Australian Education Union

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Dear Sir or Madam,

Re: AEU Submission to the 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.

Please find attached a submission from the AEU to the 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

The AEU would be happy to expand on these and any other relevant matters to assist the Committee inquiry should it consider it appropriate to conduct further consultations.

Please contact me if you have any questions in relation to this submission.

Yours sincerely,

Susan Hopgood
Federal Secretary

Australian Education Union

Submission to the Senate Education, Employment and Workplace Relations References Committee Inquiry into the Conditions of Employment of State Public Sector Employees and the Adequacy of Protection of Their Rights at Work as Compared with Other Employees.

February 2013

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Submission to the Senate Education, Employment and Workplace Relations References Committee 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.

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1. The Australian Education Union welcomes the opportunity to provide a written submission to the Senate Education, Employment and Workplace Relations References Committee 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.

2. The AEU is an organisation of employees registered under the provisions of the *Fair Work (Registered Organisations) Act 2009*. It has approximately 190,000 members employed in government schools and public early childhood work locations, in public institutions of vocational and/or technical and further education and training, in Adult Multicultural or Migrant Education Service centres and in Disability Services centres as teachers, school leaders and education assistance or support work classifications.

3. The AEU submits that the Senate is rightly concerned about the recent and growing job losses in state public sectors and the difficulties state public sector employees have in bargaining over their wages and working conditions.

4. Rather than detail the nature and extent of the job losses which in the eastern seaboard states now number in the tens of thousands, in the submissions which follow the AEU will rely on three core propositions:

   (1) State industrial relations frameworks do not provide state public sector employees with the same degree of protection or entitlements as employees covered by the *Fair Work Act* 2009 ['the FW Act'];

   (2) State industrial relations legislation does breach a number of International Labour Organisations ['ILO'] conventions to which Australia is a signatory; and

   (3) The Commonwealth does have the capacity to ensure its industrial relations legislation can apply to state public sector employees and thereby provide a means to remedy or redress disadvantages experienced by such employees.

5. In making these submissions the AEU will not examine every state's legislation and industrial relations frameworks but will concentrate upon the states of Queensland and New South Wales as it is in these states where the cuts to public sector employment have recently been most pronounced and it is these states which maintain state-based industrial relations legislation and industrial relations systems. Victoria, where public sector employment cuts have also been pronounced, does not maintain a stated-based industrial relations system. However, examination of Victoria's industrial relations bargaining framework will be provided in the section below on bargaining difficulties in state public sectors.

(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.

Queensland

6. In Queensland, two pieces of recent legislation are of particular concern: the *Industrial Relations (Fair Work Act Harmonisation) and Other Legislation Amendment Act 2012* [the 'FWAH Act'] and the *Public Service and Other Legislation Amendment Act 2012* ['the PSOL Act'].

7. Ostensibly, the FWAH Act, as its name implies, sought closer alignment of the State of Queensland's Industrial Relations Act [the 'QIR Act'] with various provisions of the Commonwealth's FW Act.

8. Two provisions are introduced which evidence a particularly worrisome mechanism that has no cognate provision in the FW Act.

9. The principal Object of the QIR Act (s3) is amended (s3(p)) to require the state IR Commission when determining public sector wages and working conditions by arbitration to take account of the state's financial position and fiscal strategy.

10. However, new section 339AA enables a senior government administrative official to brief the Commission about the State's financial position, fiscal strategy and related matters. The briefing is expressly for information purposes and must be provided in open hearing or made public. It is not open for cross-examination or other testing as such.

11. It is the view of the AEU that these provisions in tandem create a very privileged position for the state Government in its capacity as employer – a position not provided to any other employer. The Principal Object of the QIR Act now provides that in arbitral proceedings the position of one party must be taken into account and that that party's position can be provided as a briefing to the Commission, which although public, is not open to testing by the other party or parties.

12. This is not the same position for any Government or public entity as employer under the FW Act and denies to Queensland public sector employees that same degree of protection as employees covered by the FW Act.

13. The position for Queensland public sector employees is made even more dire under legislative amendments introduced by the PSOL Act.

