Australian Government

Department of Education, Employment and Workplace Relations

Senate Standing Committee on Education, Employment and Workplace Relations Inquiry into the conditions of employment of state public sector employees and the adequacy of protection of their rights at work as compared with other employees

Department of Education, Employment and Workplace Relations Submission

15 February 2013

Summary

1. The Commonwealth's legislative powers are set out in the Australian Constitution. There is no express legislative power to regulate workplace relations or State public sector employees. The Commonwealth currently relies on a range of powers to regulate workplace relations for State public sector employees, including a referral of power from Victoria and the territories power (section 122 of the Constitution). No other State has referred power to the Commonwealth in respect of its public service.[1]
2. The National Workplace Relations System is supported by the States' agreement[2] to refer power to extend the *Fair Work Act 2009* (FW Act) to private sector employers and employees otherwise outside Commonwealth power (e.g. unincorporated employers). That agreement was, and still is, underpinned by commitments given to the States that they could choose whether or not to regulate their public sector workforces.
3. The Commonwealth, State and Territory governments share responsibility for implementing ratified International Labour Organization (ILO) Conventions according to their respective constitutional powers.
4. The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) regularly assesses compliance with ratified ILO Conventions through annual reporting processes. Australia's social partners – the Australian Council of Trade Unions (ACTU), the Australian Chamber of Commerce and Industry (ACCI) and the Australian Industry Group (Ai Group), play an important and formal role in this process by commenting on individual jurisdictions' compliance with ratified ILO Conventions. The CEACR provides an impartial and technical evaluation of compliance with ratified Conventions.
5. We note that the terms of reference of this Inquiry go to the conditions of employment of State public sector employees and the adequacy of protection of their rights at work as compared with other employees. The Department provides this submission to assist the Committee as far as it can within the limits of its administrative responsibilities. To the extent that the terms of reference raise issues of constitutional policy and/or compliance with international law, responsibility rests with the Attorney-General's Department.

The National Workplace Relations System

6. The terms of reference for this Inquiry ask the Committee to note the scope of States' referrals of power to support the FW Act. The following information sets out detail about the scope of those referrals and the context in which they operate.
7. Since 1 January 2010, Australia has had a single National Workplace Relations System for the private sector that covers approximately 96 per cent of private sector employees in Australia.
8. Since 2006 Commonwealth workplace relations legislation has relied predominantly on the corporations power of the Constitution (section 51(xx)). This power enables the Commonwealth to legislate with respect to foreign corporations or corporations (formed within the Commonwealth) that are substantially engaged in trading or financial activity (known as constitutional corporations) and allows for the most comprehensive and uniform coverage of Commonwealth workplace relations legislation.

[1] Tasmania did not exclude local government from the scope of its referral of power (see Attachment A).
[2] Western Australia did not refer power to the Commonwealth in relation to private sector employers or its public sector.

9. The High Court has upheld the corporations power as a legitimate basis of regulation[3] and there is broad agreement that there are significant advantages in using the corporations power to underpin the system, including the capacity to directly regulate rights and obligations of employers and employees by setting minimum standards and obligations that apply equally to all employers and employees (e.g. the National Employment Standards).
10. Reliance on the corporations power has allowed for more comprehensive and consistent regulation across the States than previous systems. However, up until 2009, employers (in States other than Victoria) that were not constitutional corporations were outside the national system. There was significant confusion and uncertainty about the coverage of some employers and employees, for example not for profit organisations.
11. The issues were largely addressed by referrals of power from States in 2009. These referrals facilitated an expansion of coverage of Commonwealth workplace relations regulation to additional classes of private sector employers and employees and are an important part of ensuring wide coverage of the National Workplace Relations System.
12. The recent Post-Implementation Review of the Fair Work Act confirmed that the benefits of the National Workplace Relations System are considerable, and that the movement to a national system is 'strongly supported by most employer organisations and by employees and their unions'.[4]

State referrals and public sector workforces

13. Uniformity of workplace relations regulation across the private sector therefore relies on the referral of power from the States to the Commonwealth (section 51(xxxvii)) of the Constitution).
14. In 2009, all States, except Western Australia, referred power to the Commonwealth to extend the FW Act to private sector employers not otherwise within Commonwealth power (such as unincorporated businesses or companies not significantly engaged in trading or financial activity) and their employees. State public sector workforces in Victoria, the Australian Capital Territory and the Northern Territory are covered by the National Workplace Relations System.
15. New South Wales, Queensland, South Australia and Tasmania did not refer power in relation to their public sector workforces. Consequently, employers and employees in the public sector in these States remain covered by the relevant State industrial relations system. Western Australia did not refer power to the Commonwealth, and its industrial relations system regulates its public sector workforce as well as employers that are not trading or financial corporations.

