Submission to Senate Inquiry on conditions of employment of state public service employees and the adequacy of protection of their rights at work compared to other employees

Submission of Together, Industrial Union of Employees

14 February 2012

Comment

In August 2012, the Newman government removed a raft of employee entitlements reflected in awards and settled collective agreements through legislative amendments to the *Industrial Relations Act 1999*.

This legislative activity was a direct response to the Together union, and other unions in Queensland, pursuing the application of a range of clauses, appearing in awards and collective agreements applying to public service workers, that dealt with consultation in relation to organisational change. It was also a concession by the Newman government that their first approach for dealing with the removal of consultation provisions relating to organisational change, through the issuing of new Directives (one of the components of industrial regulation of public service workers in Queensland), was not within the relevant jurisdiction of the *Public Service Act 2008.*

The changes introduced by the Newman government are at odds with the extensive and settled industrial history around consultation and organisational change; inconsistent with the standards adopted in the federal jurisdiction under the *Fair Work Act 2009*; and in breach of Australia's obligations under International Labour Organisation Conventions.

In addition the government removed a range of entitlements in awards and settled collective agreements dealing with job security. The removal of these provisions was designed to facilitate the purging of more than 10 000 jobs (and still climbing with the health redundancies not yet concluded).

The terms of reference of the Senate Inquiry which questions the *adequacy of protection of (public service workers') rights at work as compared with other employees* confirms the "inadequacy" of protections in the Queensland instance.

The only method of redress for Queensland public service employees from the adverse impact of such changes, and to guarantee that Australia's obligations under signatory ILO Conventions are not undermined is for this Committee, and the Inquiry, to recognise the situation that has occurred in Queensland, and address the implications of the raft of legislative changes, adopted at a state level, through the utilisation of the federal government's external affairs powers. This will ensure public service employees are not disadvantaged through unilateral changes, by their employer / state government, to their employment conditions.

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 is answered by the fact that there has been substantial alteration to settled employment arrangements such as the termination, change and redundancy provisions in awards and agreements of the Queensland industrial tribunal. Together union asserts that this is inconsistent with obligations under International Labour Organisation (ILO) Conventions including Convention No.158. These changes have been implemented through initially changes to Directives and then subsequently though legislative change.

In addition to the legislative changes impacting on consultation around organisational change and redundancy, a related tranche of changes also occurred which rendered unenforceable elements of existing collective agreements relating to employment security. The Together union also asserts that this is a breach of the obligations under ILO Convention No.98 relating to collective bargaining and the "settlement" of collective agreements.

The referral of the non-incorporated private sector to the federal jurisdiction by the Queensland government in 2009 was designed to *provide a uniform single system for all employees in the private sector thereby providing certainty, clarity and efficiency for businesses and workers.*[1] The referral however did not deal with state and local government, local government owned or controlled entities, some statutory entities and other matters such as judicial officers, members of tribunals, their associates, law enforcement officers and the like. This represents approximately 15 per cent of all Queensland employees.[2]

The recently announced review of the referral arrangements suggests that the potential to withdraw the non-incorporated private sector from the federal jurisdiction is a consideration by the Newman government. This places in jeopardy any concept of certainty around the industrial regulatory environment for another 25 per cent of Queensland workers.

If the federal parliament was to utilise the external affairs powers to provide protection for Queensland public service workers then the ability to be able to bargain with certainty and have confidence around the settlement of collective agreements; or if the negotiations failed to have redress to an independent tribunal to settle the matter by arbitration, would ensure an industrial sameness between state public sector workers and all other workers.

The use of the external affairs powers in relation to the processes associated with organisational change would also guarantee the maintenance of consultation arrangements consistent with the settled industrial position that has operated in Australia for almost 30 years.

This would not preclude those states who have not introduced legislation that adversely impacts on public service entitlements from continuing to apply their relevant state laws. It should be noted that laws enacted using the external affairs power do not diminish state law if the law of the state provides entitlements for those employees that are more beneficial than the entitlement under the federal legislation.

Together union

Together is a state-registered union in the Queensland jurisdiction. Its coverage / eligibility is broad and includes occupations such as accountants, architects, journalists, legal officers, computer programmers, dentists, scientists, dental therapists, dietitians/nutritionists,

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[1] Office of Fair and Safe work Queensland December 2012 *Should Queensland maintain or terminate the referral of industrial relations jurisdiction for the unincorporated private sector to the Commonweath?*
[2] Ibid

medical officers, speech therapists, technical teachers, personnel officers, pilots and pharmacists engaged within the public service.

Together has a current membership of 38000 members. These members are engaged within the public service, and regulated within the state industrial relations jurisdiction; but are also found in the airlines, road transport, private health (aged care and hospitals) and higher education areas.

Of the total membership of Together 12.5 per cent of members are employed in an entity regulated by the *Fair Work Act 2009.* A small proportion of the 12.5 per cent were subject to the referral legislation introduced by the Queensland government in 2010.

Together's membership is largely found within the state public service and regulated within the Queensland industrial relations jurisdiction.

Overview of Qld public service

Employment features of public servants

A snapshot of the employment features of the Queensland public service confirms the significance of the sector as an important component of the Queensland workforce. Around 10% of the Queensland labour force is employed in the Queensland public service.[3] This does not include those employed by government-owned corporations such as those employed in the railways and the energy corporations. health; education, training and employment; community safety; police and the community service agencies together account for **82.8%** of the total public service workforce. **Annexure A** provides an overview of the public service by agency.

General public service employees, who constitute almost half of all public service employees, are engaged in providing service directly to the public, in a range of administrative, corporate and regulatory functions.

Type of work	Total %
Service delivery to the general public	44.7
Administrative support/ clerical	14.0
Corporate Services	12.5
Program design and/ or management	6.3
Policy	3.7
Exercising regulatory authority	2.3
Research	1.8
Legal	0.8
Other	3.9

Type of work undertaken in the QPS[4]

[3] As at June 2012 the Queensland Public Service (QPS) employed **243 250 people.**

[4] Public Service Commission 2010 *State of the Service Report 2010* Queensland Government, pages 57-58 [Available at: http://www.psc.qld.gov.au] (11 January 2013)

Employment conditions for public service employees for all but the most senior managers (heads of department/s referred to as the Chief Executive Officers) are established primarily through a framework of employment regulation of awards and collective agreements for general public servants, or for the Senior Officer and Senior Executive Service categories through Directives[5] issued under s.54 of the *Public Service Act 2008.*

For a general public servant, wage rates range from $41 278 per annum for a base-grade position up to $107 467 per annum for managerial or highly specialised roles. 66% of QPS are on a salary level of less than or equal to $77 644 per annum. Of that group 67% are female.

There are 2328 senior management (classification level Senior Officer) and executive management (Senior Executive Service plus Chief Executive Officers) staff in the QPS. Taken together, senior and executive management account for less than 1% of the total QPS workforce.

It is only the Chief Executive Officers who are not regulated by prescribed (and transparent) terms and conditions of employment.

Overview of public service employment regulation

Award regulation

Around 60 per cent of staff in the public service are employed under the *Public Service Act 2008.*[6] The majority of public service workers – 27 per cent full time equivalent (FTE) - are employed under the Public Service Award 2012. Awards relating to teachers, public health employees, and nurses and midwives, comprise the next three highest award regulation.[7]

Awards are subject to review by the industrial tribunal on a three yearly basis: see s.130 of the *Industrial Relations Act 1999*. The last review was completed in 2012. In undertaking that review the Queensland Industrial Relations Commission (QIRC) considered whether the award/s provided for *secure, relevant and consistent wages and employment conditions* (ss.(d)); and that the award/s provided for *fair standards for employees in the contest of living standards generally prevailing in the community* (ss.(f)).

Since the completion of that review the Newman government introduced a range of legislative amendments that have directly impacted on the provisions appearing in public service awards. Section 691D of the *Industrial Relations Act 1999* provides that if an industrial instrument contains a TCR provision about notifying an entity of a decision relating to organisational change then the TCR provision **does not apply to the extent that the employer is not required to notify of the decision until the time the employer considers appropriate**; the employer is not required to consult about the decision until the

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[5] These categories of workers are subject to a range of terms and conditions of employment, and salary scales, within the relevant Directive: see Directive Nos. 5/09 entitled "Senior Executives – Employment Conditions" and 8/11 entitled "Senior Officers – Employment Conditions".

[6] Queensland Audit Office June 2012 *Managing employee unplanned absences* Report 4:2012 page 6

[7] Teachers Award – 19 per cent; health employees – 16 per cent; nurses and midwives – 12.66 per cent.

employer notifies the entity about the decision; and the employer is **not required to consult about the decision other than in relation to its implementation.**

This was done in isolation from the QIRC review. The QIRC did not determine, nor were they asked to determine, that the provisions that were subsequently removed through legislative amendments were insecure, irrelevant or inconsistent conditions of employment; nor were they unfair standards for workers within the public service.

Bargaining and collective agreements

Collective bargaining for state public service departments commenced in 1994. Bargaining rounds have taken place every three years since.

For the first rounds of bargaining in 1994 and 1997, a framework agreement applying across the public service was entered into, with a number of departmental-specific certified agreements supporting the framework agreement.

In 2000 the majority of departmental-specific agreements were rolled into the framework State Government Departments' Certified Agreement resulting in a single "core" agreement[8] that covered the field, although the provisions of the earlier departmental-specific agreements continued to apply. Parties continued to enter into departmental-level agreements to deal with matters specific to those departments.

In 2006, the parties introduced appendices to the Core agreement dealing with departmental-specific arrangements in lieu of departmental-specific agreements. In the 2009 agreement, any continuing provisions from earlier agreements (in some cases dating back to 1994) were enumerated in the departmental-specific agreements and the earlier agreements subsequently vacated.

Negotiations historically have been, if not always amicable, characterised by genuine commitment on both sides to reaching an agreement.
In 2006 and 2009, the Government entered into memoranda of understanding (MOU) with unions that dealt with wages and other matters, establishing the broad parameters of the negotiations for replacement agreements falling due within the period of the MOUs. Together (then the QPSU) did not sign up to the MOU on wages in 2006 but was a party to MOU on wages in 2009, which subsequently governed the negotiations for the Core and other agreements.

