, has experienced a three-fold increase in the number of cases to be investigated, but this has not been reflected in the number of staff available to work with these children. The number of children who do not have an allocated case worker but needed one because they were suspected of suffering from some form of abuse has increased to 883 (as of May 2012), up from 799 in May 2011. Yet the Barnett Government did not provide funding for more DCP caseworkers in the 2012-13 budget (2011-12 estimated actual caseworker FTE was 744, with no additional FTE budgeted in 2012-13).

5.4. Issues facing state public sector workers within the jurisdiction of the *Fair Work Act* 2009 in regard to bargaining

23. WA has not referred any of its industrial powers to the Commonwealth.

24. The constituent base of the Western Australian Industrial Relations Commission (WAIRC) under the *Western Australian Industrial Relations Act (WA)* 1979 (the Act), includes State and State Agency employees who are not employed by constitutional corporations and non incorporated businesses and corporations that do not trade.[34]

5.4.1. Bargaining agents

25. In those areas where State employees are employed by constitutional corporations the CPSU has noted the involvement of non Union bargaining agents can be problematic. Often inexperienced bargaining agents bring single issue or unrealistic claims which hinder the process. Some non union bargaining agents fail to attend meetings, do not prepare documents, respond to offers and or prepare ballots.

5.4.2. Relatively poor minimum terms and conditions in comparison with the former State Award standards

26. Where employees have become federal system employees, the relevant modern award underpinning bargaining can be deficient in comparison to salaries and entitlements previously provided under the State award. The *State Government Agencies Administration Award* is overall less beneficial to employees than a number of WA State awards applying to public sector employees.

[34] The latter category includes employees of some local authorities and not for profit entities.

5.4.3. The new transfer of business provisions

27. The CPSU in WA is assessing whether the practical application *Fair Work (Transfer of Business) Act 2012* (Cth), resolves the problem of former public sector employees losing salaries and conditions when a transmission of business occurs. The time frame to make the assessment is unknown, requiring pertinent examples to present in the future for evaluation. The unamended Act left such employees at a disadvantage and the Union recognises the amendment sought to address that issue.

5.4.4. Limited arbitration to resolve disputes about Federal EA

28. Industrial matters not itemised in an Enterprise Agreement (EA) cannot be progressed through conciliation and arbitration via the EA DSP. This is overly restrictive. Matters can arise after EA registration, causing industrial disputes and requiring FWA assistance, where the parties are unable to resolve the issue. The ability to pursue such matters through conciliation and arbitration should be permitted. Otherwise the issues remain unresolved.

Chapter 6. **TASMANIA**

6.1. Composition and size of Tasmania public sector[35]

1. The Tasmania public sector is made up of eleven departments, eight agencies, six statutory authorities and three Health Organisations. All employees within these 28 organisations are employed under the *State Service Act 2000*.

2. At June 2012, the Tasmania Public Sector employed 27,451 people, representing 11.8 per cent of the Tasmania labour force (ABS Labour Force Survey). The Tasmanian public sector is a significant employer throughout the state and particularly in regional areas.

3. In the 2011/12 State budget the Tasmania Government introduced a budget savings strategy that cut the funding to Departments and Agencies by $887.2M over the next 4 years. It was announced by the Government that these cuts equated to approximately 2300 fulltime equivalent jobs. The cuts were allocated evenly across all departments and agencies with no areas exempted from the cuts. The Government did not determine the programs that would be cut to make these savings but instead left it to each department and agency to develop their own savings strategy. The reduction in jobs was to be achieved by centralised vacancy management, early retirement incentives, targeted voluntary redundancies and forced redundancies.

4. The number full time equivalent employees in the Tasmanian public sector at 30 June 2010 was 23,780. This had fallen to 22,389 by 30 June 2011 and down to 21,181 by 30 June 2012. This constitutes a reduction across 2 years of 2,599 full time equivalent positions or around 2800 jobs.

6.2. The CPSUTAS

5. The Community & Public Sector Union (State Public Services Federation Tasmania) Inc. (CPSUTAS) represents workers across all Tasmanian public sector Agencies, Departments and statutory authorities. We also represent workers in a number of government business enterprises, the University of Tasmania, Australian Maritime College and some outsourced enterprises providing services on behalf of the State Government.

6. The CPSUTAS also has extensive knowledge of the Federal jurisdiction due to having the same membership and offices as the Community and Public Sector Union (State Public Services Federation Group, Tasmanian Branch). The CPSUTAS has over 4,000

members, the majority coming under the State Industrial Relations jurisdiction and covered by the *Industrial Relations Act 1984.*

7. As the CPSUTAS has members in both the State and Federal jurisdictions, this has provided the opportunity to compare both systems in terms of the adequacy of protection of workers' rights.

8. The CPSUTAS's submission contends that the State industrial jurisdiction and the *Industrial Relations Act 1984* provide a framework which has afforded state public sector employees good protection. It has remained accessible and flexible to ensure the CPSUTAS is able to effectively represent its members.

6.3. The relative merits of the statutory architecture for industrial relations in Tasmania

9. The CPSUTAS favours retaining the benefits of the Tasmania state industrial relations jurisdiction, which has been both effective and timely in the resolution of issues. The TIC also plays a central role in registering Agreements and maintaining our Award system.

10. CPSUTAS has found ease of access to the Tasmanian Industrial Commission (TIC) a major benefit in allowing for the resolution of disputes. The TIC practice of convening prompt conciliation conferences has played key role in quickly and efficiently dealing with disputes before they are able to escalate.

6.4. Availability of Fair Work Commissioners in Tasmania

11. In 2012 the President of the Tasmanian Industrial Relations Commission, Patricia Leary resigned. In addition to her role as President of the TIC she also held a dual appointment to the Fair Work Commission. On her retirement no new Fair Work commissioner has been appointed to Tasmania. This means that hearings before Fair Work in Tasmania must wait for a Commissioner to travel to the state or be held by video conference.

12. In 2012 the Tasmanian Government made changes to the *State Service Act 2000* removing the role of the independent State Service Commissioner. As a result of these changes responsibility for undertaking reviews into administrative decisions or appointments were transferred to the TIC. This constitutes a significant body of work and is already proving to be a challenge for the two fulltime TIC Commissioners.

13. The CPSUTAS does not believe that Fair Work would have the capacity to able to properly and speedily deal with all the cases currently handled by the TIC given the current availability of Fair Work Commissioners in Tasmania and is concerned that potential delays in having matters heard would disadvantage our members.

Chapter 7. **NORTHERN TERRITORY AND ACT**

7.1. Composition and size of the Territory public sectors

14. Conditions of employment and protection of rights at work for NT and ACT public sector employees are primarily governed by the *Fair Work Act* and enterprise agreements made under that Act. Other conditions are determined by Territory specific public sector legislation.

15. At June 2012 there were 19,933 employees in the Northern Territory Public Service (NTPS), equivalent to approximately 16% of the NT workforce. The NTPS consists of 22 agencies; 21 of these engage staff under the *Public Sector Employment and Management Act* (PSEMA). The Aboriginal Areas Protection Authority engages staff under the *Northern Territory Aboriginal Sacred Sites Act*. Approximately 40% of NTPS employees work in the administrative stream. The next largest streams are health and teaching streams which each make up approximately 15% of the NTPS workforce.[36]

16. At June 2012 there were 21,955 in the Australian Capital Territory Public Sector (ACTPS), representing approximately 10% of the ACT workforce.[37] The ACT government consists of 9 Directorates and 5 Agencies. The Directorates account for almost 90% of ACTPS employees. The largest areas of employment are the Health (34.2% of all employees) and Education (29.4% of all employees) portfolios.[38]

7.2. Northern Territory Government

17. The Country Liberal Party (CLP), headed by Chief Minister Terry Mills was elected to Government in the Northern Territory on 25 August 2012. Prior to the election, Mills pledged that public sector jobs would be safe and the CLP would strengthen the NTPS, stating:

> *"The Country Liberals plan to strengthen the NT Public Service – and your job is safe"*[39].