How State referrals operate

16. Legislation in each referring State and the Commonwealth gives effect to the referrals of power. This legislation is discussed further below.

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[3] *New South Wales and Others v The Commonwealth* [2006] 231 ALR 1. The *Workplace Relations Amendment (Work Choices) Act 2005* was challenged by New South Wales, Western Australia, South Australia, Queensland, Victoria, the Australian Workers' Union and Unions New South Wales. Tasmania, the Australian Capital Territory and the Northern Territory intervened.

[4] Fair Work Review Panel, 'Towards more productive and equitable workplaces: An Evaluation of the Fair Work Legislation',(Report, Department of Education, Employment and Workplace Relations, 15 June 2012), 83.

17. The National Workplace Relations System was achieved by the States referring to the Commonwealth the power to:
    - enact provisions that extend the meaning of national system employer to encompass any employer in a referring State and their employees (subject to certain public sector exclusions, see below for further detail),
    - amend the FW Act in the future in relation to the subject matter dealt with by the FW Act (e.g. terms and conditions of employment and rights and responsibilities in employment), so far as not otherwise within Commonwealth power, and
    - enact transitional arrangements for 'incoming' State system employers and employees.
18. Each referring State excluded certain matters from its referral. New South Wales, Queensland and South Australia excluded State public sector and local government employers and employees. Tasmania excluded its State public sector employers and employees but referred power in relation to local government employers and employees. Victoria referred power in relation to its State public sector and local government employers and employees, subject to certain exclusions.[5] **Appendix A** sets out matters excluded from the referrals in more detail.
19. In 2009, the Commonwealth passed legislation to amend the FW Act to take account of the State referrals:
    - The *Fair Work (State Referral and Consequential and Other Amendments) Act 2009* extends the scope of the FW Act following Victoria's referral of power, which was given before the 1 July commencement date of most of the provisions of FW Act. The Act also makes transitional arrangements for Victorian employees and employers, who were covered by the *Workplace Relations Act 1996* as a result of an earlier referral of power and who are covered by that new referral. It also makes transitional and consequential amendments to other Commonwealth legislation as a result of the commencement of the Fair Work system.
    - The *Fair Work Amendment (State Referrals and Other Measures) Act 2009* extends the scope of the FW Act following the New South Wales, Queensland, South Australia and Tasmanian referrals of power to the Commonwealth (which were given between 1 July 2009 and 1 January 2010).
20. Each referring State passed legislation to refer legislative power to the Commonwealth. Victoria first referred power to the Commonwealth in 1996 to support the application of the *Workplace Relations Act 1996* (WR Act) to all employers and employees in Victoria. In June 2009 Victoria enacted new referral legislation, the *Fair Work (Commonwealth Powers) Act 2009* (Vic) to support the extension of the FW Act to employers and employees in that State (subject to some exclusions, see **Appendix A**).
21. The other referring States passed the following legislation in the second half of 2009:
    - *Fair Work (Commonwealth Powers) and Other Provisions Act 2009 (QLD)*
    - *Industrial Relations (Commonwealth Powers) Act 2009 (TAS)*

[5] Victoria first referred power over certain matters relating to industrial relations to the Commonwealth in the *Commonwealth Powers (Industrial Relations) Act 1996* (Vic) (the 1996 Referral Act). Victoria referred the subject matter in section 4 of the 1996 Referral Act to the Commonwealth, including conciliation and arbitration for the prevention and settling of disputes, award and agreement making, minimum terms and conditions of employment, setting minimum wages, termination and freedom of association. Section 5 of the 1996 Referral Act also excluded some matters in respect of public sector employees, including matters pertaining to the number, identity, appointment and discipline of public sector employees and law enforcement officers, in similar, though not identical, terms to the *Fair Work (Commonwealth Powers) Act 2009* (Vic).

- *Fair Work (Commonwealth Powers) Act 2009 (SA)*
- *Industrial Relations (Commonwealth Powers) Act 2009 (NSW)*

Australia's Obligations under International Labour Organization Conventions

22. The terms of reference for this Inquiry raise a number of questions about obligations under International Labour Organization (ILO) conventions ratified by Australia.

