



australian
nursing federation

Inquiry into the conditions of employment of state public sector
employees and the adequacy of protection of their rights
at work as compared with other employees

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LEE THOMAS
Federal Secretary
Australian Nursing Federation
Level 1, 365 Queen Street, Melbourne VIC 3000
P: 03-9602 8500
F: 03-9602 8567
E: industrial@anf.org.au
Website: www.anf.org.au

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1. Summary of recommendations

- 1.1. That to the extent that state legislation is not in conformity with Australia's obligations under ratified ILO Conventions, then the Fair Work Act (hereafter "FW Act") should be amended using the external affairs powers of the Constitution, to ensure that public sector worker are provided with adequate protections in accordance with those obligations irrespective of the jurisdiction or legislation that covers them.
- 1.2. That the objective in s. 3(a) of the FW Act be amended to read ".comply with Australia's international obligations" rather than simply ".take into account Australia's international obligations."
- 1.3. That state and federal industrial legislation actually reference ILO Conventions and require that they be taken into account in the considerations of the relevant industrial tribunal.
- 1.4. That believe the FW Act be amended to ensure that multi-employer and industry bargaining is permitted and that the rules in respect to protected industrial action are the same at all levels of bargaining.
- 1.5. That s. 247 of the FW Act be deleted and s.248 be amended to allow either employers or a union to bring an application for a single interest employer authorization before the Fair Work

Commission and that the initial application to the Minister be deleted (with the Minister as of right being able to appear in such proceedings).

- 1.6. That s. 228 of the FW Act be amended to allow for bargaining orders to be granted more than 90 days before the nominal expiry of the agreement and at any time while bargaining is occurring.
- 1.7. That the good faith bargaining requirements be strengthened to deal with the issue of surface bargaining and that the requirements of the New Zealand legislation, which require that an agreement be reached once bargaining has commenced, be considered.
- 1.8. That the good faith bargaining requirements in the Fair Work Act be amended to recognize triangular bargaining and:
 - require State Governments who are third party strangers who exert influence over a captive bargaining representative to adhere to good faith bargaining obligations; and
 - clarify and fortify the obligations of government entities, who are third party strangers, to provide information relevant to the bargaining process and to adhere to other good faith requirements in s. 228(1) such as responding in a timely manner to proposals from employee bargaining representatives.
- 1.9. That the concept of minimum level of service orders in essential services be explored by the Government (after consultation with union and employer stakeholders) for inclusion in the Fair Work Act to ensure the maintenance of critical services at an acceptable level, but which would allow the continuation of industrial action to continue in non-critical areas.
- 1.10. That sub-clause 275(h) be deleted and that the criteria in s. 275 be reviewed to give more prominence to fairness and equity in the outcome.
- 1.11. That s. 424 and in particular paragraph (1)(c) be amended to bring the wording in line with ILO jurisprudence requiring a “clear and imminent” threat and that reference to welfare be deleted.
- 1.12. That the Fair Work Act be amended to require a higher the evidentiary burden for suspension or termination of protected industrial action (including evidence of widespread or systematic threat).
- 1.13. That protected industrial action should not be able to be terminated (but only suspended) under section 424 unless the bargaining representatives have agreed that all issues in dispute between them are able to be dealt with by way of arbitration.

- 1.14. That the Fair Work Act be amended provide for an existing enterprise agreement to be continued insofar as that agreement deals with matters or claims subject to objection on *Re AEU* grounds.
- 1.15. That the Australian Government that they ratify the Nursing Personnel Convention 1977.
- 1.16. That s. 420(2) of the FW Act be amended so that an interim order is not mandatory and the employer must demonstrate that it is in the public interest for the FWC to use its discretion to issue an interim order stopping the industrial action complained of.
- 1.17. That s. 413(5) of the FW Act be repealed.
- 1.18. That the voting requirements for members to approve a protected industrial action ballot (that 50% + 1 of those eligible to vote must vote) be amended to reflect a reasonable percentage in line with comments by the ILO Committee of Experts.
- 1.19. That the referral in respect to public sector workers in Victoria should be amended to ensure that issues such as modes of employment (including use of casual and fixed term contractors), staffing levels and workloads can be dealt with by the Fair Work Commission.