There have been few occasions over the twenty year history of public service departments' bargaining in Queensland where the QIRC has been called upon to determine an arbitrated outcome (referred to as a Determination). These were where agreement was unable to be reached in certain unique occupational-specific negotiations, including Liquor Licensing Inspectors, Casino Gaming Inspectors, and Corrective Services Officers.

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[8] Colloquially known as the Core agreement ....

There is no history of protracted disputation or industrial action associated with bargaining in public service departments. Some instances of low-level industrial action have occurred, including 'work to rule' and short stop-work periods. When strike action took place in Queensland Health in December 2011 (a 24-hour stoppage by allied health professionals) it was generally seen as exceptional.

There was the prospect of wide-spread industrial action in state government departments in 2012. This action was pursued consistent with the parameters set under the *Industrial Relations Act 1999* and was deemed to be "protected" action. The Newman government averted this action which the QIRC had approved using the protected action ballot order processes. Instead the government (as the employer) invoked the new legislative power through an earlier legislative amendment, to refer the agreement directly to a ballot of employees.

The capacity for public sector employees to take protected industrial action in pursuit of a certified agreement in the future is now greatly curtailed by the introduction of Chapter 6, Division 6A of the *Industrial Relations Act 1999* which gives the Attorney-General the power to unilaterally terminate protected industrial action in relation to a proposed certified agreement.

While the Division has some similarity to ministerial powers already existing under the *Fair Work Act 2009*, the context in which it operates is significantly different. The *Industrial Relations Act 1999* only applies to state and local government employees. The ministerial power to terminate industrial action means the Attorney-General has the power to unilaterally terminate industrial action in circumstances in which the state government is the employer, which would in any other circumstances be viewed as an irreconcilable conflict of interest.

Current collective bargaining negotiations

In 2012 Together was engaged in efforts to negotiate a replacement Core collective agreement covering state government departments (approximately 55 000 employees) with the newly-elected Newman government. A notice of intention to bargain was served in April 2012 and negotiations commenced in May 2012, ahead of the nominal expiry of the agreement on 31 July 2012.

While negotiations were underway, the Newman government introduced and passed a *Bill* to amend the *Industrial Relations Act 1999*, materially affecting the legislative environment governing the making of agreements, the taking of protected industrial action and the powers of the QIRC to determine an outcome should the parties be unable to reach agreement.

Changes introduced effective from 1 July 2012 include: requirement that the QIRC consider the State's financial position, the State's fiscal strategy and the financial position of the relevant public sector entity in arbitrating the making of an agreement involving a public sector entity; power for Attorney-General to unilaterally terminate protected industrial

action in relation to a proposed certified agreement; and a secret ballot regime for taking of protected industrial action.

In contrast with past experiences, the negotiations for a replacement agreement in 2012 were characterised by a clear unwillingness on part of the Government to genuinely negotiate. For example, without previously presenting a log of claims, on 15 June 2012 the Public Service Commission (the government negotiator) tabled a new draft agreement in the manner of a fait accompli.

On 9 August 2012 the government negotiators sought the assistance of the QIRC to reach an agreement under s.148 of the *Industrial Relations Act 1999*; but by the 31 August the QIRC was of the view that an impasse had been reached

On 14 September 2012 the parties met before the QIRC to table the agreed documents in preparation for referral to arbitration. At that meeting the government representatives announced that instead the government would refer the agreement to a direct ballot of employees under the s.147A of the *Industrial Relations Act 1999* (another component of their earlier set of legislative amendments).

The ballot of employees closed on 18 December 2012 and failed, with 70% of ballots rejecting the proposed agreement.

A formal referral to arbitration was issued by the Commission on 31 January 2013; and the matter will be subject to a "determination" by the QIRC.

Employment arrangements and Directives

Employment regulation for Queensland public service workers is not constrained to awards and agreements. Many public service conditions are currently established under Directives issued under the *Public Service Act 2008.*

Directives are a form of ruling issued under the *Public Service Act 2008*: see s.47(6). A Directive may be issued by the chief executive officer of the Public Service Commission (referred to as a PSC Directive) or by the Minister responsible for industrial relations (referred to as Ministerial Directives). The respective subject matter of PSC and ministerial Directives is governed by ss.53 and 54 of the *Public Service Act 2008.*[9]

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[9] **53 Rulings by commission chief executive**
The commission chief executive may make a ruling about—
(a) a matter relating to any of the commission's or the commission chief executive's functions; or
Examples of what a ruling by the commission chief executive may be about—
.recruitment and selection, deployment, training and development of public service employees
.the transfer or redeployment of public service employees surplus to the needs of a department
.overall performance management standards for the public service
(b) the overall employment conditions for persons employed or to be employed as—
(i) chief executives or senior executives; or
(ii) public service officers on contract whose remuneration is equal to, or higher than, the remuneration payable to a senior executive; or

Prior to the introduction of ss.53(baa),[10] the basic breakdown of responsibility for Directives between the Public Service Commission and the Minister has been that 'money' Directives, dealing with remuneration, allowances, leave or other entitlements that can be said to have a financial component have been reserved to the Minister whilst 'soft' Directives dealing with public sector workforce management and policy matters such as recruitment, employee grievances and performance management have been the province of the PSC. The one exception is remuneration and conditions for chief executives and senior executives which is a responsibility given under the *Public Service Act 2008* to the PSC.

A Directive typically applies to public service officers engaged under the *Public Service Act 2008*. It may also apply to general and temporary employees engaged under the *Public Service Act 2008*. A Directive can be extended to apply to employees of public sector entities other than those engaged under the *Public Service Act 2008* (most notably Queensland Health) by *Regulation*.

A Directive is binding upon those to whom it applies: s.47(3). In the case of conflict between a Directive and an industrial instrument such as an award or collective agreement, the scheme established by the *Public Service Act 2008* is that a directive of the PSC will prevail over an industrial instrument, but an industrial instrument will prevail over a directive of the Minister unless the directive itself specifies otherwise: s.52.

Either the Minister or the PSC then can readily override a provision of an industrial instrument using the Directive-making power under the *Public Service Act 2008*. Not until the election of the Newman government in 2012, however, had the Directive-making power been used to unilaterally override an industrial instrument in a manner which reduced the entitlements of employees under the instrument.

Historically (that is, prior to March 2012) the making or varying of a Directive has been a consultative process involving, relevantly, the PSC or department of the Minister responsible for industrial relations, departments and unions. **Ministerial Directives** in particular have been subject to regular review to ensure they remain current and that drafting or implementation issues are redressed in a timely way.

(baa) the remuneration and conditions of employment of public service employees other than persons mentioned in paragraph (b)(i) or (ii); or
(ba) a matter relating to the application of chapter 6 or 7 to a former public service employee; or
(c) other specific matters that, under this Act, the commission chief executive may make a ruling about.
54 Rulings by industrial relations Minister
(1) The industrial relations Minister may make rulings about—
(a) the remuneration and conditions of employment of non-executive employees; or
(b) other matters under this Act that the Minister may make a ruling about.
(2) However, a ruling under subsection (1)(b) may only be made for non-executive employees.
(3) In this section—
non-executive employees means public service employees other than—
(a) chief executives or senior executives; or
(b) public service officers on contract whose remuneration is equal to, or higher than, the remuneration payable to a senior executive.

[10] This provision is operable from 1 January 2013 and is yet to be invoked.

The process for making or varying **PSC Directives** prior to March 2012 was slightly different as those Directives were not necessarily regularly reviewed but rather made or varied on an as-needs basis.

On occasion, new or varied Directives were developed through a process more collaborative than consultative between the PSC or department and interested unions. This was particularly the case where a directive was being used to give effect to an agreement reached between the parties in bargaining, or to positively redress an anomaly arising through the operation of an industrial instrument alongside a Directive, or decision of the QIRC or Industrial Court.

Directives and awards

The referencing of Directives in awards varies substantially. However the broad manner in which Directives operate and their application and interrelationship with industrial instruments has given rise in the current political environment to the Newman government seeking to unilaterally alter employment arrangements reflected in those Directives.

The capacity to change employment arrangements is provided for through the mechanism of the *Public Service Act 2008* and its interplay with the *Industrial Relations Act 1999*; and the intercession with the various industrial instruments. To give an example, the Legal Aid Queensland Employees' Award - State 2012 clause 4.10 (Redundancy) provides at subclause 15 (Provisions applying to employees of Queensland Government Departments and Agencies) as follows:

The provisions of clause 4.10 will not apply to the extent that the provisions of the redundancy arrangements are contained in a Directive issued by the Public Service Commissioner or the Minister for Industrial Relations pursuant to section 34 of the Public Service Act 1996, where the Directive provides for entitlements that are superior to clause 4.10.

As such the above clause seeks to apply by importation, superior arrangements, not identified but presumed, from the Directive relating to redundancy, that being the current Directive entitled "Early retirement, redundancy and retrenchment" - Directive (11/12).

Unlike some other Directives, this Directive does not reference the capacity for variation through decisions of an industrial Tribunal. Variation is only available through the Minister responsible for industrial relations, or by legislation.

For contrast, consider clause 7.2 (Sick leave) wherein the provision in part is as follows:

7.2.5 The entitlements for sick leave are prescribed under Directive 8/01 Sick Leave, as issued and amended by the Minister for Industrial Relations under section 34 of the Public Service Act 1996.

So in this instance the Directive does not prescribe a comparison of entitlements in establishing superior arrangements, which then are imported, but rather adopts an

entitlement that "moves" as the Directive is amended. Note that the current Directive (18/10) provides at s.7 (Variation) that the provisions in the "schedule" (which outlines the content of the Directive) can be varied in accordance with certified agreements that are made under the relevant legislation, or decisions of an industrial tribunal of competent jurisdiction.

Separating out leave entitlements, there are also a range of monetary Directives, such as those relating to allowances, which are referenced in the award.

Clause 5.10 (Allowances) provides at clause 5.10.2 (Motor vehicle allowance):

The motor vehicle allowances payable to Employees when they are required to use a private motor vehicle for official purposes are prescribed under Directive 13/01 Motor Vehicle Allowances, as issued and amended by the Minister for Industrial Relations under section 34 of the Public Service Act 1996.