18. Since being elected the new Government has introduced a number of measures that have negatively impacted on the NTPS. Decisions made by the Mills Government have

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[36] Office of the Commissioner for Public Employment, State of the Service Report 2011-12
[37] Commissioner for Public Administration, ACT Public Service – State of the Service Report 2012, pp 55-57, and ABS Cat 6212 – Labour Force June 2012
[38] Ibid, p 57
[39] Country Liberal Party, pre-election handout, August 2012

negatively affected the job security of the NTPS employees and will have significant repercussions for their ongoing employment.

19. As the NT Government has relatively recently been elected, it is not as far along in its cost cutting measures as the Queensland, NSW and Victorian Governments.

20. Many of the decisions are now in the process of being implemented and further decisions on savings and staffing are expected. As a result, the exact staffing impact of these decisions and its impact on services to the community are not yet known. However, what is clear is there is a great degree of similarity in the approach being taken by the NT Government and a number of the current conservative state governments.

7.2.1. Decisions of NT Government affecting the NTPS

21. Key decisions undertaken by the new Government after their election 25 August 2012 and their impact on NTPS employees include:

Recruitment freeze

22. The NT Government announced a total recruitment freeze to be implemented from 30 August 2012. This restricted the filling of vacancies and approval of higher duties to jobs that are deemed 'essential' for the delivery of frontline services and other essential functions only.

23. Agency Chief Executives were asked to list specific work categories within their agencies which would be exempt from the recruitment freeze. Chief Executives were required to nominate the exempt areas in a matter of hours. For any job vacancy outside those work categories, or later realised to be essential, approval from the Commissioner of Public Employment had to be sought before vacancies could be filled or continuation of higher duties allowance be approved.

24. Given that the NTPS had a 23% separation rate in 2011-12[40], this recruitment freeze alone is likely to amount to a significant reduction in the NTPS workforce. This comes on top of a staffing cap that has been in place since 2010 which means that the NTPS has not been growing in proportion with the Territory population in that time.

Changes for temporary contract employees

25. On 31 August 2012 the NT Government announced a 'review' of temporary contracts[41]. A large part of this has involved terminating/ not renewing employees on

[40] Op Cit, Office of the Commissioner for Public Employment, p 93
[41] NTNews.com.au, Public service freeze in cuts, 31 August 2012

temporary contracts. Temporary contracts unfortunately make up a large proportion of the NTPS workforce (at June 2012, 26.1% of NTPS employees were engaged on temporary contracts)[42] and many of these employees have been engaged on a temporary contracts for many years.

26. As a result of the 'review' process underway these employees face ongoing uncertainty about their future employment and many have lost their jobs. It is not clear the exact number of contract employees that have lost their employment in this manner, but the CPSU believes it to be a significant number.

Job cuts

27. On 4 December 2012 the NT Government handed down a mini-budget. As part of the mini-budget decision the Government announced that 600 jobs would be cut from the NTPS. This represents 3% of the workforce. This did not take account of the hundreds of temporary contracts that had and were ending without renewal and the significant reduction in the size of the NTPS that is to be expected as a result of the recruitment freeze.

28. The 2013-2014 Budget is expected to be even tougher on NTPS employees and NTPS agencies. Already agencies are under extreme funding pressure with the 2012-2013 Budget cutting $300 million from the public service, which included a 3% efficiency dividend for that financial year. Further budget cuts will see an increase in jobs lost from the NTPS.

Agency changes and budget cuts

29. In addition to these measures, on 4th September 2012 the NT Government established 33 agencies from the existing 23 agencies. This has now been increased to 35 agencies. At the same time there were significant changes amongst senior public servants, which saw the previous Commissioner of Public Employment a number of Chief Executives terminated.

Renewal Management Board

30. The NT Government established the Renewal Management Board (RMB) to "review" the financial situation of the NT. The RMB members required every agency Chief Executive to identify savings measures within their agency – identifying ongoing budget savings, number of staff affected and rate the community concern if the savings measures were undertaken.

[42] Office of the Commissioner for Public Employment, State of the Service Report 2011-12, p 74

31. Agency heads were then told to lodge budget submissions on the savings measures the RMB approved. These cuts amount to around 10% or more of agency budgets. It is almost inevitable that these savings will involve job losses and further pressure on employees' wages and conditions.

Approach of the NT Government and NTPS agencies

32. It is not only the actual decisions being made that have angered NTPS employees; it is also the manner in which those decisions are being announced and implemented.

33. Initially NTPS agencies sought to rush through departmental restructures and cuts without consultation with employees or unions. Despite attempts by the CPSU and other NTPS unions to ensure proper consultation and that the rights of employees were being respected, it was necessary for the CPSU and other unions to commence action in Fair Work Australia. As a result of those steps, there has been some improvement in consultative processes; including ensuring employees have the ability to voice their concerns.

34. Agencies have changed their structures to reduce their workforce. For example, Department of Education and Children Services restructured to fit 85% of their permanent workforce. This also left out over 100 temporary employees, most of whose contracts have ended. Federal funding is now allocated under Stronger Futures and staff will need to be found to fulfill this work.

35. A redeployment policy has been put into place and all vacancies must now be available to staff deemed as excess before internal or external advertising. This has caused anxiety for staff when restructures are mooted, and members are reporting that restructures may be targeting certain people.

36. There are still instances arising where the CPSU has had to notify disputes to ensure agencies comply with the terms of the NTPS Enterprise Agreement. In the case of restructures there have been instances where employees learn their particular position no longer exists when a senior agency employee publicly releases a new organisational chart. On the day of the mini-budget, Ministers released media releases which identified specific positions that would be cut, for example the photographer, librarian and security workers in Museum & Art Gallery NT.

37. The NT Government has also threatened to unilaterally force employees to relocate to other parts of the Territory; the Government asserts that it is entitled to do this under

s35 of the PSEMA[43]. For many employees with family and other commitments relocating to another area of the Territory is just not possible.

38. On 7 September 2012 the Government initially proposed to move the majority of workers in Tourism NT from Darwin to the Alice Springs. The first most affected staff heard of this was in newspaper and radio reports. However, after pressure from the CPSU and tourism operators, there were offers of voluntary relocation and restructure to enable staff who wanted to remain in Darwin.

39. In other agencies as well, the Government has asked staff to relocate to remote locations, threatening to use its power to forcefully move staff if there are no volunteers. The CPSU is still in dispute with the NTPS on this issue.

7.3. Australian Capital Territory Government

40. The actions of the NT Government can be compared to those of the ACT Government. Like the NT Government, the ACT Government faces difficult fiscal circumstances including contracting Commonwealth expenditure, a moderating economy, softening revenues and increasing cost pressures.

41. However, while there have been some cuts to departmental budgets, the ACT Government has sought to manage its fiscal position without wholesale job losses or redundancy processes. The Act Treasurer stated:

> *"We will not respond in a knee-jerk manner by slash and burn budgeting. There is greater need at this time to support the economy, employment and frontline services for the community[44]."*

42. Budget pressures on the ACTPS has manifested in other ways. In recent years, we have seen the ACT Government unilaterally reduce the employer superannuation contribution rate for new ACTPS employees, the implementation of an "Efficiency Dividend", tough bargaining conditions for enterprise agreements and a four month hiring freeze on "non-frontline positions" in 2010.

[43] Public Sector Employment and Management Act, s 35
[44] Andrew Barr MLA, ACT Budget 2013-12 Treasurer's Message

Chapter 8. CO-OPERATIVE FEDERALISM AND WHAT IT MEANS FOR STATE PUBLIC SECTOR WORKERS

8.1. Background

1. The CPSU does not in principle oppose the review of public sector services and structures where they are genuinely undertaken to ensure the most effective use of taxpayers' money in the provision of public services.