ILO Conventions relevant to the Inquiry

23. The Conventions ratified by Australia relevant to the Inquiry include the following:
    - *Forty-Hour Week Convention, 1935 (Convention 47) (ratified 22 October 1970);*
    - *Labour Inspection Convention, 1947 (Convention 81)* (ratified 24 June 1975);
    - *Freedom of Association and Protection of the Right to Organise, 1948 (Convention 87)* (ratified 28 February 1973);
    - *Right to Organise and Collective Bargaining Convention, 1949 (Convention 98)* (ratified 28 February 1973);
    - *Equal Remuneration Convention, 1951 (Convention 100)* (ratified 10 December 1974)*;*
    - *Discrimination (Employment and Occupation) Convention, 1958 (Convention 111)* (ratified 15 June 1973);
    - *Minimum Wage Fixing Convention, 1970 (Convention 131)* (ratified 15 June 1973);
    - *Workers' Representatives Convention, 1971 (Convention 135)* (ratified 26 February 1993)*;*
    - *Workers with Family Responsibilities Convention, 1981 (Convention 156)* (ratified 30 March 1990)*;*
    - *Termination of Employment Convention, 1982 (Convention 158)* (ratified 26 February 1993)
    - *Part-Time Work Convention, 1994 (Convention 175)* (ratified 10 August 2011).
24. A summary of provisions of these Conventions is provided at **Appendix B** and full-text copies of the Conventions can be found at: http://www.ilo.org/dyn/normlex/en/f?p=1000:12000:252990291578691:::P12000_INSTRUMENT_SORT:4.

Assessing compliance with ratified ILO Conventions

The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR)

25. The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) is charged with assessing compliance with ratified ILO Conventions. The CEACR was established in 1926 and is composed of 20 eminent jurists appointed by the ILO Governing Body[6] for three-year terms. Its role is to provide an impartial and technical evaluation of the application of ratified ILO Conventions by ILO Members. Each March the CEACR submits an annual report to the ILO International Labour Conference (ILC) (held in June).[7]

[6] The ILO Governing Body consists of 56 members (28 governments, 14 workers and 14 employers) and 66 deputy members (28 governments, 19 workers and 19 employers) and is responsible for taking decisions on ILO policy and administration, setting the agenda of the International Labour Conference and electing the ILO Director-General. The Governing Body sits three times per year in March, June and October.

[7] CEACR Annual Reports can be found at: http://www.ilo.org/public/libdoc/ilo/P/09661/.

26. Under Article 22 of the ILO Constitution, each Member (in the case of Australia, the Commonwealth) is required to submit an annual report to the CEACR on the measures it has taken to give effect to ratified Conventions (referred to as Article 22 reports). More information about the Article 22 reporting process is set out at **Appendix C.**
27. As a matter of practice, each State and Territory government reports individually on how their respective jurisdictions implement the Conventions consistent with the responsibilities of as each State and Territory for making and administering the relevant legislation.
28. The CEACR recognises the division of responsibilities between States, Territories and the Commonwealth and addresses its observations and direct requests to either the Commonwealth or the specific State or Territory government concerned.[8] That jurisdiction is then responsible for responding to the CEACR's comments and taking action where appropriate.
29. Certain worker and employer organisations (referred to as 'social partners') have a key role to play in this process and may submit comments on the implementation of ratified Conventions by Members and their individual jurisdictions directly to the CEACR. The CEACR takes into account the comments of the social partners when assessing the implementation of ratified Conventions. In Australia, the ILO social partners are the ACTU, the Ai Group and ACCI.
30. By way of example, in September 2011 Australia provided Article 22 reports to the CEACR in relation to Convention 98, the *Right to Organise and Collective Bargain Convention* and Convention 131, the *Minimum Wage Fixing Convention*. In relation to each Convention, the New South Wales Government communicated to the CEACR the passage of the *Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011* in June 2011. The ACTU also brought this legislation to the CEACR's attention. In March 2012 the CEACR issued direct requests to the NSW Government requesting that it respond to the ACTU's observations in the next Article 22 report (Convention 98 is due in 2013 and Convention 131 is due in 2016).[9]
31. In September 2012 Australia submitted Article 22 reports to the ILO in relation to Convention 81, Convention 100 and Convention 111. The CEACR's comments will be released in its annual report in March 2013.
32. In August 2013 Australia will submit Article 22 reports to the ILO in relation to Convention 87, Convention 98 and Convention 175. The CEACR's comments will be released in March 2014.
33. The Department undertakes to provide to the Committee a copy of any reports released by the CEACR before the reporting date.

Special complaints and representations procedures

34. In addition to the formal Article 22 reporting process and the role of the CEACR in assessing compliance, the ILO's supervisory system includes a number of ways in which complaints can

[8] CEACR 'observations' are comments published in its annual report concerning the fundamental aspects of the implementation of a particular Convention. 'Direct requests' are communicated directly to the governments concerned and relate to technical questions or requests for further information. Member States are required to respond to observations and direct requests in their next Article 22 reports.