In this instance it is not superior arrangements that are imported, and read in conjunction with the clause, but rather the clause in entirety. In this instance the Directive has some fluidity as what is imported is the "current" Directive – the amended Directive. As such Directive 14/10 is the current Directive (not Directive 13/01). The question as to whether the current Directive is superior or not to the previous Directive is not accommodated.

Note that the current Directive provides at s.7 (Variation) that the provisions in the "schedule" (which outlines the content of the Directive) can be varied in accordance with certified agreements that are made under the legislation, or decisions of an industrial tribunal of competent jurisdiction.

This contrasts with another provision within the allowances clause – clause 5.10.4 (Meal Allowance) which provides that:

Employees called upon to work for more than one hour after their usual ceasing time, are to be supplied with a reasonable meal at the employer's expense or be paid in accordance with Directive 20/01.

Unlike the earlier allowance provision for motor vehicles which moves as the Directive moves (through the use of the words "as issued and amended"), this provision appears on the surface to be stagnant: except that when considering the Directive itself (the current Directive is 01/06), provision is made that Directive 01/06 supersedes Directive 20/01.

Similarly to the motor vehicle allowance, the current Directive provides at s.7 (Variation) that the provisions in the "schedule" (which outlines the content of the Directive) can be varied in accordance with certified agreements that are made under the legislation, or decisions of an industrial tribunal of competent jurisdiction.

Implications

The legislative changes introduced by the Newman government have confirmed that, the content of all industrial instruments whether an award made by the QIRC; and agreement concluded between the parties; a Determination arbitrated by the industrial tribunal, or Directives issued by the Public Service Commission, all these arrangements have no certainty.

Overview of legislative framework for Qld public service employees

Operation and application of Public Service Act
Operation and application of Industrial Relations Act 1999

A range of legislative and other related changes were introduced by the Newman government on 29 August 2012. Although not articulated it is relatively clear that this legislative response was a direct reaction to the challenge that Queensland unions had taken to the validity of the introduction of a range of public service Directives dealing with, amongst other things employment security and organisational change; see Industrial Instruments: Employment Security and Contracting Out Provisions Directive.[11]

The purpose of the Directive stated: *Where there are provisions for Employment Security or Contracting Out in an industrial instrument, the Employment Security or Contracting Out provisions contained in the industrial instrument do not apply.*

The Together union determined that the issuing of this Directive was outside the jurisdiction of the *Public Service Act 2008* and as such could be challenged under the Queensland *Judicial Review Act 1991.* This challenge was not pursued as within less than one month the Newman government also conceded the question of jurisdiction, by enacting legislative changes in preference to the Directive for dealing with the same issues as reflected in Directive No:08/12.

Attached and marked as an **Annexure B** to this submission is an overview of the disputes that were generated by Together during the course of 2012 as a direct result of the organisational change within various public service agencies, and lack of consultation associated with that change. As indicated above, it is the Together union's view that the exercising of legitimate industrial practice of seeking to apply and enforce an industrial instrument is what gave rise to the issuing by the PSC of the Directive No:08/12; and the subsequent legislative amendments limiting or neutering provisions appearing in awards and agreements of the Queensland industrial tribunal.

Industrial relations legislation

The legislative changes to the *Industrial Relations Act 1999* (the *Amendment Act*) introduced by the Newman government removed the provisions dealing with the Queensland Industrial Relations Commission's capacity to issue Orders to give effect to article 13 of the ILO Convention [these are process and consultation issues relating to termination of employment] (see s.89(2)). These amendments were limited to, and targeted at,

[11] Directive No:8/12 issued on 31 July 2012

employees in the employment of the state to whom a relevant industrial instrument applied.

The *Amendment Act* provides that relevant industrial instrument includes an award, certified agreement, industrial agreement, Determination or ruling (such as an Order) made by the Queensland Industrial Relations Commission (QIRC) using its conciliation and arbitration powers: refer to the definition as contained in Schedule 4 of the *Public Service Act 2008.*

Further the amendments neutered those provisions **relating to employees in the employment of the state** which related to contracting out, employment security and organisational change provisions: see ss.691A-E of the *Industrial Relations Act 1999.* The legislative amendments provided for examples of the types of provisions affected as found in various industrial instruments – these are examples only and are not exhaustive: see s.691C.[12]
As the Explanatory Memorandum (EM) to the *Bill* indicated: *Additional amendments will provide legislative certainty to the Government's intentions regarding employment security,*

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[12] *(1) The following provisions of a relevant industrial instrument are of no effect—*
(a) a contracting provision;
(b) an employment security provision;
(c) an organisational change provision.
(2) In this section—
***contracting provision**—*
(a) means a provision about the contracting out, or in, of services; but
(b) does not include a TCR provision.
Examples—
The following provisions, as in force on 30 July 2012, are examples of contracting provisions—
- *clause 7.3 of the State Government Departments Certified Agreement 2009*
- *appendix 22: Queensland Government Policy on the Contracting-out of Services, of the State Government Departments Certified Agreement 2009*
- *clauses 4.2 and 4.3 of the Transport and Main Roads Operational Employees' Certified Agreement 2011*
- *clauses 2.3(1) and 2.3.2 of the QBuild Field Staff Certified Agreement 8 (2011)*
- *clauses 6.2 and 6.3 of the Queensland Public Health Sector Certified Agreement (No. 8) 2011 (EB8)*
- *clause 3.1(b) of the Queensland Ambulance Service - Determination 2010.*

***employment security provision**—*
(a) means a provision about job security or maximising permanent employment, including a provision that applies all or part of a government policy about employment security; but
(b) does not include a TCR provision.
Examples—
The following provisions, as in force on 30 July 2012, are examples of employment security provisions—
- *clauses 7.1 and 7.2 of the State Government Departments Certified Agreement 2009*
- *appendix 21 of the State Government Departments Certified Agreement 2009*
- *clause 2 contained in Appendix 5 of the State Government Departments Certified Agreement 2009: New Provisions Applicable to Employees Engaged in Operations in Youth Detention Centres*
- *clause 4.1.1 of Part 4 of the Transport and Main Roads Operational Employees' Certified Agreement 2011*
- *clause 2.3 of the QBuild Field Staff Certified Agreement 8 (2011)*
- *clauses 6.1, 6.6 and 6.7 of the Queensland Public Health Sector Certified Agreement (No.8) 2011 (EB8).*

***organisational change provision** does not include a TCR provision.*
Examples—
The following provisions, as in force on 30 July 2012, are examples of organisational change provisions—
- *clause 7.3 of the State Government Departments Certified Agreement 2009*
- *clauses 4.1 and 4.2 of the Queensland Public Health Sector Certified Agreement (No. 8) 2011 (EB8)*

contracting out, and the disclosure of personal information provisions as described in the Public Service Commission Chief Executive Directives ...

Further the EM states that: *Section 691C provides that particular provisions of industrial instruments are of no effect. These provisions of industrial instruments are:*
a contracting provision;
an employment security provision;
an organisational change provision.

Section 691D addresses termination, change and redundancy (TCR) provisions. Subsection 1 says s.691D applies to an award that contains a TCR provision which requires an employer to notify employees (and where relevant a union/s) of a decision, or to consult about a decision, where the decision will lead to changes that are likely to have a significant effect on employees. Subsection 2 sets out three principles that will apply in these circumstances:

Principle 1—the employer is not required to notify employees (and where relevant a union/s) of a decision until the time the employer considers appropriate;
Principle 2—the employer is not required to consult about the decision until after the employer has notified the employees (and where relevant a union/s). This does not mean that an employer does not have to consult about changes – the employer must consult with employees (and where relevant a union/s) after notification and at the commencement of implementation;
Principle 3—consultation is required in relation to the implementation of the decision, but not in relation to the making of the decision.

These provisions apply to industrial instruments made or certified before or after the commencement of these sections of the *Act* as they relate to the employment of persons in a government entity: see s.691B(1). Government entity is defined in accordance with s.24 of the *Public Service Act 2008*.

In addition if an industrial instrument contains a TCR provision about notifying an entity of a decision relating to organisational change then the TCR provision **does not apply to the extent that the employer is not required to notify of the decision until the time the employer considers appropriate**; the employer is not required to consult about the decision until the employer notifies the entity about the decision; and the employer is **not required to consult about the decision other than in relation to its implementation**: see s.691D.

Restrictions on giving personal information are also dealt with on the basis that the provision of that information can only occur with the express permission of the employee.

Application and impact of legislative changes

In 2012 applications were pursued by the Together union and the Australian Workers Union to declare invalid the Newman government's amendments to the *Industrial Relations Act 1999*.

Together had argued that the QIRC was a court of the State exercising judicial power when certifying an agreement, and that the legislation which purports to override provisions of a certified agreement is invalid insofar as it disturbs the exercise of judicial power in contravention of the separation of powers doctrine.

The Court held:[13]

. The doctrine of the separation of the judicial from the legislative and executive powers of government does not apply to the States. There is no constitutional principle of separation of powers in the Constitution of Queensland;

. The QIRC's role in relation to certified agreement is administrative, not judicial, in nature;

. "The award making power and the power to certify agreements (of the QIRC) are creatures of statute which the Parliament may revoke or vary from time to time". The subject legislation doesn't impinge in any way on the decision-making independence or impartiality of the QIRC or the Industrial Court and therefore does not infringe the *Kable* principle.