2. However, it also our view that serious consideration must be given to the practical effect of any changes, whether they be to:

- transfer functions from the Federal government to the States, or vice versa;
- the level of Federal funding of the States for particular activities;
- an agreement to enact complementary legislation;
- the referral of powers from the States to the Federal government;
- government service delivery frameworks; or
- proposals to outsource partly privatise or contract out services.

8.2. History of co-operative federalism through COAG and CPSU negotiations

3. The COAG National Reform Agenda was established at the 17th meeting of COAG in February 2006 and targeted a number of critical areas for regulatory reform. The 20th meeting held in December 2007 under the then-new Labor Federal agreement agreed to a new model of cooperation and established working groups.

4. Our experience to date has predominantly been with the Business Regulation and Competition reform agenda and our negotiations on behalf of public sector employees in the areas of:

- Trade Measurement and transfer from state public sector employment to the Australian Public Service (APS) terms and conditions in the National Measurement Institute (NMI)
- Australian Health Practitioners Regulation Agency (AHPRA)
- National Rail Safety Regulator (NRSR)
- National Heavy Vehicle Regulator (NHVR)

5. In 2008, the Commonwealth, States and Territories agreed to implement regulation and competition reforms under the *National Partnership Agreement to Deliver a Seamless National Economy.* Arrangements have been made between State and Federal

Governments to simplify regulatory arrangements or to rationalise public services and activities between the jurisdictions.

6. These arrangements frequently involve an exchange of functions or the centralisation of services or the harmonisation of existing regulation and powers between the State and Federal Governments.

7. While the Union does not take issue with the principle of providing efficiencies through Australia-wide uniform laws or reduction in competing regulatory regimes, the COAG and other agreements raise industrial relations and human resources implications for the staff who are currently undertaking these public functions.

8. Some of the arrangements agreed to between the Federal and State governments involve transfer of certain functions between the jurisdictions. We regard the absence of any nationwide agreement in these situations on the treatment of employees, their industrial entitlements, implications of transfer of service and the retention of their accrued entitlements as significant contributors to the ambiguous industrial relations status of the new entities.

9. Of particular relevance to this inquiry is the lack of common or centralised agreement or commitment by either the Federal or State governments on the translation of current entitlements into new employment arrangements.

10. The absence of any such arrangement has resulted in an inefficient and repetitive process of agency by agency renegotiation for individual employees or groups of employees.

11. The CPSU proposes the Federal and State governments negotiate and conclude a Memorandum of Agreement with the union, on the Principles for the Treatment of Employees affected by COAG and other inter jurisdictional agreements. This should include *inter alia*

- the employees' right to consultation,
- their right to representation by the union in the transfer discussions
- guarantees of no loss or disadvantage to be suffered either in their accumulated service entitlements, rate of pay, hours of work,
- access to comparable superannuation,
- no forcible transfer,
- rights to redeployment without loss of status, by the transfer of their employment between jurisdictions, or
- a decision declining the offer transfer.

8.3. Case studies: NMI, AHPRA, Rail Safety

8.3.1. National Measurement Institute

12. Prior to the introduction of the National Measurement Bill in 2008, responsibility for Australia's trade measurement system was shared between the Commonwealth, States and Territories. The new legislation handed these shared functions over to the existing National Measurement Institute (NMI), involving the transfer of staff in state government departments to the Commonwealth.

13. At the time, our members in the various state departments were expressing concern to us about the lack of prior consultation concerning the transfer of their employment. In response to our members' concerns, the then-Joint National Secretaries of the CPSU – David Carey and Stephen Jones – wrote to the Secretary of the Department of the Prime Minister and Cabinet on 25 November 2008 and requested a Memorandum of Agreement to deal with:

- *the employees' right to consultation and representation by the union in any transfer discussions*
- *no loss or disadvantage in employment arrangements including continuity for accumulated service entitlements*
- *access to comparable superannuation*
- *prohibition on forced transfer of employees from one jurisdiction to another and employees are to have rights to redeployment without loss of status if they decline and offer of transfer*

14. No reply was received to this letter and no Memorandum of Agreement about this, or any other transfer of staff between jurisdictions, was made.

15. In NSW for example, staff transferring to NMI faced considerable disadvantage as they would be facing a pay freeze of around 4-5 years while the Commonwealth collective agreement caught up with then-current salary levels and also because of the increase in working hours. The PSA NSW requested a transition payment to transferring staff, this was refused and a dispute was lodged in the NSW IRC which did award the payment.

16. The transition of staff from known state departments to the existing known Commonwealth entity, the NMI, proved by comparison to be more straightforward than other transitions. However, problems still arose which required much negotiation to ensure fair transfer of superannuation and leave entitlements which varied amongst jurisdictions and with what became the new employment arrangements under Fair Work. None of the attempts by our union to develop an understanding of the complexity of the issues by both state and Commonwealth governments and to ensure a uniform and standard approach to staffing transition arrangements met with success.

8.3.2. Australian Health Practitioner Regulation Agency (AHPRA)

17. This national agency was formed to administer the accreditation and registration of health professionals nationwide. Legislation was passed by the host jurisdiction, Queensland, (*Health Practitioner Regulation [Administrative Arrangements] National Law Bill 2008*) and mirrored by legislation in other states. There was from the very beginning however a lack of clarity around the status of the new organisation and the extent of its authority. A project team was established by the Australian Health Ministers Advisory Council but it had no legislative standing and was unable to make commitments or decisions regarding terms and conditions or employment, entitlements, location, redundancies or other important employment considerations.

18. The CPSU and the Australian Nurses Federation, repeatedly expressed concerns about the unclear nature of the new organisation's proposed status and AHPRA finally agreed in 2009 that it did not meet the definition of a national system employer under the Fair Work Act and could not therefore lodge one Agreement federally to apply to all staff.

19. As a result, AHPRA commenced negotiations for Victoria and the Territories, which are Fair Work jurisdictions. We formed a joint AHPRA –Unions negotiating team in order to reach agreement about possible common terms and conditions which could be applied nationally without prejudicing the outcomes of future negotiations with individual jurisdictions.

20. AHPRA's initial intention was to avoid one national agreement where arguably they would need to adopt some of the most favourable elements from each State. Instead, AHPRA opted to negotiate awards and agreements for their employees in each State jurisdiction. This approach was abandoned when they launched a bargaining dispute in mid-2012 in Western Australia with the sole intention of being declared a national system employer for the purposes of the Act and thus avoiding the arbitration elements of the system in that State where negotiations had already been underway.

21. Some doubt exists over the question whether AHPRA is a constitutional corporation and that matter was the subject of an appeal to the Full Bench of Fair Work Australia. If that appeal is successful doubts will remain as to whether, outside of Victoria, AHPRA can conscript workers into the Federal system

22. Time-consuming negotiations are currently underway in South Australia and New South Wales concurrently.

23. A major problem with the piecemeal and inconsistent approach taken by AHPRA has been the iniquitous outcome whereby employees with varying terms and conditions of employment work side by side. Our members advise that there are employees working next to each other in the transitional period of the last few years and doing the same job but with different terms and conditions of employment, depending upon where their

previous employment was and what industrial instrument applied to them. Then to ensure the passage of agreements through the balloting process, knowing that persons will not vote in favour of them if they are worse off, AHPRA exacerbated this inequity amongst the workforce by preserving previous terms and conditions of employment on a case-by-case basis.

24. In NSW, we are advised that there have been staff who have resigned or refused promotion because of loss of the entitlements promised to them in the transition agreement. Such entitlements have been systematically diluted by AHPRA, including the refusal to grant flex-time arrangements or pay Time in Lieu at agreed overtime rates.