14. Under ss53 & 54 of the state Public Service Act [the 'QPS Act'], directives or rulings of the Public Service Commission Chief Commissioner and the industrial Relations Minister can, in specified but easily attained circumstances, override the provisions of an industrial instrument determined by the Industrial Relations Commission. Under the PSOL Act amendments, those directives and rulings can be about the remuneration and conditions of employment for all non-executive public service employees (QPS Act, s53(baa)) and can expressly or specifically reduce a public service officer's overall conditions of employment. It achieves this latter objective through the removal of, now former, s23(3) of the QPS Act which contained a prohibition on a directive enabling a reduction in an employee's overall condition of employment except in limited specified circumstances.

15. The PSOL Act also amended the QIR Act by inserting new ss691A-D to the effect that provisions of state awards or certified agreements which dealt with contracting in or out of services, job or employment security, organisational change or certain consultation rights for registered employee organisations are of no effect so far as they relate to state public sector employees (ie, employees of government entities).

16. There are simply no such provisions under the FW Act either privileging a Government, or indeed other employer, as employer, or legislatively enabling them to reduce conditions of employment.

New South Wales

17. The *Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011* and its similarly named Regulation introduced new s146C to the state's Industrial Relations Act [the 'NSW IR Act'].

18. The new provision requires that state's industrial relations commission to give effect to (as distinct from 'taking account of') the Government's public sector wages and employment policies, as declared by regulation, in so far as it affects public sector employees when the Commission is making or varying orders concerning conditions of employment.

19. The similarly named regulation makes it also clear (Regulation, s6) that there is no capacity or jurisdiction for the state IRC to award wage increases beyond 2.5% unless such an increase is to be demonstrably off-set by savings in related employee costs. Such 'savings' cannot include departmental contributions to whole-of-government savings or 'efficiency dividends', savings from administrative re-structuring or provide for back-pay earlier than the Commission decision or date of any agreement reached in principle.

20. There is simply no similar provision in the FW Act and so NSW public sector employees subject to that state's industrial relations legislation do not have the same level of protection as cognate employees under the federal jurisdiction.

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

21. The state legislation which removed long-held principles relating to termination, change and redundancy ['TCR'] is the state of Queensland's PSOL Act and the relevant ILO conventions are the *Termination of Employment Convention 1982 (No. 158)* together with its accompanying Recommendation *Termination of Employment Recommendation 1982 No. 166).*

22. The PSOL Act inserts new s691D into the QIR Act. This new section provides that where a state industrial award contains provisions concerning notification to and consultation with an 'entity' over the termination, introduction of change and redundancy of employees, then the employer only has to notify at a time it considers appropriate and consultation is to occur only after notification and only in relation to implementation of the employer's proposals.

23. These provisions are clearly inconsistent with the terms of ILO Convention 158 (see Article 13) and Recommendation 166 (see Articles 7-13 & 19-22) which require employers to consult in good time with workers representatives through the provision of all relevant information and to provide for measures to discuss ways of averting, minimising or mitigating the adverse effects of the terminations and of any other significant change which is planned to be introduced.

24. By way of contrast, the National Employment Standards (see FW Act, Part 2-2, Division 11), which apply to 'national system employers and employees' (ie, corporations and their employees and others about whom any State has referred its regulatory powers to the Commonwealth) provide for Notice of Termination and Redundancy Pay.

25. Interestingly, Part 6-4 of the FW Act deals with additional requirements relating to termination of employment. The requirements are expressly to give effect or further effect to the ILO Convention and Recommendation and importantly are not confined to what that Act defines as 'national system employers or employers' but relate to employers and employees as ordinarily defined (see FW Act, ss769-789).

26. The AEU is not aware of any legal case as yet where the relationship between these additional requirements of the FW Act and the new provisions of the QIR Act has been authoritatively examined.

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

27. As noted above, Queensland's PSOL Act, which received Royal Assent in August 2012, inserted new s691C into the QIR Act. The effect of the section is that any employment security provision in an industrial instrument (defined to include a state industrial award or agreement or a determination or ruling of a body exercising conciliation and/or arbitration powers) which applies to state public sector employees is null and void.

28. The provision has an interesting history as the state government had earlier by means of a Public Service Commission Chief Executive Direction (No 8/2012, July 2012) sought to apply the very same measures. The Direction itself was subject to an application for judicial review. However, that application did not proceed as the government pursued its objective via supervening statutory amendment.