[9] *Right to Organise and Collective Bargaining Convention (ILO No 98),* opened for signature 18 August 1949, 96 UNTS 257 (entered into force 18 July 1951); the *Minimum Wage Fixing Convention (ILO No 131),* opened for signature 22 June 1970 (entered into force 29 April 1972).

be brought to the ILO concerning the implementation of a ratified Convention. Briefly, these include:

- complaints regarding violations of freedom of association by an ILO member can be made to the Governing Body Committee on Freedom of Association (CFA). The CFA investigates the complaint and makes recommendations about how the situation could be remedied. Among other things, the CFA may recommend the review of legislation and in extreme cases propose a 'direct contacts' mission to address the problem directly;
- for serious cases of non-compliance with ratified Conventions, representations on the application of ratified Conventions can be made to the Governing Body alleging that a Member 'has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party.' A three-member tripartite committee of the Governing Body is then established to examine the representation and make recommendations to address the situation; and
- for exceptional cases of non-compliance with ratified Conventions, complaints can be made to the ILC by a delegate to the ILC, an ILO Member or the Governing Body.[10] This can lead to a Commission of Inquiry carrying out a full investigation. A Commission of Inquiry is the ILO's highest-level investigative procedure and is generally used to address the most persistent and serious violations.

Commonwealth legislative powers

35. The terms of reference for this Inquiry ask the Committee to consider, noting the scope of States' referrals of power to support the Act, what legislative and 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.
36. The Commonwealth and the States have had overlapping roles in regulating wages, employment conditions and other aspects of labour regulation since Federation. The Commonwealth and State industrial relations systems evolved, and continue to evolve, separately. While there are many elements common to each, every system is different. As in the case of the Commonwealth, each State has its own legislation which specifically regulates its public service.[11] It is not possible to meaningfully compare the benefits and protections of each system as they apply generally. This would require a case by case analysis.
37. The National Workplace Relations System is supported by the following constitutional powers:
    - the corporations power (section 51(xx));
    - matters referred by States (section 51(xxxvii));
    - the external affairs power (section 51(xxix));
    - the territories power (section 122);
    - the interstate and international trade and commerce power (section 51(i));

[10] There have only been 13 Commission of Inquiry since 1962.

[11] See for example the *Australian Public Service Act 1999* (Cth); *Public Sector Employment and Management Act 2002* (NSW); *Public Administration Act 2004* (Vic); *State Service Act 2000* (Tas); *Public Sector Act 2009* (SA); *Public Sector Management Act 1994* (WA); *Public Service Act 2008* (Qld).

- the Commonwealth's power to regulate its own employment relationships (principally section 52(ii)); and
- the incidental power (section 51(xxxix)).

38. In theory, it would be possible for the Commonwealth to seek to further regulate aspects of State public sector employment using additional constitutional powers. For example, the conciliation and arbitration power (section 51(xxxv)) gives the Commonwealth power to legislate with respect to 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State'. This power has historically been used to support Commonwealth workplace relations legislation[12] and, in conjunction with the incidental power (section 51(xxxix)), would support legislation to establish a process for prevention and settlement of interstate industrial disputes. However, the conciliation and arbitration power might not so clearly support direct regulation of the rights and obligations of employers and employees, for example through the National Employment Standards, as the corporations power does. Use of the conciliation and arbitration power to regulate State public sector employees and employers is also constrained by the requirement that there be an interstate dispute. Further, while it would be possible for the Commonwealth to rely on both heads of power, each power authorises a different method of regulation and allows different coverage. Reliance on the conciliation and arbitration power would involve complex legislative reform.
39. As far as State public sector employment is concerned, there is an implied constitutional limitation set out in *Melbourne Corporation v Commonwealth*[13] (the Melbourne Corporation doctrine). This limitation on Commonwealth powers functions to preserve the autonomous existence of the States.[14]
40. The States' implied constitutional immunity from the application of certain Commonwealth laws was put by Rich J in the Melbourne Corporation case as follows:

> Any action on the part of the Commonwealth, in purported exercise of its constitutional powers, which would prevent a State from continuing to exist and function as such is necessarily invalid because [the action is] inconsistent with the express provisions of the Constitution…[15]

41. The principle has been refined by subsequent authority,[16] and was described by French CJ in *Clarke v Federal Commissioner of Taxation*[17] in the following terms:

> [T]he Commonwealth cannot, by the exercise of its legislative power, significantly impair, curtail or weaken the capacity of the States to exercise their constitutional powers and functions (be they legislative, executive or judicial) or significantly impair, curtail or weaken the actual exercise of those powers or functions…This is not a return to any generalised concept of inter-governmental immunity. It simply recognises that there may be some species of Commonwealth laws which would represent such an intrusion upon the functions or powers of the States as to be inconsistent with the constitutional assumption about their status as independent entities.