25. We are also advised by members that the classification structure imposed by AHPRA, and without consultation with the union, has resulted in discrepancies between the pay scales offered and the corresponding position descriptions and consequently workloads.

8.3.3. Office of the National Rail Safety Regulator (ONRSR)

26. The ONRSR is based in Adelaide because South Australia hosts the legislation which other jurisdictions mirror as in the AHPRA model. A significant difference however is that the legislation does enable the ONRSR to be a national system employer under Fair Work.

27. The ONRSR do not consider themselves to be a *public entity* and though we do not in principle agree with this position, our union is representing employees on the basis the organisation is established by the Crown in the right of one of more States and therefore falls into the coverage of our union.

28. ONRSR from the outset adopted a consultative and inclusive approach to their industrial relations which made for a productive relationship. Rather than negotiating separate agreements for each jurisdiction -as AHPRA are currently doing - they instead took the view that one national Greenfields agreement would be the preferable approach. ONRSR also recognised the need for this Agreement to include the best provisions from each jurisdiction both to entice employees to cross over to the new entity from their current State Departments, and to ensure that no employee was worse off.

29. Negotiations between ONRSR, the CPSU and one other Union towards a Greenfield agreement commenced in March 2012. On 30 October 2012 the *ONRSR Greenfields Agreement 2012-2014* was approved by Fair Work Australia, providing certainty to both the ONRSR and its employees about their employment arrangements.

8.3.4. What these examples tell us

30. These three examples demonstrate the complexities involved in creating entities which though carrying out activities clearly in the public interest, funded ultimately by the taxpayer and reporting to Ministers through councils or their equivalents, are in some way able to avoid being defined as public sector organisations.

31. While we recognise that there may be conflicting interests arising from our system of federalism, we still believe that many of the difficulties could be overcome by more careful consideration of the employment implications for staff. To this end we make the following recommendations:

8.4. Recommendations to the committee to streamline transfers of employees between state and federal governments

32. When there are changes to the level of government that provide or administer government services, public sector employees may be transferred between levels of government or indeed to newly-created entities which in some cases are not considered as public sector. We do not believe that these entities which continue to perform services which are essentially the same as those carried out by the previous government organisations and continue to operate in the public interest should be removed from the sphere of the public sector. Furthermore, we believe that affected employees regardless of the status of the newly-created entities need to be treated fairly according to the following principles:

    32.1. employees should not be subject to disadvantage

    32.2. employees should be entitled to at least their previous salary or that payable in the new agency, whichever is higher;

    32.3. there should be recognition of prior service and portability of provisions such as long service/personal/annual/parental leave; and

    32.4. employees should be able to choose to maintain existing superannuation arrangements if they consider them to be superior.

Chapter 9. THE RECENT TRANSFER OF BUSINESS AMENDMENTS – THE PROBLEM OF LABOUR HIRE AND A PROPOSED SOLUTION

9.1. The Fair Work (Transfer of Business) Act 2012

1. The CPSU welcomes the passage of the *Fair Work (Transfer of Business) Act 2012* ("inserts a new Part 6-3A into the *Fair Work Act 2009*.("FWA") This amendment extends the transfer of business provisions in Part 6-3 beyond transfers between national system employers to transfers from a State public sector employer to a national system employer.

2. The new provisions take in the definition of "transfer of business: from s 311 of the FWA. There is a transfer of business if, within three months of the termination of an employees employment, the employee becomes employed by a new employer and performs work the same or substantially the same work and there is a "connection" between the old and new employer.

3. Under s311 and s768AD a "connection" exists between two employers in the following circumstances:

    3.1. there has been a transfer of assets

    3.2. the old employer (or an associated entity) has outsourced the transferring work to the new employer (or an associated entity)

    3.3. the new employer (or an associated entity) ceases to outsource work to the old employer (or an associated entity) and instead employs an employee or employees to undertake the work who had performed the work for the old employer (insourcing) or

    3.4. the new employer is an associated entity of the old employer when the transferring employee begins employment.

4. There are occasions where a State public sector employer and the new employer are "connected" in the relevant sense, however, the relevant "connection" may not extend to the relationship between a labour hire company and a public sector employer.

5. Further, it is unusual for whole operational unit to be outsourced to labour hire in the public sector, rather, the usual practice is for a small component of the "work" (such as word processing) to be outsourced in this way. It follows there is a real question whether outsourcing a component of the "work" is caught by the section.

9.2. A new general protection against undermining existing terms and conditions and job security

6. The efforts of the federal government to protect State public sector workers when the work, or part of the work, are transferred would be greatly enhanced by a new general protection that attacks the malady of existing terms and condition and security of employment being undermined by the use of labour hire.

7. An example of the use of labour hire in the Victorian Public Sector is provided by the following case study. Which highlights labour hire as a means to attack secure employment:

> Case study 1: Environment Protection Authority (Victoria)
>
> Staff member has been employed through Hays for 4.5 years, in the same role at EPA for the duration. They have predominantly been full time, though have moved to part time recently. They received one pay rise during this time, when an EPA team leader renegotiated the temp's hourly rate upwards. It should be noted that during the 4.5 years of this person's employment, EPA has completed 2 restructures.
>
> Case study 2: Environment Protection Authority (Victoria)
>
> Staff member has been employed through Hays for 3 years, in their current role for 2.5 years. They are an authorised officer, having been put through EPA's EPO training. They work full time, and received one pay rise after they requested their hourly rate be raised. They do not complete LEAPs (PDPs), nor have they had performance reviews. Their position has been rated as 3.1.2, however their hourly rate is $28. This is the equivalent to a VPS 2.1.3[1]
>
> The two are integrated into the EPA Org Structure, perform on-going roles and are Public Servants, except for the way they are employed.

8. The Committee should give consideration to a new general protection to sit in Chapter 3 Part 3-1 of the *Fair Work Act 2009* to protect workers from conduct which "undermines employment security or existing terms and conditions at the workplace".

9. The Federal Court could also be empowered, on a finding of a breach of this general protection, to apply existing terms and conditions to employees or contractors of external service providers.

[1] Assuming a casual loading of 25%, $28/hr equates to a base hourly rate of $22.40 ($28 / 1.25 = $22.40), or an annual salary equivalent of $44,262 ($22.40 * 38 * 52 = $44,262). This is just lower than VPS 2.1.3 salary of $44,351 (at 1 January 2013).

Chapter 10. **COMMON THEMES IN THE TREATMENT OF STATE and TERRITORY PUBLIC SECTOR**

10.1. Introduction

1. There are a series of common themes in the preceding Chapters which indicate a commonality in the methods currently adopted to limit public sector bargaining and the rights of public sector workers.

10.2. Terms and conditions removed from industrial instruments, precluded from bargaining or from the jurisdiction of relevant industrial tribunals

2. All governments, particularly conservative governments, have removed long standing terms and conditions from enforceable instruments. This has been achieved by the use of the State's unique power to use legislation and policy settings in their dual role as legislator and employer to require changes as a condition of an agreement.

3. The situation in NSW where the Government is removing a host of matters from consideration of the NSWIRC or from bargaining is the most egregious current example of this problem.

10.3. Wages policy as it is applied in the public sector

4. The current wages policy of the State and Territory Governments are seeking to impose a limit of around 2.5%.

5. This policy is always buttressed by concessional bargaining where public sector workers must trade off conditions in return for increases above arbitrarily imposed limits. Recently proposed increases to the superannuation guarantee charge have also been required to be incorporated into the pay policy.

6. A third factor which impedes the ability of public sector workers to seek decent wage outcomes is the so called "productivity dividend" which departments are required to deliver reductions in spending each year. This reinforces a misguided "cash at bank" concept of productivity that is not valid for public sector work (see the discussion on productivity and concessional bargaining below).

10.4. False division between the so called backroom bureaucrats and frontline staff

7. In order to justify the cuts which they have imposed on the citizens of the States and Territories State employers have sought to create a division in the minds of the public

between "front line staff" which usually means teachers, nurses, fire-fighters and police and "backroom bureaucrats".