29. What is pertinent to the Senate Committee's inquiry is that at the very same time that the state government was acting through a Directive or statutory amendment, it was negotiating and settling agreements which contained the very same measures it sought to avoid by these other means.

30. For example, the state Department of Education, Employment & Training made an agreement covering its TAFE educational employees on 11 October 2012 and had it certified on 16 November 2012. It has an operative date of 1 August 2012. That agreement contained provisions relating to security of employment and preference for permanency of employment.

31. The use by the state government of its administrative and legislative powers to overturn measures which it, in its capacity as employer, has agreed to is at odds with the letter, spirit and intent of ILO conventions and associated recommendations.

32. Those ILO instruments are: *the Freedom of Association and the Right to Organise Convention (C87),* the *Right to Organise and Collective Bargaining Convention 1949 (C98),* the *Collective Agreements Recommendation 1951 (R91),* the *Collective Bargaining Convention 1981 (C154),* and the *Collective Bargaining Recommendation 1981 (R163).*

33. These ILO instruments oblige signatories to establish machinery for the voluntary negotiation, conclusion, revision and renewal of collective agreements between employers and workers and their representatives.

34. Importantly, ILO Convention 87 (Article 3) specifically requires public authorities to refrain from interfering with workers and their representatives in their organising and progressing of collective bargaining and other lawful activities. Although Convention No 98 (Article 6) contains an exclusion for public servants engaged in the administration of the state, it has long been the case that the ILO's Committee of Experts has held that the exclusion applies only in relation to 'high office holders' and not to those in more operational or service roles.

35. Under the ILO instruments, the terms of collective agreements:

    - are meant to be binding on parties,
    - legislative or contractual measures aren't permitted to override the agreement's terms (Recommendation 91, Article 3),
    - collective agreements are meant to extend to all matters covering working conditions and terms of employment' and
    - public authorities are not to undermine or discourage collective bargaining or agreements (see Convention 154, Articles 2, 5, 7 & 8).

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

36. As detailed in the submissions above, state government industrial relations frameworks which:

    - render nugatory through legislative fiat, various provisions of collective agreements voluntarily negotiated (Queensland),
    - permit administrative decision-makers to issue directives diminishing public servants remuneration and terms of employment (Queensland), and
    - require the state industrial relations commission to give effect to government public sector employment policies including management of 'excess' staff (NSW)

    clearly do not provide protections to workers.

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

37. The state public sector workers represented by the AEU - predominantly teaching staff and other education workers in government schools, TAFE institutions and early childhood education settings - do face particular difficulties in bargaining under either current state or federal legislation. These difficulties are additional to those already outlined.

38. The difficulties arise from the protracted, surface, or pattern bargaining strategy or tactics adopted by state governments or their contracted agencies together with the absence of any statutory obligation to make concessions during the bargaining process and to reach agreement.

39. The difficulties are compounded because both state and federal legislation enables, or does not prohibit, the employer to bypass the bargaining process and put a proposed 'agreement' directly to its employees or even to unilaterally impose altered terms of employment (provided, under federal legislation at least, that any imposed alteration cannot be worse overall than any applicable enterprise agreement or industrial award).

Victoria

40. Victorian public sector workers are covered by federal industrial relations legislation either because they are employed directly by a trading corporation, eg, teaching and other staff employed by Victorian TAFE institutes, or as a consequence of the referral by the State of its industrial relations powers to the Commonwealth through passage of the *Fair Work (Commonwealth Powers) Act 2009* [Vic], the federal legislation has been amended to extend to apply to Victorian state public sector workers, eg, teaching and other staff employed in government schools.

41. Under the federal FW Act (s228), although bargaining representatives must meet certain specified bargaining requirements, there is expressly no requirement for there to be any concessions made or for there to be any agreement reached at all (see s228(2)). Indeed, there is no statutory definition of bargaining or of negotiation at all.

42. Absent the consent of the bargaining parties (FW Act, s240) or absent the high thresholds the FW Act establishes for access to arbitral determination of industrial action related or bargaining related disputes (FW Act, ss266 & 269), there is simply no mechanism for dealing with the situation where one party decides it either does not want to make an agreement or only wants to make an agreement on its own terms.