2 Introduction

- 2.1 The Australian Nursing Federation welcomes the opportunity to make a submission to this inquiry into the conditions of employment of state public sector employees and the adequacy of protection of their rights at work as compared with other employees.
- 2.2 The ANF represents over 225,000 nurses (RNs and ENs),midwives(RMs) and assistants in nursing (ANINs) nationally. Approximately 120,000 of these members are employed in state and territory government hospitals and health services around Australia. The number of registered and enrolled nurses registered with the Nursing and Midwifery Board of Australia in 2011 was 326,669 (268,018 RNs and 58,651 ENs – see AIHW Nursing and Midwifery Workforce 2011, Cat No HWL48, table 2.3). Of these 283,577 were employed in nursing and midwifery. If you allow for approximately 12-16,000 AIN and aged care members, then the ANF membership represents around 72-74% of the employed nursing and midwifery workforce nationally. Around half of the ANF AIN members are employed in the public sector.
- 2.3 The terms and conditions of public sector nurses in NSW, Queensland, Tasmania, Western Australia and South Australia are regulated under state industrial relations systems. In Victoria, the ACT and NT the federal industrial relations system operates exclusively.

2.4 In particular the ANF is concerned about the behavior of state governments in:

- Changing rights and entitlements to termination change and redundancy in legislation and unilaterally over-riding negotiated provisions in enterprise agreements (Queensland)
- Arbitrarily prescribing maximum wage increases and otherwise limiting what can be negotiated by the parties or, failing agreement, what can be arbitrated by state industrial tribunals
- Adopting bargaining frameworks in legislation that are inconsistent with their obligations under ILO Conventions and which, in some instances, provide fewer rights and entitlements to public sector workers than other workers under the Fair Work Act ('federal system' or FW Act).

2.5 The ANF also has concerns that under the Fair Work Act ('FW Act') public sector workers in Victoria, the ACT and Northern territory face difficulties in bargaining as compared to private sector workers. In particular our concerns go to:

- Good faith requirements and triangular bargaining where the government is the real negotiator but is not at the negotiating table (nor is it subject to good faith bargaining requirements)
- Inability to take effective industrial action before it can be suspended or terminated due to s. 424 (threat to endanger the life, health and safety, or welfare or the population or part of it)
- The lack of adequate compensatory mechanisms where protected industrial action is terminated
- Constitutional issues arising from Re AEU in Victoria in that FWC cannot arbitrate all issues in dispute
- Onerous protected industrial action ballot requirements

3 Protections under State Industrial Relations Legislation

A) [whether] the current state government industrial relations legislation provides state public sector workers with less protection and entitlements than workers to whom the Fair Work Act 2009 (the Act) applies

- 3.1 The ANF does not propose to undertake a detailed comparison of the Fair Work Act against the various state industrial relations legislation which is now confined largely to public sector workers in NSW, Queensland, Western Australia, South Australia and Tasmania.
- 3.2 The ANF and its Branches are particularly concerned that State governments (whether under the state or federal systems) have in recent years prescribed arbitrary wage outcomes for bargaining across the public service and public sector, with little connection to what is affordable or without recognition of the difference between occupational groups sectors. In recent times governments have adopted a policy of a maximum wages outcome of 2.5% per annum, unless identified and 'bankable' cost savings achieved. This is akin to pattern bargaining by an employer, behavior which is unlawful for a union and its members to engage in.
- 3.2 Of course, it is in the nature of collective or enterprise bargaining for each party to be able to set parameters for bargaining. Where there is an intractable bargaining dispute, it would be expected that under an arbitrated outcome – whether an industrial action related workplace determination (s. 266 FW Act) or a bargaining related workplace determination (s. 269 FW Act) – that the Fair Work Commission at the federal level would exercise its discretion by balancing all of the factors contained in s. 275. These factors include (a) the merits of the case, (c) the interests of the employers and employees concerned and in (d) and (e) the conduct of the parties and whether they have complied with good faith bargaining requirements. State tribunals have generally been guided by similar criteria.
- 3.3 In Victoria, the Baillieu Government has imposed bargaining constraints through their public sector workplace relations policy as follows:
- A wage guideline rate of 2.5 per cent per annum, so that the total cost of an agreement (including conditions, allowances or any other agreement related payments) is no more than 2.5 per cent annualised.
 - There is no ceiling or limit on wage outcomes. However, enterprise agreement outcomes in excess of the wage guideline rate must be fully offset by genuine productivity gains linked to workforce reform achieved as part of the agreement negotiations. These gains must be bankable, i.e. they must generate savings that will be available to fund any outcome in excess of the wage guideline rate.