The full judgment available here: http://archive.sclqld.org.au/qjudgment/2012/QCA12-353.pdf

The Court of Appeal went on to conclude that *when regard is had to the substance of the QIRC's role in relation to certified agreements, it is apparent that it is administrative in nature with executive and legislative aspects. ... It is clear that certification is not analogous to function traditionally exercised by the courts. ...* (87)

In referencing the legislative amendments that were made by the Newman government, the Court of Appeal states that *(S)ections 691C, D and E do not impinge in any way on the decision making independence of impartiality of the QIRC or the Court. The award making power and the power to certify are creatures of statute* ***which the parliament may revoke or vary from time to time.*** *The parliament may prescribe what may or may not be contained in awards. It did that in s.126 of the Act, prior to the enactment of the* Amendment Act. *Similarly it may prescribe the requirements for certification and the procedures relating to applications for certification. It did that in ss.154, 154 and 155 prior to the enactment of the* Amendment Act. *As the respondent submitted,* ***the effect of ss. 691C, 691D and 691E is to attach new legal consequences to parts of existing instruments and to state the legal consequences of relevant provisions in future instruments.*** *(emphasis added)* (102)

In the decision, the Court of Appeal addressed the issue of the application of s.691D and whether inconsistency occurred with Part 6-4 (ss.786 and 787) of the *Fair Work Act 2009*. It determined that there was no inconsistency with the *Fair Work Act 2009*. Rather it determined that the relevant sections of the federal legislation combine to give an employee the right to seek a remedy if certain actions are not taken - nothing in the *Industrial Relations Act 1999* amendments hinders the exercise of that right. Even if the federal legislation section at hand (s.786) did impose positive obligations, the *Industrial Relations Act 1999* amendment does not absolve employers of that obligation, **it only removed the industrial instrument as an additional source of the obligation.**

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[13] *AWU, Queensland v State of Queensland, State of Queensland v Together Queensland, Industrial Union of employees and Anor* [2-12] QCA 353 (14 December 2012)

Although the *Fair Work Act 2009* is principally constrained to "national system employees" (see ss.13 and 14), Part 6-4 is broader in reach in that the terms "employer" and "employee" are given the ordinary meaning. As such these provisions have equal application to all employees disregarding the jurisdiction in which they operate. See s.720.

Section 784 sets out the object of the Division which is "to give effect, or further effect" to the Internal Labour Organisation Convention. Article 13 of the Termination of Employment Convention requires an employer contemplating termination for specified reasons to provide workers' representatives, firstly, and in **good time, with relevant information** which includes the reasons for the terminations, the numbers and categories of workers likely to be affected and the period over which the terminations will be carried out; and secondly, and as **early as possible, with an opportunity for consultation on measures to avert or minimise the terminations and their adverse effects on the workers concerned.**[14]

Division 2 of Part 4, Chapter 3 of the *Industrial Relations Act 1999*, before amendment, contained provisions giving effect to article 13 of the Termination of Employment Convention. The Division applied when an employer decided to dismiss 15 or more employees for an economic, technological or structural reason. See s.89. It prescribed notification and consultation by employers in generally similar terms to those in s.786(2) and (3) of the *Fair Work Act 2009*, except that it provided that an employer could dismiss employees only if the prescribed notification was given and that the employer "must" give employee organisations the opportunity to consult. See s.90A.

The *Amendment Act* removed the Division's application to employees covered by a "relevant industrial instrument". See s.22A. At the same time, s.691D was enacted (a limiting provision) to apply where a "relevant industrial instrument" included a "TCR" provision about notification or consultation.[15]

As the Court of Appeal indicated *(I)f s.786 did not impose such an obligation, the object of Division 3 of Part 6-4, to give effect or further effect to the Termination of Employment Convention and the associated Recommendation, would be defeated. Fair Work Australia did not have a discretion whether to make an order, but an obligation to do so once it was satisfied that the matters in s.786(1)(a), (b) and (c) existed.*

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[14] Recommendation No.166 (Termination of Employment) which supplements the Convention provides that *(W)hen the employer contemplates the introduction of major changes in production, programme, organisation, structure or technology that are likely to entail terminations, the employer should consult the workers' representatives concerned* ***as early as possible*** *on, inter alia, the introduction of such changes, the effects they are likely to have and the* ***measures for averting or mitigating*** *the adverse effects of such changes:* see 20(1) *To enable the workers representatives concerned to participate effectively in the consultations referred to in subparagraph (1) of this Paragraph, the employer should supply them in* ***good time*** *with all relevant information on the major changes contemplated and the effects they are likely to have:* see 20(2). (Emphasis added)

[15] It removed the application of an organisational change provision entirely from agreements. It removed organisational change provisions from awards except for a "TCR" provision contained in an award, though such provision was altered.

The Court of Appeal decision indicated that s.691D purported to state the law in a way which was directly inconsistent with s.786. The former provision authorised the making of an award containing provisions consistent with the principles set out in s.691D(2) which then, although inconsistent with s.786, would have the force of law. And s.691D denied or varied the positive obligations placed on employers under s.786 to notify and consult as soon as practicable.

Section 786 made detailed provision in respect of the timing and extent of notification and consultation with employee organisations where the decision was made to terminate 15 or more employees for the specified reasons. In particular, it required that the employer notify and consult as soon as practicable after a decision had been made.

Section 691D, on the other hand, allowed the employer to decide when it was appropriate to notify an employee association of a decision, and permitted consultation to be deferred until after that notification. It limited consultation to the implementation of the decision to terminate, whereas s.786 specified that consultation should include measures to avert or minimise the effects of the proposed terminations.

The Newman government argued that s.786 imposed no requirement on an employer to give notice or to consult. *Section 785 created obligations; the language of s.786 was entirely different. It merely conferred a general discretion upon Fair Work Australia to make orders if certain facts were found to exist: those set out in ss.(1)(a) – (c), which included a failure to comply with ss.(2) and (3). It did not make any reference to contravention. There was a possible consequence for an employer if he failed to notify or consult in the way provided for in ss.(2) and (3), but no obligation for him to do so.* ***The terms of s.691D did not conflict with s.786, because the former simply made it clear that there was no obligation under Queensland industrial instruments to notify or consult; but s.786 did not assume the existence of any obligation before it could operate.*** (128) (emphasis added)

NSW activity

The Court of Appeal relied upon *Public Service Association and Professional Officer's Association Amalgamated of NSW by Director of Public Employment* [2012] HCA 58.[16] In this matter the High Court unanimously upheld the validity of a provision of the *Industrial Relations Act* 1996 (NSW) which requires the Industrial Relations Commission of New South Wales to give effect to *Regulations* declaring aspects of government policy.

The central provision in this appeal was s.146C(1) of the *Act*. That sub-section provides that the Industrial Relations Commission must *give effect to any policy on conditions of employment of public service employees ... that is declared by the regulations to be an aspect of government policy that is required to be given effect to by the Commission* when making or varying any award or order.

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[16] The appellant brought proceedings in the Industrial Court challenging the validity of s.146C(1). The appellant claimed that it undermined the integrity of the Industrial Court for its judicial members to be required to give effect to policy declared in regulations when sitting as, and exercising the functions of, the Commission. The Industrial Court rejected that claim and the appellant, by special leave, appealed to the High Court.

The *Industrial Relations (Public service Conditions of Employment) Regulation 2011* (NSW) dealt with policies affecting the conditions of employment of public service employees, among which was a limitation upon the increases in remuneration that the Commission could award.

The High Court unanimously dismissed the appeal. Although s.146C(1) and the *Industrial Relations (Public service Conditions of Employment) Regulation* used the words "policy" and "government policy", the policies contemplated by s.146C(1) (and those contained in the *Regulation*) were no different from any other laws (including any applicable statutes and *Regulations*) which the Industrial Relations Commission must apply in exercising its functions. It cannot undermine the integrity of the Industrial Court for its judicial members to apply the law as it stands from time to time when sitting as, and exercising the functions of, the Commission.

Implications

The amendments introduced by the Newman government have resulted in the three key employment regulation arrangements applying to public service employees - awards, agreements and Directives – being subject to unilateral change outside of the jurisdiction of the industrial tribunals. The removal or neutering of provisions dealing with organisational change and consultation from various industrial instruments was determined by the Court of Appeal as being open to the Newman government as the industrial tribunal – the QIRC – was not considered to be a judicial, but rather an administrative, body.

The decision is subject to a special leave to appeal application to the High Court.[17] However, pending the outcome in that matter, the law continues to apply. The potential for such laws to be extended into other areas of employment regulation reflected in awards, agreements and Directives means that any matters subject to tribunal deliberation will potentially be capable of neutering if the decision of the tribunal does not favour the Newman government.

The position in NSW wherein their state government adopted limiting arrangements for the awarding of wage adjustments to public service employees is an example in point not yet tested in Queensland, but certainly left open on the initial findings in the Court of Appeal matter.

Public service legislation

In addition the *Public Service Act 2008* was amended by providing that the Commission (Public Service Commission) Chief Executive (CCE) could make a ruling in the same manner as the Minister would have made rulings in relation to remuneration and conditions of employment. This amendment changed the role and responsibilities of the CCE so that these were rulings outside of the normal functions of the CCE: see s.53(baa) (**rulings by commission chief executive**).

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[17] B3 of 2013

The breadth of operation of the *Industrial Relations Act 1999* is constrained in relation to the application of industrial instruments. Section 687 **(Conflict between industrial instruments etc. and statutory decision)** provides that this section applies if there is an inconsistency between any of the following directives under the *Public Service Act 2008:*

> *(i) a directive made by the chief executive of the Public Service Commission that is the subject of a regulation under section 52(2) of that Act;*
> *(ii) a directive made by the Minister administering this Act; and*
> *(b) an award, industrial agreement, certified agreement or decision of the commission (the* ***industrial instrument****).*
> *(2) If the commission decides that the subject matter of the directive is within its jurisdiction, the industrial instrument prevails to the extent of the inconsistency. ...*[18]

The legislative changes adopted by the Newman government have ensured that the functions and jurisdiction of the QIRC have been neutered by ensuring that Directives are made by the "chief executive of the Public Service Commission" (see amendment to s.54(baa))[19] and that such Directives are not subject to *Regulation.* **In the past "condition" Directives would have been made by the Minister (see s.54) thus ensuring that s.687 was enlivened and the QIRC had a role in protecting employment arrangements. That has now been negated.**

In context Directives are issued under ss.53 and 54 of the *Public Service Act 2008.* Under s.53 the Public Service Commission Chief Executive (CCE) may issue Directives on matters relating to the Public Service Commission's or the Public Service Commission Chief Executive's functions, and the overall employment conditions for Chief executives, senior executives and public service officers on contract whose remuneration is equal to, or higher than, the remuneration payable to a senior executive.