43. The State of Victoria quite rigidly controls the outcomes from wage increases to other matters that can be included in agreements through use of public sector employment workplace relations policy settings. A copy of the State Government's current policy can be found at: http://www.dtf.vic.gov.au/CA25713E0002EF43/WebObj/PSWRPolicies-Dec2012/$File/PSWRPolicies-Dec2012.pdf

44. Where governments as employers – or indeed any party - are not obliged to make concessions or to reach agreement, the situation results, for example, with respect to that State's government school teachers whereby despite an existing agreement passing its nominal expiry date and negotiations and industrial action occurring for close to 2 years, no agreement has as yet been reached.

45. That situation is not fair, frustrates the guarantee of a relevant safety net and is no example of a balanced framework for cooperative and productive workplace relations.

Queensland

46. As noted earlier in these submissions, the relatively recent amendments to the state Public Service and Industrial Relations Acts have seen the agreed terms of industrial agreements legislatively overridden and permitted administrative Directives to lessen remuneration and other terms of employment.

47. That situation simply renders otiose the whole concept and efficacy of bargaining.

(F) Whether the Act provides the same protections to state public sector workers as it does to other workers to the extent possible, within the scope of the Commonwealth's legislative powers

48. As noted earlier, the FW Act applies to state public sector workers only where they are employed by a trading corporation or where a state has expressly enabled the FW Act to apply to it through referral of its industrial regulatory powers (see FW Act, Part 1-3, esp. Divisions 2, 2A & 2B).

49. It follows therefore that the FW Act does not and cannot provide the same protections to state public sector workers as it does to other workers to whom the Act applies.

50. The Commonwealth has chosen to base its FW Act, in this regard, predominantly upon its constitutionally provided legislative powers concerning corporations and state referral of powers (see Commonwealth Constitution, ss52(xx) & (xxxvii))

51. The scope of the Commonwealth's legislative powers concerning employment and industrial relations matters is not confined to the corporations or the states' referral powers. Other sources of power are readily available, most notably the External Affairs and the Conciliation & Arbitration powers (Commonwealth Constitution, ss51(xxix) & (xxxv) respectively).

(G) Noting the scope of states' referrals of power to support the Act, what legislative or regulatory options are available to the Commonwealth to ensure that all Australian workers, including those in state public sectors, have adequate and equal protection of their rights at work

52. Given that there are and can be diverse sources of constitutional power upon which the Commonwealth bases its legislation and that those sources have validly grounded past Commonwealth legislative schemes which have overridden state legislation (eg, state hydro-electric schemes, national parks, non-discriminatory access to in-vitro fertilisation schemes & state abolition of industrial arbitration) it is open to the Commonwealth to do so again.

53. Undoubtedly, in crafting any such legislation the Commonwealth will need to take account of the constitutional 'implied limitation' upon Commonwealth legislation power as described by the High Court most recently in cases such as *Re AEU and Ors; ex parte the State of Victoria & Anor,* [(1994-1995) 184 CLR 188], *Victoria v Commonwealth* [(1996) 187 CLR 416] and *Austin v Commonwealth* [(2003) 215 CLR 185]

54. That implied limitation effectively prohibits Commonwealth legislation regulating state public sector industrial relations frameworks on matters dealing with the number and identity of persons the State wishes to employ, the term of any such appointment and the number and identity of person the State wishes to dismiss from its employment on redundancy grounds.

55. However, it is particularly pertinent and urgent that the Commonwealth does legislate, albeit cognisant of the implied limitation, where:

    - state legislative frameworks operate inconsistently with Australia's obligations under international treaties and thereby involve Australia in direct contravention, or where
    - state legislative frameworks expressly operate to curtail the capacity of state industrial relations tribunals to determine matters brought before them on the basis of 'equity, good conscience and their substantial merits'.

56. Such measures could involve a direct Commonwealth 'over ride' of specific state legislation or more simply involve a discretionary measure ensuring a choice for workers in state jurisdictions who have had their protections and rights at work curtailed to apply for orders enabling the Commonwealth law to cover them.