3.4 Further:

All agreed wage outcomes between employers and employees need to take into account the recent decision by the Commonwealth Government to increase the employer superannuation guarantee.

(Public Sector Workplace Relations Policies December 2012 Update:
[http://www.dtf.vic.gov.au/CA25713E0002EF43/WebObj/PSWRPolicies-Dec2012/\\$File/PSWRPolicies-Dec2012.pdf](http://www.dtf.vic.gov.au/CA25713E0002EF43/WebObj/PSWRPolicies-Dec2012/$File/PSWRPolicies-Dec2012.pdf))

- 3.5 Because of the difficulty in quantifying any future productivity savings (which given the general efficiency of the public sector is usually code for agreeing to relinquish long held employment conditions) this policy effectively operates as a fixed cap rather than as a 'range'. As discussed in respect to NSW below it is arguably in breach of key ILO Conventions 87 and 98.
- 3.6 Fortunately, the Fair Work Commission, hereafter referred to as FWC, (and, until recently, all of the state tribunals) is not bound to apply a state government bargaining policy setting a maximum wages outcome. In 2012 in Victoria in both the nurses dispute as well as the core public sector disputes the fear of a greater amount being awarded in arbitration has probably lead the Government to settle before arbitration so they can claim that their policy is intact. Within these settlements increases above the 2.5% are usually hidden in other allowances or payments or classification restructures.
- 3.7 In Victoria this has been counterbalanced by the problems faced by public sector unions not being able to have Re AEU matters, which have not been referred to the Commonwealth (such as number and identity of persons employed – staffing and workload matters), included in any arbitration. This threat has meant that unions, like the ANF, are more likely to want to settle than go to arbitration where the risk is not only a modest wages outcome but exclusion from the arbitrated workplace determination of items such as nurse-patient ratios that were part of expired agreements).
- 3.8 The capacity of state tribunals to make decisions independently and outside government policy was evident in Queensland in 2010 when a Full Bench (DP Swan and Commissioners Thompson and Fisher, August 11 2011) arbitrated an outcome for police officers. The Full Bench expressed that "A continuing matter for concern in this Decision relates to the "one size fits all" Government offer to its employees within the public sector." [para. 218]. They continued:

[221] We are curious as to how a fixed offer can be made by the Government to its workforce without any apparent or obvious consideration being given to the type of industry under consideration. For the purposes of this Decision and the Legislation, if an

"industry" can be identified within that context, then the work of policing is an "industry". It may be that within the public sector, "industry" could cover similar work performed within different agencies/departments - i.e. work falling under the general heading of "emergency services".

[222] We are unsure of what consideration has been given to the fact that, within the public sector, employees are often engaged in a range of diverse activities. Further, in offering a fixed wage offer, there appears to be little consideration given to the fact that each bargaining party may have, and usually do have, a different set of claims to be considered.

[223] This matter involves the determination of an appropriate enterprise bargaining outcome for employees of the QPS. The "industry" in question, i.e. that of policing, is inherently different and discrete to other sectors within the public service - a claim that could arguably be made by many other sections within the public service.

[224] It is up to the parties negotiating with the State Government as to whether they agree to accept a fixed wages offer. However, if an enterprise bargaining negotiation has not been resolved between parties and a s. 149 application is made, the requirement is that the Commission adhere to the requirements of the Act and particularly to the statutory direction to act with equity, good conscience and the substantial merits of the case.

[225] Against that background, it would not be unusual that outcomes achieved through a s. 149 of the Act application may produce different results.