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[12] *Conciliation and Arbitration Act* (Cth) *1904*, *Industrial Relations Act 1988* (Cth), *Industrial Relations Act 1993*(Cth)and the *Workplace Relations Act* (Cth) *1996* prior to the *Workplace Relations Amendment (Work Choices) Act* (Cth) *2005.*
[13] (1947) 74 CLR 31.
[14] The limitation was further discussed by the High Court in the context of State public sector employment in *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 and *Victoria v The Commonwealth* (1996) 187 CLR 416.
[15] (1947) 74 CLR 31 at [66].
[16] See, for example, *Austin v The Commonwealth* (2003) 215 CLR 185 at 217 (per Gleeson CJ) and 249ff (per Gaudron, Gummow and Hayne JJ).
[17] (2009) 240 CLR 272 at [94].

Recent reform – the *Fair Work Amendment (Transfer of Business) Act 2012*

42. The terms of reference for this Inquiry ask whether the FW 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.
43. The Australian Government recently enacted amendments to the FW Act to protect the entitlements of State public sector employees transferring into the National Workplace Relations System as a result of a transfer of business from a State public sector employer to a national system employer. These amendments facilitate a more nationally consistent set of rules to protect employee entitlements where a transfer of business occurs from a State public sector employer to a national system employer.
44. Prior to these changes, the transfer of business protections in the FW Act did not apply to former public servants in Queensland, New South Wales, South Australia, Tasmania and Western Australia. The amendments were passed by the Parliament on 27 November 2012 and commenced operation on 5 December 2012.

APPENDIX A

***Fair Work Act 2009* – Referral Exclusions**

State	Act	Exclusions
Queensland	*Fair Work (Commonwealth Powers) and other Provisions Act 2009* s 6.	• matters relating to Ministers or Members of Parliament; or • matters relating to the Governor, the Office of the Governor, the Governor's official residence (known as 'Government House') and its associated administrative unit; or • matters relating to judicial officers, or members of tribunals established by or under a law of the State, or their associates; or • matters relating to public sector employees and employers; or • matters relating to persons appointed or engaged by the Governor, Governor in Council or a Minister under any other Act, law or authority; or • matters relating to officers or employees of the parliamentary service as defined under the *Parliamentary Service Act 1988*, section 23; or • matters relating to law enforcement officers; or • matters relating to local government sector employees and employers.
New South Wales	*Industrial Relations (Commonwealth Powers) Act 2009* s 6.	• matters relating to Ministers, Members of Parliament, judicial officers or members of administrative tribunals, or • matters relating to persons in the service of either House of Parliament, or of the President or Speaker, or of the President and Speaker jointly, or • matters relating to State public sector employees, or • matters relating to persons appointed or engaged by the Governor or a Minister under any Act, law or authority, or • matters relating to law enforcement officers, or • matters relating to local government sector employees, or matters relating to the employer of any of the above.
South Australia	*Fair Work (Commonwealth Powers) Act 2009* s 6.	• matters relating to Ministers, Members of Parliament, judicial officers or members of tribunals established by or under a law of the State; or • matters relating to public sector employees; or • matters relating to persons engaged as a member of a Minister's personal staff; or • matters relating to persons—

		○ appointed under section 68 of the *Constitution Act 1934* ; or ○ appointed or engaged by the Governor or a Minister under any other Act, law or authority; or • matters relating to persons holding office as Parliamentary officers or employed under the *Parliament (Joint Services) Act 1985* ; or • matters relating to persons holding office or employed under the *Courts Administration Act 1993* ; or • matters relating to— ○ members of SA Police under the *Police Act 1998* ; or ○ police cadets, police medical officers or special constables; or ○ persons employed as protective security officers under the *Protective Security Act 2007* ; or ○ matters relating to local government sector employees.
Tasmania	*Industrial Relations (Commonwealth Powers) Act 2009* s 6.	• matters relating to Ministers, Members of Parliament, judicial officers or members of tribunals established by or under a law of the State; or • matters relating to public sector employees, or officers within the meaning of the *State Service Act 2000*; or • matters relating to persons engaged as a member of the personal staff of a Minister or Member of Parliament; or • matters relating to officers appointed under section 3, or sessional or temporary employees appointed under section 4, of the *Parliamentary Privilege Act 1898*; or • matters relating to persons appointed under the *Governor of Tasmania Act 1982*; or • matters relating to – ○ police officers; or ○ ancillary constables, or trainees, or junior constables, within the meaning of *the Police Service Act 2003*.
Victoria	*Fair Work (Commonwealth Powers) Act 2009* s 5.	• 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; • matters pertaining to the number or identity of employees in the public sector dismissed or to be dismissed on grounds of redundancy; • matters pertaining to Ministers, members of the Parliament, judicial officers or members of administrative tribunals; • 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);
		• 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;
		• matters pertaining to persons employed as Ministerial officers under Part 6 of the *Public Administration Act 2004*;
		• 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;
		• matters pertaining to—
		  ○ the transfer of employees between public sector bodies; or
		  ○ the redundancy of employees of a public sector body—
		as a result of a restructure by or under an Act;
		• the following matters relating to provision of essential services or to a state of emergency—
		  ○ 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;
		  ○ directions to employees of a public sector body not 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;
		• 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;
		• 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.