Under s.54 the industrial relations Minister may issue directives about the remuneration and conditions of employment applying to public service employees (other than Chief Executives and senior executives) and public service officers on contract whose remuneration is equal to, or less than, the remuneration payable to a senior officer.

Ministerial Directives apply to the employees specified in the application clause of the particular Directive.

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[18] Section 51 **(Relationship with legislation)** of the *Public Service Act 2008* provides that "If a ruling is inconsistent with an Act or subordinate legislation, the Act or subordinate legislation prevails to the extent of the inconsistency." Section 52 **(Relationship between directives and industrial instruments)** provides that if a Directive deals with a matter all or part of which is dealt with under an industrial instrument of the QIRC, a directive of the Commission Chief Executive will prevail over an industrial instrument, unless a Regulation provides otherwise. In the alternate an industrial instrument prevails over a Directive of the industrial relations Minister, unless the Directive provides otherwise.

[19] Section 53(baa) is a new subsection introduced under the Newman Government's amendments to the *Public Service Act 2008* which took effect on 1 January 2013 and is yet to be invoked.

In addition s.23(3) of the *Public Service Act 2008* was deleted removing the requirement to consider whether there is a reduction in the employee's overall employment conditions when the *Public Service Act 2008* or a ruling is applied.

Implications

As such **new Directives or amendments to existing Directives could occur, and if the impact of that new or changed Directive gave rise to a diminution to an existing condition of employment, then there was no redress for such impact.**

The situation of external conditions of employment, of substance and broad content, being subject to change through an employer sponsored decision which culminates in a legislative amendment, where the employer and the legislator are the same, is a beguiling situation.

Not only does this raise issues of certainty around employment arrangements, even though such Directive may be referenced within industrial instruments, particularly in the instance of reference within a bargained and settled agreement, the practice denotes a lack of separation between the employer and the legislator and the arbitrator to the disadvantage of the employee.

Minimum standards for all workers

Constitutional power

The *Constitution* establishes a federal system of government in which legislative powers are distributed between the Commonwealth and the states. Section 109 of the *Constitution* provides that: 'when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'. This provision may operate in two ways: it may directly invalidate state law where it is impossible to obey both the state law and the federal law; or it may indirectly invalidate state law where the Australian Parliament's legislative intent is to 'cover the field' in relation to a particular matter.

The external affairs power enables the Australian Parliament to make laws with respect to matters physically external to Australia; and matters relating to Australia's obligations under bona fide international treaties or agreements, or customary international law.

Express and implied constitutional limits

The *Constitution* provides for express and implied limitations.

Express constitutional limitations include those in ss.51(xiii) and 51(xiv) of the *Constitution*, which provide that the Australian Parliament may legislate with respect to banking and insurance, but not state banking or state insurance that does not extend beyond the limits of the state.

Implied constitutional limitations include the principles that a federal law may not discriminate against a state, or prevent a state from continuing to exist and function as an independent unit of the federation.

The Commonwealth can legislate to regulate matters impacting on the state public and private sectors to the exclusion of the states.[20]

Legislative provisions applying to public service employees in the higher levels of state government may be one qualification to the Commonwealth's power. The High Court has found that Commonwealth laws that seek to regulate state employees at the 'higher levels of government' (including ministers, ministerial assistants and advisers, heads of departments and judges) may interfere with the existence and nature of a state. This is not inconsistent with the ILO Convention No.98.

Operation and application of external affairs powers

The *Constitution* gives the Commonwealth Parliament power over "external affairs". The High Court has held that the power covers the regulation of conduct that takes place outside Australia. The power has also been held to extend to the implementation of international treaties even if the subject matter of the treaty is otherwise not within Commonwealth power.

Laws can subsequently be enacted which are a faithful implementation of some international Treaty or Convention to which Australia is a party. Conventions are open for ratification by member states once adopted by the ILO Conference. Their adoption is affected by the approval of two-thirds of the delegates present. The Conventions become operable 12 months after the ratification by two countries. In most instances this immediately obliges the country concerned to maintain its laws and practice in conformity with the Convention. It is not mandatory for member states to ratify and as such unratified Conventions do not place an obligation on member states. However once a country has ratified the expectation of compliance ensues.[21]

Practice

There is, in theory, an open-ended potential for the Commonwealth to encroach on areas of traditional State competence through the external affairs power.

Evidence of this process in practice can be seen with the enactment of the 1993 industrial relations amendments through the *Industrial Relations Reform Act 1993*. In this instance *the ratification of ILO Convention 158 (the Termination of Employment Convention) had*

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[20] A number of pieces of federal human rights legislation, including the *Age Discrimination Act 2004* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Racial Discrimination Act 1975* (Cth), regulate the activities of state and territory public service authorities.

[21] See B Creighton 1993 'Industrial Regulation and Australia's internal obligations' in P Ronfeldt and R McCallum (eds) *A new province of legalism: legal issues and the deregulation of industrial relations* ACIRRT Monograph no 9 University of Sydney; B Creighton and A Stewart 1994 *Labour Law: an introduction* 2nd edition The Federation Press Sydney

taken place without the formal agreement of any state or territory government[22] *and in circumstances where the law and practice was not in compliance with any jurisdiction, including the Commonwealth. Even though there had been a practice for consultation with the states to take place prior to ratification, this is not necessary as a matter of law. This is because the capacity of the Commonwealth to enter into internal obligations derives from the 'prerogative' powers of the Crown in relation to treaty making which the Commonwealth inherited at the time of federation.*[23]

The provisions as introduced into the *Reform Act* dealing with minimum wages, equal pay, termination of employment, parental leave and industrial action: see Division 4 of Part VIB, all rely on Australia's general obligations.

To date this power has been used with some discretion, and often with "understandings" about adopting alternate approaches rather than using that power. An example in point is the Queensland referral legislation that enabled the residual of private sector employers (and their employees) to be "transferred" to the federal jurisdiction for the purposes of industrial relations regulation. These employers were not incorporated and therefore not subject to the federal legislation through the "corporations powers".

Work Choices, the Fair Work Act 2009 and the external affairs powers

Other than the activity around the 1993 *Reform Act*, the limitations inherent in the conciliation and arbitration power under s.51(xxxv) of the *Constitution*, essentially led to a dual industrial relations system in Australia, in which the power to legislate with respect to industrial relations was one held by both Commonwealth and State governments.

However, the *Work Choices* legislation, and later the *Fair Work Act 2009*, sought to rely on the corporations, territory and external affairs powers under the *Constitution* as well as a referral of power to the Commonwealth, in order to create, as far as possible, a new national industrial relations system.

There are a range of provisions within the *Fair Work Act 2009* which were introduced using the external affairs power. These include notice of termination of employment by the employer, unpaid parental leave and unlawful termination.

Reference is made to the relevant conventions in sections 743-747, 758-762, 771 and 784 of the *Fair Work Act 2009*. These being:

ILO Convention (No.156) concerning *Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities*; and the *Workers with Family Responsibilities Recommendation* 1981 (Recommendation No.R165) (unpaid parental leave);

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[22] See for example the Queensland Government's agreement to ratify ILO Convention No.175 (Part Time Work) wherein the Cabinet note states: *It is general practice that a convention is not ratified until law and practice complies in all jurisdictions, and all jurisdictions formally agreed to ratification.*

[23] K Reade April 1995 *The Use of the External Affairs Power in the Industrial Relations Reform Act 1993* Centre for Employment and Labour Relations Law Working Paper No 5

ILO Convention (No.158) concerning *Termination of Employment at the Initiative of the Employer*; and the *Termination of Employment Recommendation 1982* (Recommendation No.R166) (notice of termination of employment by the employer);

ILO Convention (No.111) concerning *Discrimination in respect of Employment and Occupation* (unlawful termination).

It should be noted that laws enacted using the external affairs power apply to every employee in Australia unless as the *Fair Work Act 2009* prescribes unless the law of the state provides entitlements for those employees that are more beneficial than the entitlement under the federal legislation. This means that the provisions of the *Fair Work Act 2009* that relate to unpaid parental leave, notice of termination by the employer, and unlawful termination, apply to all employees in Australia, including employees of unincorporated employers in Western Australia; and to state government employees in all states other than Victoria (which is already subject to the federal regulation) .

AEU

AEU and ANF ex parte Victoria (the *AEU case*)[24] provides the boundaries for the legislative capacity available to the Commonwealth Parliament in relation to regulating state government employees. Note should be made in this matter that the use of the "arbitration" powers (for award making) rather than the external affairs powers were utilised. However the decision is a broad reference point for recognising what is the regulatory responsibility of state governments in relation to their employees.

AEU established what would be the implied limitations for state governments:

It seems that critical to the capacity of a State is the government' right to determine the number an identity of the persons whom it wishes ***to employ****, the term of appointment of such persons and, as well, the number and identity of the persons whom it wishes* ***to dismiss*** *.... An impairment of a State's rights in these respects would ... constitute an infringement of the implied limitation. ...* ***the prescription by a federal award of minimum wages and working conditions would not infringe the implied limitation****, at least if it takes appropriate account of any specific functions or responsibilities which attach to the employees in question. ...* **(emphasis added)** (para 57)

... also critical to the State's capacity to function as a government is its ability ... the terms and conditions on which those persons shall be engaged. ... Ministers, ministerial assistants and advisers, heads of departments and high level statutory office holders, parliamentary officers and judges would clearly fall within this group. (para 58)

AEU established some broad boundaries of limitation. These are not enough to give rise to an overall impediment to regulating the terms and conditions of employment of State government employees with federal legislation utilising the external affairs powers.

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[24] *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 233; *Austin v Commonwealth* (2003) 215 CLR 185.

ILO Conventions

The right to collective bargaining

The right to collective bargaining is based on the right set forth in Article 3 of Convention No.87 (Freedom of Association and Protection of the Right to Organise) of which provides for organisations to organise their activities and to formulate their programmes which, applies to workers in both the private and the public services. Indeed, the preliminary work for the adoption of Convention No. 87 clearly indicates that "one of the main objects of the guarantee of freedom of association is to enable employers and workers to combine to form organisations independent of the public authorities and capable of determining wages and other conditions of employment by means of freely concluded collective agreements".