- 3.9 In that case amounts of 3.8%, 3.8% and 3.5% were awarded for each year of the determination (absorbing the 2.5% pay increases already applied by the government in the first two years).
- 3.10 In the federal jurisdiction there have been a number of examples of workplace determinations, including in two of the three widely publicized Qantas disputes (pilots and ground staff) in 2012. In each of these the FW Commission weighed the evidence and against the factors in s 275 of the FW Act. While we are critical of the criteria contained in s. 275 as leading inevitably to a "lowest common denominator" type outcome, at least the FWC has discretion to act independently, unlike NSW.

New South Wales

- 3.11 On 17 June 2011 the O'Farrell Government in NSW amended the Industrial Relations Act by inserting a new section, s 146C, and a new sub-section, s 105(2) which affected 'unfair contracts' and is not presently relevant. Both amendments were effected by the *Industrial Relations*

Amendment (Public Sector Conditions of Employment) Act 2011 (NSW) ("the Amendment Act"). Section 146C requires the Commission to give effect to certain policies when it makes (or varies) an award or order about the employment conditions of public sector employees. S146C said:

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

(1) The Commission must, when making or varying any award or order, give effect to any policy on conditions of employment of public sector [employees](#):

(a) that is declared by the regulations to be an aspect of government policy that is required to be given effect to by the Commission, and

(b) that applies to the matter to which the award or order relates.

3.12 Such policies are those which the NSW government declares (by regulation) to apply to a matter before the Commission. It should be noted that the section applies to any policy that is declared in regulations and applies to the matter to which an award or order relates. This could include wages, termination and redundancy and a range of issues other than the guaranteed minimum conditions.

3.13 To define the employment policies which the Commission must give effect to the Government subsequently made the *Industrial Relations Amendment (Public Sector Conditions of Employment) Regulations 2011* on 20 June 2011. The Regulation capped public sector salary increases at 2.5% (unless offsetting cost savings were made). Regulation 6 says in part:

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

(a) Public sector employees may be awarded increases in remuneration or other conditions of employment that do not increase employee-related costs by more than 2.5% per annum.

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

3.14 The paramount policies under Regulation 5 are the minimum guaranteed conditions detailed in Regulation 7 (including unpaid parental leave, paid parental leave, Commonwealth prescribed

superannuation payments, long service leave, annual leave, personal leave, public holiday entitlements and part-time work entitlements) and equal remuneration.

- 3.15 We note the submission of the NSW Nurses and Midwives Association (submission 6) which alerts the Committee to the possibility that the O'Farrell Government will amend their policy and the Regulation to incorporate the recommendation of the NSW Commission of Audit, Interim Report, Public Sector Management that the government should "amend the NSW Public Sector Wages Policy 2011 to include a provision that workforce management policies (such as staff ratios) should not be included in industrial instruments". In the upcoming bargaining for a new enterprise agreement for nurses and midwives in NSW (the current agreement expires in mid 2013) the key issues will be nurse-patient ratios, workload management and patient safety. We also note that the regulations affect termination and redundancy by virtue of clause 6(1)(f) and that is referred to elsewhere in this submission.
- 3.16 In October 2011 the Public Service Association and Professional Officers' Association Amalgamated of NSW ("the PSA") applied to the Industrial Court of NSW for a ruling that the Amendment Act and the regulations were invalid on the basis that the Amendment Act and regulation undermines the integrity of the Commission. The PSA "submitted that the institutional integrity of the Industrial Court is impermissibly affected because judicial members of the Commission, who sit as the Industrial Court, must comply with government policy when exercising the arbitral functions conferred on the Commission."
- 3.17 The Industrial Court rejected the argument on the basis that the Amendment Act and Regulation (except in relation to unfair contracts) did not apply to the Court. The High Court reaffirmed that view.
- 3.18 In the decision (12 December 2012) Chief Justice French at paragraph 45 said:

The application by the Commission of a regulation of the kind contemplated by s 146C does not involve the Commission in giving effect to an executive direction. It is simply required to apply the law as set out in the [IR Act](#) and the relevant regulation, which incorporates by reference the principles set out in a policy declared by the regulation. Such a policy could be embodied in the text of the regulation itself without any need to separately identify it as a "policy". There is no relevant constitutional distinction to be drawn between the making of a regulation which creates decision-making rules that have been formulated by the executive government to give effect to its policies, and the making of a regulation which incorporates by reference a statement of a policy setting out those rules.