8. This feeds hostility between the public and our members particularly those staff that have direct dealings with the public.

10.5. Productivity and concessional bargaining

9. 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.

10. The term 'productivity' is often referred to in discussions about Australia's economic prosperity. 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.

11. 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. This difficulty is compounded in the provision of services by the public sector.

12. In recent times the Office of National Statistics in the United Kingdom has attempted to measure productivity for part of the public sector.[45] The report concludes there is no agreed measure of productivity for public sector work. We would argue that assessment of the productivity of public sector workers is vexed on both a micro and macro level.

13. 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? The list of variables is never ending. Further: how does one assess the productivity outcome of public policy? Is a saving on occupational health and safety investigators good for the well being of society?

14. The recent Fair Work Australia report entitled "*An overview of productivity, business and competitiveness and viability 2011"*[46] points out that official productivity estimates

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[45] Atkinson T (2005) Atkinson Review: Final Report: Measurement of government output and productivity for the National Accounts (2005, Palgrave MacMillan, Basingstoke)

[46] Dr. Samantha Farmakis-Gamboni and Kelvin Yeun, `an overview of Productivity, business competitiveness and viability' Fair Work Australia (2011) Research Report 1/2011 Melbourne Australia.

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 determinants of community wellbeing".[47]

15. It follows from this that an assessment of productivity of the workers who implement public policy requires a sophisticated and multi faceted approach.

16. The CPSU has recently commissioned a report conducted by the National Institute of Labour Studies that analyses the academic and other research on public sector pay and productivity.[48] It questions the value of assessments of productivity and the attachment of wage rises to this concept in the public sector.

17. 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 productivity, where academic research questions whether public sector productivity is capable of adequate measurement and agreements can only be secured by assent to trade offs of conditions for wage rises.

18. A system of bargaining with intervention limited to procedural bargaining orders is not adequate to deal with this problem. What is required is a Tribunal armed with a capacity to intervene and arbitrate on a range of issues (including productivity) allied to a greater capacity to arbitrate bargaining disputes in circumstances of an impasse in bargaining.

10.6. The limits on Federal referrals

19. Victoria remains the only State to have referred its public sector to the Commonwealth. All other States, apart from Western Australia have made referrals of their private sector. Both the 1996 and 2005 Victorian referrals have exclusions (seeAppendix1 below). To the extent that excluded matters could come within the jurisdiction of the *Fair Work Act 2009* Victorian public sector workers are disadvantaged. Victorian governments have not enacted any State legislation to deal with the excluded matters in

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[47] Ibid at p 145

[48] Hancock, Healy, Mavromaras, Sloane and Wei, National Institute of Labour Studies Brief Report to the CPSU (2011) Public Sector Pay and productivity, (2011, Flinders University, Adelaide). A copy of this report is attached to this submission as Attachment 1

the event of a dispute. The excluded matters (including the regulation of redundancy) remain unregulated outside the common law of employment.

10.7. Labour Hire

20. The move to insecure forms of employment has been part of a growing trend to deregulate labour markets and create more "flexible" work patterns.

21. While many Australians are familiar with downsizing of the public sector many are unaware that the public sector area also affected by insecure forms of work. The use of labour hire had become epidemic in the public sector (up to 6 million hours in NSW alone) has implications for public sector employment for unions and for citizens.

22. Labour hire may not be caught by recent changes to the *Fair Work Act 2009* to protect employees transferring from a State sector workforce to a national system employer[49]. It is, by its nature, an indirect form of employment in which an agency supplies workers for a host workplace. The contract is between the worker and the labour hire agency. It is a form of employment that has gained currency in public sector because it can provide State employers with a means of removing entitlements and labour standards from public sector workers.

23. Labour Hire undermines the wages and conditions of work that have been negotiated into awards and agreement. It is more often the case that labour hire workers performing a particular task do not have the same wages and entitlements of workers they work alongside. Often the use of labour hire staff is more expensive than employing permanent staff and the various Governments can disguise the cost and use labour hire by various methods in budgets. This in turns raises issues about transparency and accountability in Government.

24. Insecure work and labour hire in the public sector has significant governance and integrity issues. The role of the public service is to deliver the processes of government impartially and equitably to all citizens. The increasing use of labour hire puts these principals at risk. Labour hire is of a transitory nature, labour hire workers have a contract with the agency not with the public service department in which the contractor performs work. They do not have the same legal obligations to public service codes of conduct, standards or procedures that govern work in specific public service organisations.

25. We propose in Recommendation Six in Chapter 12 that a new general protection be included in Chapter 3 of the Fair Work Act to prohibit conduct by an employer which undermines job security or the terms and conditions of employment of permanent

employees. This would attack the malady at the heart of the labour hire epidemic in public sector employment.

Chapter 11. **ANSWER TO THE TERMS OF REFERENCE**

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

New South Wales

1. Subsequent to the O'Farrell "reforms" whereby the NSW State Government has removed the capacity of state public sector workers to either collectively bargain or to seek a determination from the NSW Industrial Relations Commission for wages (and other conditions) superior to the legislated maximum is unprecedented in Australian industrial law.

2. The rights of federal system employees are superior in that there is no "maximum" imposed on bargaining outcomes and the restrictions on the matters that can be subject to an enterprise bargain are minor in comparison.

3. Also in the pathway towards a workplace determination under the *Fair Work Act 2009* the right of a party to raise any quantum of wage increase is unlimited.

Victoria

4. Due to the Referral[50], Victorian public sector workers are subject to the *Fair Work Act 2009*. The excluded matters mean that not all the rights and entitlements available to other workers under the Act are available to Victorian public sector workers. FWC's Full Bench decision in the *Parks Victoria* case[51], deals with the effect of the Referral exclusions on the Commission's jurisdiction

5. Parts 2-4 (Enterprise agreements); and 2-5 (Workplace determinations) of the Act can only apply to the Victorian public sector to the extent that it is supported by the Referral Act. This is so because enterprise agreements and workplace determinations can only apply to 'national system employers' and 'national system employees' (s.259 and s.267(4)). Victorian public sector agencies are not national system employers within the meaning of s.14 of the Act. But the term 'national system employer' (and 'national system employee') is given an extended meaning in respect of 'referring States'. The State of Victoria is a referring State within the meaning of s.30B and

[50] *Fair Work (Commonwealth Powers) Act 2009 (Vic)*
[51] [2013] FWCFB 950; Parks Victoria v The Australian Workers' Union and others,

hence the provisions of Division 2A of Part 1-3 apply. Relevantly, s.30D serves to extend the definition of a national system employer to include Victorian public sector agencies (also see s.30C in respect of the extended definition of national system employee). Further, s.30H provides that Division 2A only has effect to the extent of the matters referred to the Commonwealth Parliament by the Referral Act.

6. Therefore the Commission is empowered to make an enterprise agreement or workplace determination in respect of Victorian public sector employers and its employees, but only to the extent authorised by the Referral Act. Section 5 of the Referral Act sets out the matters which are excluded from the matters referred by s. 4(1).[52] The Commission does not have jurisdiction to include in an enterprise agreement or workplace determination any terms (agreed or otherwise) which pertain to an excluded subject matter. To the extent that an agreed term deals with an excluded subject matter (within the meaning of s.5 of the Referral Act), s.267(2) has no valid operation. This is because the Referral Act is the sole source of the Commission's power.[53]

7. The Commission found that clauses relating to the regulation of fixed term, casual, and seasonal employment were not able to be included in the proposed workplace determination. The provisions were found to pertain to the number and appointment of public sector employees, and not terms and conditions of employment. Hence, they fall within the scope of the exception in s. 5(1)(a) of the Referral Act.