Any such interference would appear to infringe the principle that workers' and employers' organisations should have the right to organise their activities and to formulate their programmes.

Public authorities should refrain from an interference or the impeding of the right through collective bargaining to improve the living and working conditions of employees.[25]

However, over and above the reference to Convention No. 87, the underlying principles of collective bargaining are Convention Nos. 98, 151 and 154. *The right to collective bargaining is a fundamental right endorsed by the members of the ILO in joining the organisation which they have an obligation to respect, to promote and to realise, in good faith* (ILO Declaration of Fundamental Principles and Rights at Work and its Follow Up)

Promotion of collective bargaining and applicability of Conventions Nos.98 and 151 to the public service

Convention No.98 was ratified by the Australian government on 28 February 1973. It provides at Article 4 that *measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and works organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.*

Article 6 provides that *(T)his Convention does not deal with the position of public servants engaged in the administration of the state, nor should it be construed as prejudicing their rights or status in any way.*

In adopting this Article, bargaining in the public service was recognised as having special characteristics noticeably that it comprises an employer who has the legislative authority.

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[25] B Gernigon 2007 *Labour Relations in the Public and Para-Public Service* Working Paper No.2 ILO Geneva page 2

The Convention excludes categories of workers employed by the State on the grounds that they are formally placed on the same footing as certain public officials engaged in the administration of the State. See articles 4 - 6.[26] As such, certain categories of employees can be excluded from the application of legislation covering public services. This can include employees exercising legislative, executive or judicial functions, such as members of parliament, ministers or magistrates.[27]

The distinction must be drawn however, on the one hand, public servants who by their functions are directly employed in the administration of the State (for example, employed in government ministries and other comparable bodies), who may be excluded from the scope of the Convention and, on the other hand, all other persons employed by the government. In this connection, the Committee of Experts has emphasized that the mere fact that public servants are white-collar employees is not in itself conclusive of their qualification as employees "engaged in the administration of the State".

In several countries, personnel engaged in managerial, supervisory or confidential positions are also excluded from the scope of the legislation governing labour relations in the public service. This is the case, for example, in Canada and the United States, where managerial personnel and those in decision-making positions are excluded from the provisions respecting accreditation to bargaining units and exclusive representation rights.[28] [29]

Queensland context

The Queensland Public Service comprises of Chief Executive Officers, Senior Executive Officers, Senior Officers, Officers, General Employees and Temporary Employees. As far as the definition from the Convention No.98 of "public servants" engaged in the administration of the State, that definition would only apply to Chief Executive Officers. Chief Executives are subject to a written contract entered into with the Minister. The Senior Executive Service, Senior Officers and general employees have a history of their employment conditions regulated by awards and, where relevant, agreements pursuant to the *Industrial Relations Act 1999;* or alternatively through Directives specifying aspects of their terms and conditions of employment.

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[26] *Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.*
The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.
In accordance with the principle set forth in paragraph 8 of Article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.
This Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way. (emphasis added)

[27] B Gernigon op cit page 16

[28] Ibid Page 2

[29] For a discussion on the relevance of Convention No.151, see **Annexure C.**

As such the best boundary point for the applicability of the ILO Convention No.98 is employees whose employment conditions are regulated by an award, collective agreement or Directive can properly be regarded as public servants who are not engaged in the administration of the state.

Collective agreements: Recommendation No. 91[30]

The provisions of Convention No. 98 were supplemented by the Collective Agreements Recommendation, 1951 (No. 91).

This Recommendation contains provisions on: the establishment of machinery appropriate to the conditions existing in each country to negotiate, conclude, revise and renew collective agreements; the binding effects of collective agreements; and, the submission of disputes arising out of the interpretation of a collective agreement to an appropriate procedure for settlement.

As such, and consistent with ILO standards and principles, *collective agreements should be binding.*[31]

There should also be capacity to settle a bargain by way of arbitration: *It is (also) acceptable for conciliation and mediation to be imposed by law in the framework of the process of collective bargaining .... However the imposition of compulsory arbitration in cases where the parties do not reach agreement is generally contrary to the principle of voluntary collective bargaining and is only admissible: (1) in essential services ...(2) with regard to public servants engaged in the administration of the state; (3) where after prolonged and fruitless negotiations it is clear that the deadlock will not be overcome within an initiative by the authorities; and (4) in the event of an acute national crisis. Arbitration which is acceptable to both parties (voluntary arbitration) is always legitimate.*[32]

Queensland context

The certainty of a collective agreement was a feature of the Queensland industrial relations system up until the election of the Newman government. Parties entering into collective agreements did so with the knowledge that the agreement would stand until such time as it passed its nominal expiry date and was replaced with another agreement.

That feature was removed as a result of the 2012 legislative amendments.

The process for determining a bargain through arbitration is not unique in the Queensland context. Sections 148 to150 of the *Industrial Relations Act 1999* provides the relevant mechanism to facilitate the settlement of the bargain through arbitration. The sections are clear in that s.148 is designed to facilitate bargaining by proving a mechanism for the QIRC

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[30] Whilst Conventions have the status of international labour legislation, Recommendations are not open to ratification and fail to create binding obligations in their own right.

[31] Gernigon B, Odero A, Guido H 2000 *Collective Bargaining: ILO standards and the principles of the supervisory bodies* ILO Geneva page 75

[32] Ibid page 76-77

to assist the parties in the efficient conduct of the negotiations (ss.(3)(a)); whilst s.149 provides that if the QIRC considers that it is unlikely that the matter will be settled (ss.(1)(b)) or that the negotiating parties agree that the commission should determine that matter by arbitration (ss.(1)(c)), then the commission may exercise its powers to do so.

The Queensland legislative provisions are not inconsistent with the ILO's standards and principles.

The number of "arbitrated" settlements to bargain is very small in contrast to those agreements settled through negotiation. In the context of the Queensland public service, "determinations" have occurred on a few occasions in relation to, for example, departmental employees,[33] police,[34] and ambulance.[35]

Of note however is that as a result of the legislative changes adopted by the Newman government in August 2012, and the removal of job security entitlements from then existing (current) certified agreements, the Together union is now subject along with 14 other unions with coverage within the Queensland public service, to an arbitration around the key general public service agreement: see CA/2012/289.

The right to consultation as a result of termination of employment

The right to consultation as a result of termination of employment bargaining is based on the right set forth in Article 13[36] of Convention No.158 of which provides that *(W)hen the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall: (a) provide the workers representatives concerned in good time with relevant information including the reasons for the termination ...; (b) 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 ...*

The various industrial instruments that public service workers are subject to – principally awards and collective agreements – have provided a mechanism for consultation in relation to termination, change and redundancy. The award arrangements are not dissimilar to those adopted as part of the 1984 *TCR decision*[37] and the subsequent 1987 *Queensland TCR decision*.[38] In this regard the award reflected the tenet of the ILO Convention No. 158.

Separately the collective agreements that public service employees are subject to provide a mechanism for affected employees who are subject to organisational change. As an example in point clause 7.3(3) of the State Government Departments Certified Agreement 2009 (2009 CA)[39] outlines the material that should be provided to industrial organisations.[40]

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[33] CA/2011/28 – *Together and Department of Transport and Main Roads* – 3 October 2012
[34] CA/2-1-/12 – *Queensland Police Service and QPUE and QPCOU* – 11 August 2011
[35] CA/2008/317 – *LHMU and Department of Community Safety* – 12 July 2012
[36] Part III of the Convention.
[37] 8 IR 34 and 9 IR 115
[38] 125 QGIG 1119
[39] *All Government departments and agencies covered by this Agreement shall provide in writing to the members of their Consultative Committee (CC) of their intention to implement organisational changes that may*

Promotion of consultation and applicability of termination of employment: Convention No.158

This Convention was ratified by the Australian government on 26 February 1993.

In August 2005, the International Finance Corporation's *Good Practice Note on Managing Retrenchment* stressed the importance of consultations to both the development and the implementation of a retrenchment plan. The Good Practice Note states that *without consultation, companies run the risk of not only getting key decisions wrong, but also of breaching legal rules and collective agreements and alienating workers and the community. Workers can often provide important insights and propose alternative ways for carrying out the process to minimize impact on the workforce and the broader community.*[41]

The Convention makes provision for various methods of implementation. Article 1 of the Convention provides that, in addition to legislation, *the ratifying State may give effect to the Convention by means of collective agreements, arbitration awards, court decisions, or in such other manner as may be consistent with national practice. Case-law thus plays a fundamental role in giving effect to the provisions of the Convention.*[42]
As such the inclusion of redundancy provisions in industrial instruments is supported as an adjunct to the effective operation of the Convention. This is consistent with what has occurred in Queensland instruments (awards, collective agreements and Directives) up unto the Newman legislative amendments in August 2012.

Termination of employment: Recommendation No.166

Recommendation No. 166 which deals with termination of employment provides guidance as to the kind of measures which could be adopted to avert or minimize the terminations of employment. Such measures might include *restriction of hiring, spreading the workforce reduction over a certain period of time to permit natural reduction of the workforce, internal transfers, training and retraining, voluntary early retirement with appropriate income protection, restriction of overtime and reduction of normal hours of work.*[43]

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affect the employment security of employees, prior to the commencement of any planned changes. This shall include all information required to be provided in accordance with the "Introduction of changes" and "Redundancy" clauses of relevant awards. Departments and agencies are also required where requested to provide relevant unions with a listing of the affected staff comprising name, job title and work location.

[40] The QIRC has considered the issue of consultation post the Newman government amendments and provided a "snapshot" of the process that should be considered: refer to **Annexure D.**

[41] International Finance Corporation of the World Bank Group Good Practice Note – Managing Retrenchment August 2005 (No. 4)
www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_Retrenchment/$FILE/Retrenchment.pdf

[42] Note on Convention No.158 and Recommendation No.166 Concerning Termination of Employment
www.ilo.org/wcmsp5/groups/public/@ed.../wcms_100768.pdf page 17

[43] Ibid page 166 at para 21

Queensland context

The impact of the redundancies on the Queensland public service has been substantial. The Newman government adopted a position of challenging the public service unions in their pursuit of information in regard to the foreshadowed cuts.