APPENDIX B

Summary of key ratified ILO Conventions relevant to the Inquiry

The following summaries are drawn from the ILO's *Guide to International Labour Standards*.[18]

Full-text copies of the following Conventions can be found at: http://www.ilo.org/dyn/normlex/en/f?p=1000:12000:252990291578691::::P12000_INSTRUMENT_SORT:4.

Forty-Hour Week Convention, 1935 (No. 47)[19]

Convention 47 is a promotional Convention which requires ratifying Members to declare its approval of the principles of a 40 hour week applied in such a manner that the standard of living is not reduced as a consequence; and to apply this principle as appropriate to classes of employment in accordance with the detailed provisions prescribed by other Conventions ratified by Members on this subject.

Labour Inspection Convention, 1947 (No. 81)

The objective of Convention 81 is the establishment of a system of labour inspection applicable to commercial workplaces, unless this is explicitly excluded at the time of ratification. Under Convention 81, the principal functions of the system of labour inspection are:

- securing the enforcement of legal provisions, particularly through inspection visits, as well as the investigation of complaints and material, technical and administrative examinations;
- supplying technical information and advice to employers, workers and their respective organizations; and
- bringing to the notice of the competent authority defects or abuses not covered by existing legal provisions.

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

Convention 87 requires ratifying Members to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise. In doing so, Members must permit workers and employers to establish and join organisations of their own choosing for furthering and defending their interests. Organisations, federations and confederations have the right to draw up their constitutions and rules, elect their representatives, organise their administration and activities and formulate their programs. Governments and public authorities have to refrain from any interference which would restrict this right or impeded the lawful exercise thereof. The extent to which the Convention applies to the armed forces and the police is determined by national laws and regulations.

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

Convention 98 requires ratifying Members to ensure workers are protected against acts of anti-union discrimination, particularly with respect to:

- restricting union membership; and

[18] International Labour Standards Department and International Training Centre of the ILO, *Guide to International Labour Standards*, (International Labour Standards Department , 2008).
[19] Department of Industrial Relations, *Status of ILO Conventions in Australia 1994*, (Australian Government Public Service, 1994), 114.

- causing dismissal or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours, or, with the consent of the employer, within working hours.

Measures appropriate to national conditions have to be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between, on the one hand employers, and on the other hand employers' and workers' organizations with a view to the regulation of terms and conditions of employment by means of collective agreements.

The Convention leaves it to national laws or regulations to determine the extent to which it applies to the armed forces and the police. Furthermore, it does not deal with the position of public servants engaged in the administration of the State, nor may it be construed as prejudicing their rights or status in any way.

Equal Remuneration Convention, 1951 (No. 100)

Convention 100 provides that ratifying Members must ensure, in so far as is consistent with the methods in operation for determining rates of remuneration, the application to all workers of the principle of equal remuneration for men and women workers for work of equal value. For the purpose of the Convention, the term 'equal remuneration for men and women workers for work of equal value' refers to rates of remuneration established without discrimination based, directly or indirectly, on sex.

Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

Convention 111 requires ratifying Members to declare and pursue a national policy designed to promote equality of opportunity and treatment with a view to eliminating any discrimination in respect of:

- access to vocational training;
- access to employment and to particular occupations; and
- terms and conditions of employment.

For the purpose of the Convention, discrimination means any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin (or such other ground as may be specified by the Member concerned), which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

Minimum Wage Fixing Convention, 1970 (No. 131)

Convention 131 requires ratifying Members to establish a system of minimum wages and create, maintain or modify machinery for the fixing and adjustment of minimum wages with the direct participation and in full consultation with organizations of employers and workers for these groups of wage earners. Once they have been fixed, minimum wages must have the force of law and failure to apply them must be sanctioned by appropriate penalties.

Under the Convention, minimum wage is the minimum sum payable to a worker for work performed or services rendered, within a given period, whether calculated on the basis of time or output, which may not be reduced either by individual or collective agreement, which is guaranteed by law and which may be fixed in such a way as to cover the minimum needs of the worker and his/her family, in the light of national economic and social conditions.