8. The *Parks Victoria case* demonstrates conclusively that any term in an enterprise agreement or workplace determination that falls within the excluded matter of the Referral Act and is now unenforceable. Terms understood for many years as not being caught by the Re.AEU limitations now are.

9. As previously stated there are over 30 Victorian public sector industrial instruments that cover CPSU and Victorian public sector employers. Many have terms in the same form as those found in *Parks Victoria* to be excluded matters. Similarly, all Victorian public sector agreements potentially contain unenforceable terms. Limits on the time period that a temporary employee could be employed in the Victorian public service for instance have existed since at least 1890[54], if not earlier. Victoria's current *Public Administration Act 2005 (Vic)* however, does not contain terms and conditions of employment due to their referral to the Commonwealth.

10. Redundancy pay minimum payments set out in the National Employment Standards (NES) (Part 2-2 Division 11, Subdivision B) are another matter specifically excluded.

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[52] See Appendix # for excluded matters

[53] [2013] FWCFB 950; Parks Victoria v The Australian Workers' Union and others,

[54] *Public Service Act 1890 (Vic)* See s38 requiring a register; and 3 months limitation on engagement. Provision retained with extension to 1 year's engagement in subsequent legislation.

11. The most recent example of this situation concerns an application by the State of Victoria for an interim injunction preventing protected industrial action by members of the Australian Education Union (AEU), and CPSU in regard to bargaining for new teachers, and school support staff agreements. Victoria claims that the unions' are seeking non permitted terms in proposed agreements as their claims include matters in their logs that have been excluded from Victoria's referral of powers to the Commonwealth. On 7 February 2013 Justice Jessup refused Victoria's request for an interim injunction.[55] Nevertheless, Victoria has continued to publicly assert that the industrial action is unlawful due to these constitutional limitations. The matter is scheduled for hearing before Justice Jessop on 20th February 2013.

Western Australia

12. The Western Australian industrial legislation is less beneficial than the Fair Work Act 2009 in these respects:

No compensation in lieu or reinstatement for an unfair dismissal

13. The *Industrial Relations Act 1979* (WA) (the Act) does not provide for financial compensation in lieu of reinstatement in unfair dismissal matters for Government Officers (as defined by Act). See *SGIC v Johnson* (1997) 41 AILR 13-113.

Certain public sector standards cannot be the subject an application to the tribunal following passage through the disputes settlement procedure

14. The exclusions listed at s80(E)(7) of the Act, *The Public Sector Management Act 1994* (WA) (PSMA) result in the Public Service Arbitrator and Public Sector Appeal board (Constituent Authorities of the WAIRC) having no jurisdiction in regard to industrial disputes regarding matters that are the subject of a public sector standard breach procedure.

15. Relevant industrial matters excluded from review by reason of this exclusion: recruitment; selection; appointment; secondment; transfer; and temporary deployment.

16. The standards set out minimum requirements in relation to merit, equity and probity to be met by the employer. These matters cannot be the subject of a dispute brought to the Tribunal through a disputes settlement procedure.

17. The PSMA only provides a limited form of administrative appeal where an employee claims a breach in relation to these industrial matters.

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[55] Federal Court Order. State of Victoria v Australian Education Union and another, 7 February 2013, VID57/2013

18. If a breach is found the Public Sector Commissioner (PSC) can issue a recommendation to an employer to rectify the breach. The employer is under no legal obligation to action that recommendation.

19. As a consequence of the administrative nature of such a recommendation the WA Public sector unions and employees view the standards regime as a paper tiger. Very few applications are made to seek relief under the regime.

20. Prior to 1996 public sector employees could take industrial disputes re these matters to the WAIRC. The CSA have consistently sought the return of the matters to WAIRC jurisdiction. To that end it has lobbied the ALP and National Party to introduce amending legislation. The Whitehead review of the PSMA in 2004 supported legislative change to provide WAIRC jurisdiction over certain public sector standard matters. The WA Department of Employment and Consumer Protection in a submission to the Whitehead review also acknowledge some WAIRC oversight was required.

No general protections

21. The Act contains no General Protections regime similar to that provided for in *Fair Work Australia (FWA Pt 3-1).*

22. This is especially pertinent given that Union delegates have been warned of potential disciplinary action (against them and members) for insisting on a member's right to be represented at disciplinary meetings. The delegates have been trained by the Union to offer a representative and advocacy role at such meetings. Referring to a PSC Commissioners Instructions (CI) on discipline, WA public sector employers attempt to deny representation, advising that members can only bring an observer or support person to the meeting and that the latter has limited participation rights. The CSA has made the WAIRC aware of the above.

23. The Act and PSMA do not provide the protections offered under *FWA* for transfer of agreements, awards and other instruments during transmission of business type scenarios. See *Pt 2-8 FWA.* This has consequences when the State Government seeks Non Constitutional Corporations (NCC) to undertake former public sector activities. The current WA Government has developed a key partnership with the Non Government welfare and housing (not for profit) sectors for the latter to provide an increasing suite of services. Some of these services were previously provided by the public sector. The labour cost differential between the public sector and the Non Government not for profit sector is a driver of that relationship for the Government. This differential means that those moving from the public to Non Government sector face a reduction in salary and conditions.

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

New South Wales

24. The Committee will note the various restrictions on the redundancy and long held redeployment rights of NSW dealt with under heading 2.5 in Chapter 2 of this submission.

25. Article 13(1) of the convention, states that:

> "*When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:*
>
> *(a) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment."*

26. Reasonable redeployment processes could be argued to be essential criteria to be a measure to avert or minimise the number of terminations as a consequence of restructuring. It could be argued that the current process is merely a piecemeal one.

27. The substantial reduction in the severance package given to state public servants who elect redeployment and are forcibly retrenched means that the process could be argued not to be genuine. Furthermore the fact that excess officers who have been displaced for more than three months no longer receive priority assessment could again be seen as an unsatisfactory process for those people.

28. The Termination of Employment convention does seek to ensure that workers have a right to redundancy pay in the event that they retrenched. Article 12 of the Convention states:

> *"A worker whose employment has been terminated shall be entitled, in accordance with national law and practice, to-*
>
> *(a) a severance allowance or other separation benefits, the amount of which shall be based inter alia on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions…"*

29. Redundancy pay in MEE 2012 far exceeds that of the Fair Work Act minimum or obligations under international conventions. Nevertheless the convention may allow the minimum provisions the Fair Work Act to be a protection for State a public sector in case the NSW Government tried to reduce severance payments in the future.

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

30. The epidemic use of labour hire to undermine terms and conditions of employment and job security in public sector employment undermines existing collective agreements and breaches Article 5 of the *Collective Bargaining Convention* by undermining rather then promoting collective bargaining.

31. In these circumstances a new general protection is required to protect job security and existing terms and conditions of employment as we propose in Recommendation Six in Chapter 12.

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

New South Wales

32. The legislative changes made by the NSW government to give its wages policy the force of law has placed NSW public sector workers in a position where they enjoy neither collective bargaining rights, nor access to independent conciliation and arbitration as applied previously.

33. Article 4 of the Right to Organise and Collective Bargaining convention 1949 obliges signatories to take:

> "Measures appropriate to national conditions to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers and employee organisation with a view to the regulation of terms and conditions of employment by means of collective bargaining."

34. The provision of legislated maximum outcome for wages is not consistent with relevant ILO conventions.

35. This is supported by Gerinon, Odero and Guido in their 2000 paper *"ILO principles concerning collective bargaining"*[56] at page 49 who, after listing measures that could be taken by Governments that are compatible with the Freedom of Association and Collective Bargaining conventions, and go on:

> "This is **not the case of legislative provisions which, on the grounds of the economic situation, impose unilaterally, for example, specific percentage increase and rule out any possibility of bargaining**, particularly by means of pressure subject to the application of severe sanctions."