The Together union's experience at QIRC dispute conferences[44] was of intransigence by the Public Service Commission in recognising the provisions as contained in the various industrial instruments, which prescribed consultation in relation to organisational change. This was confirmation of the Newman's government intention of denuding the various industrial instruments of their organisational change/consultation provisions.

Without factoring in the recently announced Queensland Health redundancies, there have been 10 600 public service employees[45] who have been made redundant. In some instances more than one half of total staff of a department has been terminated.[46]

The Newman government promoted the option of redundant employees being placed on a register for alternate placement.[47] The register is a source of mystery. There is an indication (unsubstantiated) that the register has only ever held approximately 260 names. This is 260 names out of a potential of more than 10 000 employees who have exited the public service. This suggests the cynicism public service employees hold as to the potential benefit of the register. This is confirmed when one considers that in two separate instances – that of the Department of Treasury and Trade and the Department of Justice and Attorney General, agencies advertised externally for 80 positions each within their agency.

The Public Service Commission advised in correspondence to the Together union (dated 29 November 2012) that in relation to the vacancies in Treasury and Trade approval had been given to the advertising of the 80 positions after a small number of positions (initially only three) were drawn from the register. Thus indicating that of the 260 names on the register almost all of these were deemed suitable. A similar situation has arisen in Justice and Attorney General.

The notion that employees cannot be placed internally within the public service confirms the message that the register is a ruse, did not border on any level of mitigation against the adverse impact of the organisational change, and that employees when "offered" a redundancy but provided with the option of being placed on a register for vacant positions, have seen no alternate option and their redundancy not less than "forced".

This is confirmed by the extent to which the PSC has shielded the register from the Together union, to the extent that an application for access under *Right to Information Act 2009* was

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[44] See **Annexure B.**

[45] A full listing of redundant employees matched to agency/department excluding Queensland Health (as of mid-2012) is available at www.couriermail.com.au/news/full-list-of-queensland-public-service-redundancies/story-e6freon6-1226471881372

[46] Energy and Water Supply – 135 redundancies against 273 employees – www.couriermail.com.au/news/full-list-of-queensland-public-service-redundancies/story-e6freon6-1226471881372

[47] Directive No:06/12 Employees Requiring Placement

denied on the basis that *the disclosure ... could reasonably be expected to prejudice the management function of an agency or the conduct of industrial relations by an agency. Releasing internal information of this nature .... would in the view of the PSC prejudice the conduct of industrial relations in the public sector.*[48] Together has applied to the Information Commissioner for an independent external review in accordance with s.85 of the *right to Information Act 2009*.

The practice adopted and applied by the Newman government is at odds with the process as outlined in Convention No.158, wherein recognition of the contribution that can be made by the workers affected by the organisational change should not be discounted: and that every effort to mitigate against the impact of the organisational change on employees should be pursued.

Overview of referral of state legislation to the federal jurisdiction

Queensland's referral legislation

Background

On 11 November 2009, the Queensland Parliament passed legislation to refer industrial relations matters for the unincorporated private sector to the Commonwealth - the *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (*Referral Act*). New South Wales, South Australia and Tasmania undertook similar referrals of industrial relations jurisdiction. Victoria had referred its state industrial relations jurisdiction in 1996 and the Australian Capital Territory and Northern Territory are subject to national industrial relations legislation due to their status as territories. Western Australia did not refer industrial relations powers and retains a state industrial relations system for its unincorporated private sector.

The effect of the referral in Queensland was to further reduce the jurisdictional coverage of the State industrial relations system to state and local government, local government owned or controlled entities, some statutory entities[49] and other matters such as judicial officers, members of tribunals, their associates, law enforcement officers and the like. This represents approximately 15 per cent of all Queensland employees.

The *Fair Work Amendment (State Referrals and Other Measures) Act 2009* amended the *Fair Work Act 2009* to enable Queensland's reference of powers and provided transitional arrangements for state referred employees and employers. It also provided a mechanism to exclude certain state entities from the national industrial relations system (the exclusion

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[48] Correspondence from the Public Service Commissioner dated 30 January 2013.

[49] The restrictions governing the exercise of the power to declare employers not to be national system employers capture: a body corporate established for a public purpose by or under a law of Queensland, by the Governor, or by a Minister; [refer to s.30K of the *Fair Work Act 2009* and the definition of state public service employer] or a body established for a local government purpose by or under a law of Queensland; or *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* a wholly-owned subsidiary (within the meaning of the *Corporations Act 2001*) of, or a body which is wholly controlled by, a body mentioned above;
a university.

mechanism). The exclusion mechanism has been used to exclude a number of state entities from the national industrial relations system.

However, the exclusion mechanism may not be applied to certain entities, namely national system employers that: generate, supply or distribute electricity supply or distribute gas; provide services for the supply, distribution or release of water; operate a rail service or port or is an Australian university.

The *Fair Work Amendment (State Referrals and Other Measures) Act 2009* (Cwlth) is the Commonwealth legislation which gives effect to Queensland's referral of matters. Item 31 of Schedule 1 of that Act inserted into the *Fair Work Act 2009* a new section 30L.

Section 30L is designed to protect the State's interests in the event that Queensland no longer wishes the Commonwealth to have the power to legislate with respect to the referred matters. Section 30L(6) makes it clear that the termination of the initial reference, the amendment reference, or the transition reference, would result in Queensland ceasing to be a referring State (except in specified circumstances explained below). This would bring to an end the Commonwealth's power to legislate for Queensland in relation to any of the referred matters. In other words, the new s.30L of the *Fair Work Act 2009* has been drafted in such a way that it will overcome any argument, based on s.109 of the *Constitution*, that Queensland could not terminate its referral.

The *Act* enables a declaration to be made by *Regulation* that a particular employer is not a national system employer. Once endorsed by the Commonwealth Minister, such a declaration has the effect of moving the declared employer and its employees back into the State industrial relations system, and takes effect irrespective of the corporate status of the employer.

It is acknowledged that, in practical terms, the effect of the *Act* will be that the power to legislate with respect to private sector employers and their employees will be referred to the Commonwealth. Technically, the Queensland Parliament will retain a concurrent power to legislate with respect to the referred matters. However, any Queensland law relating to industrial relations is likely to be rendered ineffective in so far as it applies to the referred private sector, because it is likely to be inconsistent with the *Fair Work Act 2009*.

Section 7 of the *Referral Act* enables the termination of all of the references, or only the amendment or the transition references, by the publication of a proclamation made by the Governor. Section 9 provides that the date fixed for the termination of the references must usually be six months from the day of the proclamation. The effect of terminating all, or any, of the references, will usually be that Queensland ceases to be a referring State.

Additionally, s.9(2) of the *Referral Act* makes it clear that the Governor may terminate the amendment reference on 3 months' notice if the Governor declares that, in his or her opinion, the *Fair Work Act 2009* has been amended, or is proposed to be amended, in a way that breaches one or more of the fundamental workplace relations principles. If the Governor terminates the amendment reference in these circumstances, Queensland will remain a referring State.

If the amendment reference terminates in either of the two situations explained above, then the *Fair Work Act 2009*, as in force at the time of the termination, will continue to apply in Queensland because Queensland will remain a referring State.

However, until the Queensland Parliament re-enacts the amendment reference, any subsequent amendments the Commonwealth makes to the *Fair Work Act 2009* will not take effect in Queensland's referred jurisdiction.

That is, if the State revokes its reference, Commonwealth industrial relations law will no longer have any effect for unincorporated employers and their employees in Queensland to the extent that it was only supported by the referral.

De-referring

Referral legislation operates on the basis of "understandings" and commitments about practice and procedure. It is underpinned by good intention, but as is evident in the drafting of the legislation there is no impediment if the Queensland government so chose to do so for the non-incorporated private sector to exit the federal jurisdiction and return to the state jurisdiction.

The recently announced review by the Queensland government establishes an interest in doing just this: see the issues paper *Should Queensland maintain or terminate the referral of industrial relations jurisdiction for the unincorporated private sector to the Commonwealth?*[50]

As is noted in the issues paper, *(I)rrespective of any termination of the referral, all incorporated private sector employers and their employees would remain in the national industrial relations system and be subject to the FW Act. This is because all trading or financial corporations (collectively referred to as "constitutional corporations") are regulated exclusively by the national industrial relations system.* (page 4)

The capacity (and ease) in which a referring state can create an exit mechanism for the unincorporated private sector confirms that the practice of referrals is subject to government and political whim.

<u>Consistent employment arrangements for all workers</u>

Redress

Given the propensity of the Queensland government to legislate to restrict the issues that can be subject to a collective agreement, or to amend the legislative framework to remove entitlements as previously accommodated in either awards or collective agreements or Directives, in some recent instances with retrospective effect, the current Queensland

[50] December 2012 Office of Fair and Safe Work Queensland

legislative framework does not provide appropriate protections of rights arising from ILO Convention No.98.

Such protections can only be achieved under federal legislation utilising the external affairs power of the *Constitution* and extending to all public service workers excluding those engaged as Chief Executive Officers.

Convention No.98 focuses the content of collective bargaining on "terms and conditions of work and employment". The concept of working conditions is not be limited to traditional working conditions such as working time, overtime, rest periods, wages and the like. It also covers matters which are normally included in conditions of employments such as promotions, transfers and dismissal without notice.