Workers' Representatives Convention, 1971 (No. 135)

Convention 135 provides that workers' representatives in the enterprise, in so far as they act in conformity with national laws or collective agreements, must enjoy effective protection against any act prejudicial to them, including dismissal, based on:

- their status or activities as a workers' representative;
- their union membership; or
- their participation in union activities.

Facilities have to be afforded to workers' representatives to enable them to carry out their functions promptly and efficiently, in accordance with national conditions and the nature of the enterprise. The granting of such facilities must not impair the efficient operation of the enterprise.

Labour Administration Convention, 1978 (No. 150)

Convention 150 provides that ratifying Members must ensure the organisation and effective operation of a system of labour administration, the functions and responsibilities of which are properly coordinated. Under the Convention, system of labour administration includes all public administration bodies responsible for and/or engaged in labour administration.

The principal functions of the agencies within the system of labour administration are as follows:

- participating in the preparation, administration, coordination, checking and review of national labour and employment policy;
- studying the situation of employed, unemployed and underemployed persons, taking into account the relevant national laws and regulations and national practice, drawing attention to defects and abuses observed in this field and submitting proposals on means to overcome them;
- making their services available to employers, workers and their organizations with a view to the promotion of effective consultation and cooperation between public authorities and bodies and employers' and workers' organizations, as well as between such organizations; and
- responding to requests for technical advice from employers and workers and their respective organizations.

Workers with Family Responsibilities Convention, 1981 (No. 156)

Convention 156 is intended to create effective equality of opportunity and treatment in employment and occupation:

- between men and women workers with family responsibilities; and
- between such workers and other workers.

Members that have ratified Convention 156 must have the objective of enabling persons with family responsibilities to engage in employment without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities.

Under the Convention, workers with family responsibilities are men and women workers with responsibilities in relation to their dependent children or other members of their immediate family who clearly need their care or support, where such responsibilities restrict their possibilities of preparing for, entering, participating in or advancing in economic activity.

Termination of Employment Convention, 1982 (No. 158)[20]

Convention 158 provides that employment may not be terminated by an employer unless there is a valid reasons for such termination connected with the capacity or conduct of the worker based on the operational requirements of the enterprise. The Convention also deals with the procedures to be followed in relation to:

- termination of employment;
- appeal against termination;
- reasonable periods of notice to be given (or compensation in lieu thereof); and
- consultation arrangements with workers' representatives where termination of employment is for economic, technological or structural reasons.

The Convention applies to all branches of economic activity and to all employed persons with some possible exceptions, including fixed-term contracts, probationary periods and casual labour.

Part-Time Work Convention, 1994 (No. 175)

Convention 175 provides that ratifying Members must ensure that part-time workers do not, solely because they work part time, receive a basic wage which, calculated proportionately on an hourly, performance-related, or price-rate basis, is lower than the basic wage of comparable full-time workers. Furthermore, they have to receive the same protection and conditions as those accorded to comparable full-time workers in respect of:

- the right to organise, the right to bargain collectively and the right to act as workers' representatives;
- occupational safety and health;
- discrimination in employment and occupation;
- statutory social security schemes based on occupational activity;
- maternity protection;
- termination of employment; and
- paid leave.

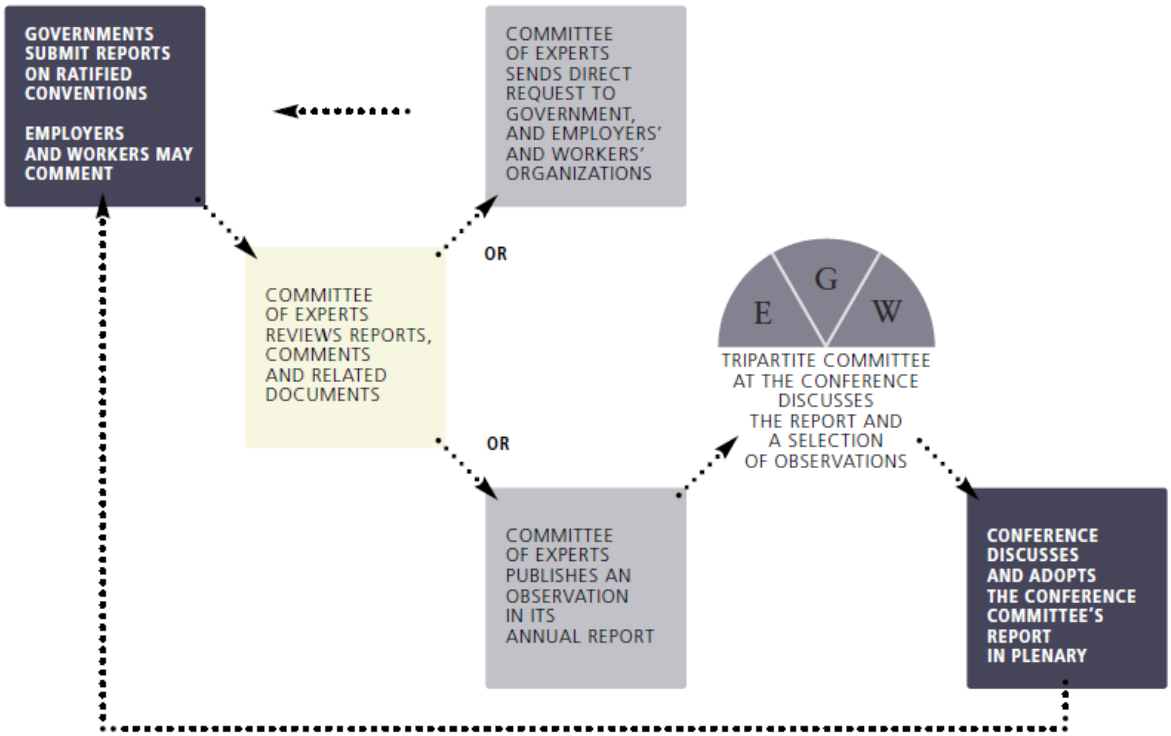
[20] Ibid 342.