36. A negotiation where the maximum outcome is predetermined and set under statutory machinery is by it nature not "voluntary" and does not "promote collective bargaining" as required under the convention.

Western Australia

37. The *Industrial Relations Act 1979* breaches the Freedom of Association and Protection of the Right to Organise Convention,1948 (87).

38. The statutory requirement under *s64 B* of the *Industrial Relations Act 1979* for Union membership to end where subscriptions are not paid has been subject to adverse comment by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) in 2011. Pursuant to *Article 3* of the Convention, the rules of the Union should address the matter and it should not be the subject of outside interference.

39. The State Governments attempt to restrict Union Delegates when acting in a representative capacity on behalf of members in disciplinary meetings breaches Article three of the convention.

40. As we have mentioned in the body of our submission we have had situations where Union delegates has been informed by employers of potential disciplinary action where they act in a representative capacity at a disciplinary meeting.

41. Should such a disciplinary procedures can lead to dismissal, the Union that would involve an Article *5 (b) which prohibits* dismissal for acting in a representative capacity.

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[56] Bernard Gernigon, Alberto Odero, Horacio Guido: *ILO Principles concerning collective bargaining*; No 1 (2000)International Labour Review (ILO, Geneva) p 33 to 55 at p 49

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

New South Wales

42. The difficulties faced by our members in NSW where legislative amendments acts as a barrier towards matters being dealt with by the NSWIRC or in free bargaining are dealt with in our answer to Term of Reference (A).

Western Australia

43. The *Industrial Relations Act 1979* does not recognise the legal right to strike pursuant to *Articles 3 and 10.*

44. The WA Public Sector Wages Policy limits the capacity of the industrial party's to freely and independently negotiate terms and conditions of employment relevant to the enterprise.

45. Inflexible time frames, artificial limits on salary increases, unilateral Government / employer pronouncements and burdensome permission requirements have produced resource intensive and drawn out negotiation processes. The Government policy apples to negotiations under the Act and FWA.

46. There is no protected industrial action regime available to Unions and employees in WA, when negotiating enterprise agreements pursuant to s41 of the Act.

47. Indeed the Act does not specifically recognise a legal right to strike. The recent Amendola review of the state IR system (2009) recognised Unions and employees engaged in industrial action had no immunity from civil suit. The LRLA (see above) proposed no change to the current law, whereas Amendola recommended a form of protected industrial action mirroring FWA. Pursuant to the deliberations and conclusions of the ILO Freedom of Association Committee re Convention 87, the right to withdraw ones labour is a legal right.

11.6. (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

Victoria

48. There is a clear deficiency in the Federal regulation of State public sector workers with respect to redundancy. State public sector workers regulated by the *Fair Work Act 2009* may not even have access to the NES redundancy provisions.

49. After *Re AEU*[57] it is clear that some restrictions exists on the Federal Government's ability to regulate "high office" public sector workers,[58] and the number and identity of the persons which the State wishes to dismiss on redundancy grounds".[59]

50. The interpretation the Victorian Government places on these restrictions go well beyond the legal extent of these restrictions, particularly when the regulation by the Federal Government are supported by a State reference under the referral power.[60]

51. The Commonwealth would greatly assist the parties and add certainty to this situation in legislating to the full extent of the reference after seeking appropriate advice.

Western Australia

52. Given the concept of protected industrial action was introduced in the 1990's premised on the Commonwealth's external affairs powers under the *Constitution* and in accordance with ILO obligations, there is no legal bar to the Commonwealth legislating for protected industrial action for non senior WA public sector employees.

53. Recent FWA amendments have closed a legislative loop hole to protect employee conditions in transmission of business scenarios when WA employees move from employment by State to National system employers. That amendment is of no assistance where employees move between employers in the State system or from a National employer to a State employer. The LRLA does not require a new employer to recognise prior conditions of employment as per the FWA regime.

11.7. (ii) 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.

54. It is the firm view of the CPSU SPSF that the range of powers available to the parties and to the Federal Commission are too limited to address the unique problems of public sector workers bargaining against the State.

55. The *Fair Work Act 2009* would be enhanced by the inclusion of greater powers of arbitration to manage and settle bargaining and other disputes.

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[57] 1995 184 CLR 188
[58] Ibid at 233

[59] Ibid at 232
[60] There was no referral in issue in the circumstances that that lead to the High Court decision in *Re AEU*

56. A mechanism to facilitate this would be for the Federal Government to ratify the *Labour Relations (Public Service) Convention 1978* (No 151) which compels the availability to public sector workers of a suite of powers to settle disputes against the State including through the use of mediation, conciliation and arbitration.

Chapter 12. **RECOMMENDATIONS**

57. The CPSU seeks the following recommendations from the Committee.

58. The Committee should also note that the CPSU SPSF made comprehensive proposals for amendments to the *Fair Work Act 2009* in the 2012 McCallum Review. We still assert that the amendments we proposed there would improve the Act.[61]

12.1. RECOMMENDATION ONE: Condemnation of removal of rights of review and statutory limits on bargaining

1. The unilateral removal of conditions, the arbitrary limits on wage outcomes, and the interference with the independence of industrial tribunals, especially as practised by New South Wales should be condemned by the Committee in the most resolute terms.

2. The Committee should note the capacity of the Federal Government to intervene in workplace relations between the State and its employees is limited in those States where there is no referral or only a private sector referral.

3. Short of a resurrection in the use of the conciliation and arbitration power by the Federal Government there is a grave doubt as to the capacity of the Federal Parliament to extend its jurisdiction into the employment of State public sector workers in those States.

4. Furthermore, in the South Australia and Tasmania, State sector workers enjoy an industrial relations regime that has simple processes dealing with industrial action and easier access to arbitration. than those available under the *Fair Work Act 2009.*

5. In those circumstances we will limit our recommendations to those State public sector workers who are presently employed by a national system employer or who will transfer employment to a national system employer.

12.2. RECOMMENDATION TWO: Greater access to arbitration for public sector workers in the Fair Work Act

6. The Committee should recommend that, given the various unique difficulties experienced by public sector workers and their unions in bargaining under the *Fair Work Act 2009*, greater access to arbitration should available to public sector workers to resolve bargaining and other disputes.

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[61]Our submission can be viewed at: http://home.deewr.gov.au/submissions/FairWorkActReview/Initial.htm#c

12.3. RECOMMENDATION THREE: Ratification of the Labour Relations (Public Service Convention) 1978 (NO 151)

7. The Committee should urge the Commonwealth Government to become signatory to the Public Service Convention which recognises conciliation and arbitration as part of a suite of techniques for the resolution of bargaining disputes between public authorities, public sector workers, and their unions.

8. The ratification of this Convention by the Federal Government would buttress the constitutional power of the conciliation and arbitration specifically for public sector workers in the federal system through the external affairs power.

12.4. RECOMMENDATION FOUR: Re AEU and the problem of the Victorian referral

9. It offends justice that Victorian public sector workers have ,at best, limited rights to regulate redundancies or the use of fixed terms employment by reason of the limited referral of industrial relations power to the Commonwealth.

10. The Committee should urge the State of Victoria to amend its referral to the Commonwealth to include these matters and for the Commonwealth to legislate to the full extent of its constitutional power to regulate Victorian State employment.

12.5. RECOMMENDATION FIVE: COAG - streamline transfers of employees between state and federal governments

11. When there are changes to the level of government that provide or administer government services, public sector employees may be transferred between levels of government or indeed to newly-created entities which in some cases are not considered as public sector. We do not believe that these entities which continue to perform services which are essentially the same as those carried out by the previous government organisations and continue to operate in the public interest should be removed from the sphere of the public sector. Furthermore, we believe that affected employees regardless of the status of the newly-created entities need to be treated fairly according to the following principles:

    11.1. employees should not be subject to disadvantage;

    11.2. employees should be entitled to at least their previous salary or that payable in the new agency, whichever is higher;

11.3. there should be recognition of prior service and portability of provisions such as long service/personal/annual/parental leave; and

11.4. employees should be able to choose to maintain existing superannuation arrangements if they consider them to be superior.