The types of "working conditions" included in agreements should be reflective of contemporary collective bargaining. Procedures to resolve problems associated with staff reductions, to manage workloads and work allocation; manage organisation change including consultation and the ability to mitigate against the potential loss or employment; coupled with job security are all within the purview of permitted matters: see *Fair Work Act 2009* at s.172(1).[51]
The Committee on Freedom of Association has provided that *there are certain matters which clearly appertain primarily or essentially to the management and operation of government business; these can reasonably be regarded as outside the scope of negotiation. ... while staffing levels or the departments to be affected as a result of financial difficulties may be considered to be matters which appertain primarily or essentially to the management and operation of government business and may therefore reasonably be regarded as outside the scope of negotiations, the larger spectrum of job security in general includes questions which relate primarily or essentially to conditions of employment, such as*

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[51] Terms *permitted*

- terms relating to particular staffing levels (subject to any other applicable legislative requirements or limitations) particularly if those terms are aimed at ensuring the health, safety and wellbeing of employees
- terms relating to conditions or requirements about employing casual employees or engaging labour hire or contractors if those terms sufficiently relate to employees' job security
- terms which would provide that casual employees are converted to permanent employees after a set period of time

Terms *not permitted* - The Explanatory Memorandum to the *Fair Work Bill 2009* (at para 673) provides the following as examples of terms that would not be intended to be within the scope of permitted matters for the purpose of the *Fair Work* legislation:

- terms that would contain a general prohibition on the employer engaging labour hire employees or contractors
- terms that would contain a general prohibition on the employer employing casual employees
- terms that would require an employer to source only products from a particular supplier or Australian made products, unless, for example, such a term was directly related to employees' job security
- terms that would require an employer to engage or not engage particular clients, customers or suppliers who had agreed to commit to certain employment, environmental or ethical standards, unless, for example, such a term was directly related to employees' health and safety
- terms that relate to corporate social responsibility (eg terms requiring an employer to participate in charity events or commit to climate change initiatives).

pre-dismissal rights, indemnities ... which should not be excluded from the scope of collective bargaining

Wage adjustments are also accommodated within the bargaining process for Queensland public service employees. Although the concept of a wage ceiling is not rejected in the international context as being "objectionable" to bargaining, this position is underpinned by such ceiling having been subject to *wide discussion and consultation;* with the negotiating parties concluding an agreement *freely;* with the settlement of an agreement being matched to certainty; and the ability to refer the progressing of a bargain to the relevant tribunal not limited.

The terms of reference of the Senate Inquiry into *the conditions of employment of state public service employees and the adequacy of protection of their rights at work as compared with other employees* is clearly answered. The Newman government has dealt with their employees through legislation to preclude basic entitlements and rights associated with their employment arrangements. This is at odds with the standards adopted in the federal jurisdiction under the *Fair Work Act 2009*; and in breach of Australia's obligations under ILO Conventions.

Public service workers should not be subject to the susceptibility that comes from their employer being the legislator. A commitment to the standards and principles prescribed in ILO Convention Nos. 87, 98 and 158, and their application to public service workers, will provide some certainty that is not evident, at least, in the Queensland situation.

This would not be dissimilar to the processes already adopted in regard to ss.743, 758, 771 and 784 of the *Fair Work Act 2009.*

The only method of redress for Queensland public service employees is that this Inquiry recognise the Australian government's obligations under signatory ILO Conventions and utilise the breadth of its external affairs powers to ensure public service employees are not disadvantaged through unilateral changes, by their employer / state government, to their employment conditions.

Together
14 February 2013

Annexure A - Public Service Employees by Agency

AGENCY	FEMALE	MALE	TOTAL
Aboriginal & Torres Strait Islander & Multicultural Affairs	196	108	304
Agriculture Fisheries & Forestry	1,162	1,625	2,787
Anti-Discrimination Commission Qld	22	10	32
Comm for Children & Young People & Child Guardian	336	92	428
Communities Child Safety & Disability Services	5,512	1,651	7,163
Community Safety	4,016	9,175	13,191
Education Training & Employment	65,614	19,407	85,021
Electoral Commission Qld	27	25	52
Energy & Water Supply	150	131	281
Environment & Heritage Protection	779	573	1,352
Health	61,708	20,505	82,213
Health Quality Complaints Commission	49	21	70
Housing & Public Works	2,212	3,323	5,535
Justice and Attorney-General	3,271	2,099	5,370
Legal Aid	367	135	502
Local Government	72	57	129
Museum	182	123	305
National Parks Recreation Sport & Racing	606	917	1,523
Natural Resources & Mines	1,416	1,480	2,896
Police	5,517	9,435	14,952

Premier and Cabinet	300	148	448
Public Service Commission	63	28	91
Public Trust	395	185	580
Qld Art Gallery	233	152	385
Qld Audit Office	100	121	221
Qld Treasury & Trade	634	517	1,151
Qld Water Commission	37	28	65
Science Information Technology Innovation & the Arts	2,275	1,610	3,885
State Development Infrastructure & Planning	596	384	980
State Library	221	93	314
Tourism Major Events Small Business & Commonwealth Games	82	45	127
TransLink Transit Authority	194	210	404
Transport & Main Roads	5,286	5,207	10,493
Queensland Public Service	**163,630**	**79,620**	**243,250**

Queensland Public Service (QPS) agencies and their employee head-count as at June 2012

Annexure B – Indicative disputes before the QIRC – 2012 – lack of consultation surrounding redundancies

AGENCY	DISPUTE NOTICE	DATE LISTED
DAFF	D2012/147 (Swan)	23 July 26 July
COMMUNITIES	D2012/146 (Fisher)	23 July 31 July
COMMUNITY SAFETY (DARLING DOWNS CORRECTIONAL CENTRE)	D2012/41 and D2012/140 (Injunction) (Linnane)	27 July 9 August 21 August 3 Sept
DET	D2012/150 (Bloomfield)	25 July
DEWS	D2012/160 (Thompson)	30 July 2012
JAG - State Reporting Bureau (Mackay)	D2012/159	27 July 2012
PREMIER AND CABINET (MINISTERIAL SERVICES BRANCH)	D2012/149 (Swan)	24 July
PREMIER AND CABINET (INTERNAL AUDIT AND RISK SERVICES)	D2012/148 (Swan)	24 July
QUEENSLAND HEALTH	D2012/180 (Brown)	16 August
TRANSLINK	D2012/133 (Fisher)	16 July
TMR	D2012/154 (Bloomfield)	26 July 31 July 13 August
TREASURY AND TRADE	D2012/169 (Fisher)	3 August

Annexure C - Relevance of ILO Convention No.151

Note that Convention No.151 protects collective bargaining rights specifically for the public services. Convention No.151 is similar to Convention No.98 but is a weaker alternative model of "participation" applicable to certain workers in certain circumstances (for example high level public servants in government ministries), who are not automatically entitled to protection from Convention No.98.

The wording in this Convention follows the text of Article 4 of Convention No. 98, with a difference to take into account the specific situation of public employees, namely the possibility of having recourse to methods other than collective bargaining. In so doing, the International Labour Conference made it possible to extend the rights recognized by Convention No. 98 to public employees by officially according them the right to participate in the determination of their terms and conditions of employment, with collective bargaining being specifically referred to as one of the possible means of doing so.

By considering collective bargaining as being only one of the methods envisaged, even though it is the only one to which explicit reference is made, the Convention introduces an element of flexibility in the choice of procedures. There are basically two types of procedures for effective participation, namely consultation and negotiation, broadly defined. Those procedures, in which the workers are limited to formulating their views or opinions in connection with the determination of their conditions of employment may be considered to be consultation procedures.

For most workers Convention No.151 offers lower levels of protection than Convention No.98.

The necessity to seek to ratify and then apply Convention No.151 is not necessary in securing adequate protections for public servants.

Annexure D – Process for Consultation

After the election of the Newman government, restructuring commenced within the state public sector. In large this restructuring did not adhere to the framework as provided for under the relevant awards in relation to consultation with industrial organisations (insert provision); nor were the obligations as outlined in the collective agreements adhered to.

Of the disputes that were generated to the QIRC pursuant to s. 229 of the *Industrial Relations Act 1999* (Qld), the commission provided some guidance as to the process that should be undertaken by the employer. However the result of this guidance can be readily seen in the reaction of the Newman government through the Public Service Commission in the issuing of Directive 7/12 which purported to prevent the release of personal information to a third party authorised by an industrial instrument except with written consent of the employee concerned to the employer; and the release of Directive 8/12 which dealt with (insert).

In matter D/2012/154 - *Together Queensland, Industrial Union of Employees v Department of Transport and Main Roads* (1 August 2012) – the commission noted that the releasing of Directive 8/12 on the day prior to the release of his statement did not preclude TMR from consulting with the personal who will be affected by any organisational changes including those who might be subject to retrenchment as well as their unions about measures to avoid or minimise any adverse consequences of the decision taken by the employer.

Bloomfield C indicated in his statement of 1 August 2012 that *the obligation to consult about the proposed changes and measures to avoid or minimise the adverse consequences is a serious obligation and one not to be dismissed lightly.*[52]

In citing *Vodafone: In deciding whether or not to make orders sought I have considered the importance of consultation. Consultation is not perfunctory advice on what is about to happen. This is a commonplace misconception. Consultation is providing the individual, or other relevant persons, with a* ***bona fide opportunity to influence the decision maker.*** *Section 179GA(1)(b) of the Act speaks of* ***measures to avert or minimise terminations to mitigate the adverse affects of the terminations.*** *Consultation is not joint decision making or even a negative or frustrating barrier to the prerogative of management to make*

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[52] Bloomfield DP went on to state: *In a well-known case abut a similar issue, Commissioner smith in CEPU v Optus Administration Pty Ltd said: "The Oxford dictionary defines consult as: 'To take counsel together, deliberate, confer ... to seek advice from ... to confer about, deliberate upon, debate, discuss, consider ... to mediate, plan, devise, contrive ...' This is language that connotes active participation by the authorities to the consultation. Consultation is directed towards making an informed decision where the views of the stakeholders can be given mature reflection.*

As was stated by Toohey in TVW Enterprises Ltd v Duffy and Others: 'Consultation is no empty term. The requirement of consultation is never to be treated perfunctorily or as a mere formality. [Port Louis Corporation v Attorney-General of Mauritius (1965) AC 111 at 1124]. That decision and others eg Rollo v Minister of town Planning (1045) 1 A11 ER 13 at 17 and Sinefield v London transport Executive (1970) Ch 550 at 558 make it clear that a responsibility to Consult carries a responsibility to give those consulted an opportunity to be heard and to express their views so that they may be taken into account.'

decisions. Consultation allows the decision making process to be informed, particularly as it may affect the employment prospects of individuals.'

The opportunity to seek to avoid or mitigate the effects of a termination cannot be underestimated by those who wield power over those and their families who will be the subject of the exercise of the exercise of that power."