APPENDIX C

ILO Article 22 reporting process

Under Article 22 of the ILO Constitution, Members must submit an Article 22 report on the application of each ratified Convention (on a three- or five-yearly basis – see reporting schedule below) by September. Members' social partners (the most representative organisations of workers and employers) also submit their comments on the application of the Conventions by that Member at this time. The CEACR considers all Article 22 reports in December of each year and publishes its annual report the following March. This report is then subject to discussion by the International Labour Conference Committee on Application of Standards (CAS) at the ILC the following June. Diagram 1 illustrates the process.

Diagram 1: ILO Article 22 reporting process



Source: ILO, *Rules of the Game: A brief introduction to International Labour Standards*, 2009, page 81, http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_108393.pdf

Article 22 Reporting schedule

Members must submit Article 22 reports to the CEACR on a three-yearly basis for 'fundamental'[21] and 'governance'[22] Conventions, and on a five-yearly basis for all other ratified Conventions. The CEACR can also request Article 22 reports for specific Conventions at shorter intervals.

[21] The 'fundamental' Conventions are the: *Forced Labour Convention, 1930* (No. 29), *Abolition of Force Labour Convention, 1957* (No. 105),*Freedom of Association and Protection of Right to Organize Convention, 1948* (No. 87*), Right to Organize and Collective Bargaining Convention, 1949* (No. 98), *Equal Remuneration Convention, 1951* (No. 100*), Discrimination (Employment and Occupation) Convention, 1958* (No. 111), *Minimum Age Convention, 1973* (No. 138), *Worst Forms of Child Labour, 1999* (No. 182).

[22] The 'governance' Conventions are the: *Labour Inspection Convention, 1947* (No. 81), *Employment Policy Convention 1964*, (No. 122*), Tripartite Consultation (International Labour Standards), 1976* (No. 144*), Labour Inspection (Agriculture) Convention, 1969* (No. 129).

A first Article 22 Report must comprehensively detail how the Member complies with the Convention. Subsequent Article 22 reports provide updates to legislation, policy and practice that have been made since the previous report.

The following table illustrates Australia's Article 22 reporting schedule in relation to those Conventions relevant to this inquiry.

Convention	**Last report submitted**	**CEACR annual report date**	**Next report due**
Forty-Hour Week Convention, 1935 (No. 47)	2008	2009	2013
Labour Inspection Convention, 1947 (No. 81)	2012	2013	2015
Freedom of Association and Protection of the Right to Organise, 1948 (No. 87)	2011	2012	2013
Right to Organise and Collective Bargaining Convention, 1949 (No. 98)	2011	2012	2013
Equal Remuneration Convention, 1951 (No. 100)	2012	2013	2015
Discrimination (Employment and Occupation) Convention, 1958 (No. 111)	2012	2013	2015
Minimum Wage Fixing Convention, 1970 (No. 131)	2011	2012	2016
Workers' Representatives Convention, 1971 (No. 135)	2009	2010	2014
Labour Administration Convention, 1978 (No. 150)	2009	2010	2014
Workers with Family Responsibilities Convention, 1981 (No. 156)	2011	2012	2016
Termination of Employment Convention, 1982 (No. 158)	2011	2012	2014
Part-Time Work Convention, 1994 (No. 175)	Ratified in 2011	N/A	2013 (first report)

Australia's complete Article 22 reporting schedule can be found at:
http://www.ilo.org/dyn/normlex/en/f?p=1000:14000:0::NO:14000:P14000_COUNTRY_ID:102544