12.6. RECOMMENDATION SIX: a new general protection to protect terms and conditions and security of employment eroded by labour hire.

12. State governments are spending millions of dollars outsourcing work by the use of labour hire agencies. The amendments to the *Fair Work Act 2009* brought about by the *Fair Work (Transfer of Business) Act 2012* may not capture this sort of outsourcing by public sector employers.

13. The new transfer of business regime may not adequately protect the job security or terms and conditions of State government employees where the State engages in excessive use of labour hire.

14. The Committee should recommend a new general protection to sit in Chapter 3 Part 3-1 of the *Fair Work Act 2009* to protect workers from conduct which "undermines employment security or existing terms and conditions at the workplace".

12.7. RECOMMENDATION SEVEN: public sector productivity measure

15. We propose a working group comprising public sector unions, labour economists, representatives of all three tiers of Government and the Fair Work Commission to develop a measurement for public sector productivity that reflects the longitudinal and regulatory work of public sector employees rather than the "cash at bank" notion of productivity used by governments to justify concessional bargaining.

APPENDIX 1. VICTORIA'S REFERRAL EXCLUSIONS

2009 REFERRAL	1996 REFERRAL
5 Matters excluded from a reference	**5. Matters excluded from a reference**
(1) A matter referred by section 4(1) does not include—	(1) A matter referred by a sub-section of section 4 or 4A does not include— ;
(a) matters pertaining to the number, identity or appointment (other than terms and conditions of appointment) of employees in the public sector who are not law enforcement officers;	(a) matters pertaining to the number, identity, appointment (other than terms and conditions of appointment) or discipline (other than matters pertaining to the termination of employment) of employees, other than law enforcement officers, in the public sector
(b) matters pertaining to the number or identity of employees in the public sector dismissed or to be dismissed on grounds of redundancy;	(b) matters pertaining to the number, identity, appointment (other than matters pertaining to terms and conditions of appointment not referred to in this paragraph), probation, promotion, transfer from place to place or position to position, physical or mental fitness, uniform, equipment, discipline or termination of employment of law enforcement officers; (c) matters pertaining to the number or identity of employees in the public sector dismissed or to be dismissed on grounds of redundancy;
(c) matters pertaining to Ministers, members of the Parliament, judicial officers or members of administrative tribunals;	(d) matters pertaining to the following subject matters— (i) workers' compensation; (ii) superannuation; (iii) occupational health and safety; (iv) apprenticeship; (v) long service leave; (vi) days to be observed as public holidays; (vii) equal opportunity— but not so as to prevent the inclusion in awards or agreements made under the Commonwealth Act of provisions in relation to those matters to the extent to which the Commonwealth Act, as enacted as at 30 November 1996 (whether or not in force), allows such

2009 REFERRAL	1996 REFERRAL
	awards or agreements to include such provisions; * * * * * * * (f) matters pertaining to Ministers, members of the Parliament, judicial officers or members of administrative tribunals;
(d) matters pertaining to persons holding office in the public sector to which the right to appoint is vested in the Governor in Council or a Minister (including the Premier);	(g) matters pertaining to persons holding office in the public sector to which the right to appoint is vested in the Governor in Council or a Minister;
(e) matters pertaining to persons employed as executives within the meaning of the Public Administration Act 2004 or persons employed at higher managerial levels in the public sector;	(h) matters pertaining to persons holding senior executive offices in the service of a Department within the meaning of the **Public Sector Management Act 1992**; (i) matters pertaining to persons employed at the higher managerial levels in the public sector;
(f) matters pertaining to persons employed as Ministerial officers under Part 6 of the Public Administration Act 2004;	(j) matters pertaining to persons employed as ministerial assistants or ministerial advisers in the service of Ministers;
(g) matters pertaining to persons holding office as Parliamentary officers (but not persons employed as Parliamentary officers under Division 3 of Part 3 of the Parliamentary Administration Act 2005) or persons employed as Department Heads within the meaning of the Parliamentary Administration Act 2005, including the Secretary of the Department of Parliamentary Services;	(k) matters pertaining to persons holding office as Parliamentary officers;
(h) matters pertaining to— (i) the transfer of employees between public sector bodies; or (ii) the redundancy of employees of a public sector body— as a result of a restructure by or under an Act;	(l) matters pertaining to the transfer or redundancy of employees of a body as a result of a restructure by an Act;
(i) the following matters relating to provision of essential services or to a state of emergency— (i) directions to employees of a public sector body to perform work (including to perform work at a particular time or place, or in a particular way), being directions that are given under the Act under which the relevant proclamation or declaration is made; (ii) directions to employees of a public sector body not	(m) matters pertaining to the duties of employees if a situation of emergency is declared by or under an Act or an industry or project is, by or under an Act, declared to be a vital industry or vital project and whose work is directly affected by that declaration.

2009 REFERRAL	1996 REFERRAL
to perform work (including not to perform work at a particular time or place, or in a particular way), being directions that are given under the Act under which the relevant proclamation or declaration is made;	
(j) matters that would allow or require a public sector employer within the meaning of the Public Sector Employment (Award Entitlements) Act 2006 to provide a term or condition of employment in breach of section 10 of that Act;	(n) matters that would allow or require a public sector employer within the meaning of the **Public Sector Employment (Award Entitlements) Act 2006** to provide a term or condition of employment in breach of section 10 of that Act or to offer, accept, make or lodge with the Employment Advocate a workplace agreement that does not pass the fairness test within the meaning of that Act;
(k) matters that would allow or require a public sector employer within the meaning of the Public Sector Employment (Award Entitlements) Act 2006 to offer an employee within the meaning of that Act, or to accept an offer from an employee of, a statutory industrial agreement within the meaning of that Act that provides any terms or conditions of employment that are materially different from the terms and conditions of employment that would otherwise apply to the employee in employment with the employer under a collective agreement or that would apply to the employee under the terms of a relevant award or a designated preserved award within the meaning of that Act.	(o) matters that would allow or require a public sector employer within the meaning of the **Public Sector Employment (Award Entitlements) Act 2006** to offer an employee within the meaning of that Act, or to accept an offer from an employee of, a statutory industrial agreement within the meaning of that Act that provides any terms or conditions of employment that are materially different from the terms and conditions of employment that would otherwise apply to the employee in employment with the employer under a collective agreement or that would apply to the employee under the terms of a relevant award or a designated preserved award. (2) Insofar as a matter specified in sub-section (1) of this section does not fall within the terms of a sub-section of section 4 or 4A, sub-section (1) of this section must be taken to have been enacted for the avoidance of doubt.
(2) In addition to the matters set out in subsection (1), a matter referred by section 4(1) does not include—	
(a) matters pertaining to the number, identity or appointment (including terms and conditions of appointment, to the extent provided for in paragraph (b)) of law enforcement officers;	
(b) matters pertaining to probation, promotion, transfer from place to place or position to position, physical or mental fitness, uniform, equipment, discipline or termination of employment of law enforcement officers except—	
(i) matters pertaining to the payment of allowances and reimbursement of expenses and pertaining to notice of termination of employment and payment in	

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lieu of notice of termination of employment; and (ii) to the extent that Divisions 1 and 2 of Part 6-4 of the Commonwealth Fair Work Act, as originally enacted, deal with the matters. (3) In this section, *essential services* means any of the following— (a) any matter in respect of which a proclamation has been made under Part 6 of the Electricity Industry Act 2000; (b) any matter in respect of which a proclamation has been made under Part 9 of the Gas Industry Act 2001; (c) any vital State project that is declared to be so under the Vital State Projects Act 1976; (d) any vital industry that is declared to be so under the Vital State Industries (Works and Services) Act 1992.	