- 3.19 Other judgements were critical of the appellant in bringing the action. Justice Heydon at paragraph 70 said:

It is the law that courts are subject to legislative power. And it is the law that courts are subject to acts of the Executive, including the making of regulations, carried out pursuant to valid delegations of legislative power. Section 146C(1)(a) is a perhaps excessively colourful and triumphalist grant of regulation-making power. But it is no more than a grant of regulation-making power.... As the Attorney-General for the State of Victoria submitted, s 146C(1)(a) provides that the Commission "must give effect to delegated legislation in the exercise of its statutory powers", but "merely sets the parameters for the Commission's exercise of its statutory powers without directing the outcome of particular proceedings."

- 3.20 The Court did not address whether the making of the Amendment Law and Regulation complied with Australian obligations under relevant ILO Conventions, nor was it raised in argument.

- 3.21 It is the submission of the ANF that the Amendment Act and Regulations are likely to be in breach of the ILO Conventions and particularly Convention 98, *Right to organise and Collective Bargaining Convention 1949*, ratified by Australia in 1973.

- 3.22 The General Survey of the Reports on the Freedom of Association and the Right to Organize Convention (No. 87), 1948 and the Right to Organize and Collective Bargaining Convention (No. 98), 1949 presented at the International Labor Conference 81st Session (1995), said in relation to this trend, i.e. to restrict "free fixing of wages by means of collective bargaining, especially public servants", that :

....The Committee must, however, recall that if, under an economic stabilization or structural adjustment policy, that is for imperative reasons of national economic interest, wage rates cannot be fixed freely by means of collective bargaining, these restrictions should be applied as an exceptional measure and only to the extent necessary, should not exceed a reasonable period and should be accompanied by adequate safeguards to protect effectively the standard of living of the workers concerned, in particular those who are likely to be the most affected [para. 260].

- 3.23 Further, the Committee of Experts said:

263. While the principle of autonomy of the parties to collective bargaining is valid as regards public servants covered by the Convention, the special characteristics of the public service described above require some flexibility in its application. Thus, in the view of the Committee, legislative provisions which allow Parliament or the

competent budgetary authority to set upper and lower limits for wage negotiations or to establish an overall "budgetary package" within which the parties may negotiate monetary or standard-setting clauses (for example: reduction of working hours or other arrangements, varying wage increases according to levels of remuneration, fixing a timetable for readjustment provisions) or those which give the financial authorities the right to participate in collective bargaining alongside the direct employer are compatible with the Convention, provided they leave a significant role to collective bargaining. It is essential, however, that workers and their organizations be able to participate fully and meaningfully in designing this overall bargaining framework, which implies in particular that they must have access to all the financial, budgetary and other data enabling them to assess the situation on the basis of the facts.

264. This is not the case of legislative provisions which, on the grounds of the economic situation of a country, impose unilaterally, for example, a specific percentage increase and rule out any possibility of bargaining, in particular by prohibiting the exercise of means of pressure subject to the application of severe sanctions.

3.24 It appears that in respect to NSW the O'Farrell Government has done exactly what is decried in the Committee of Experts. Without consultation they have set an arbitrary maximum (not a range) which is an on-going prescription for wages rather than exceptional measure. It precludes bargaining around wages and it precludes arbitration based on the merits of the case. Not only does it provide workers in NSW with less protections and entitlements than workers under the FW Act or other state legislation where the relevant Tribunal will have discretion over the arbitrated outcome, but it is unlikely to comply with the key ILO Conventions.

3.25 As noted in the submission of the CPSU (submission no. 8) at paragraph 25:

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

3.26 We concur with that view. This absence of the basic bargaining 'infrastructure' which is available in the Fair Work Act and state systems such as South Australia and Tasmania, may soon also be

combined with proposals for new and severe penalties for taking industrial action in contravention of an order of the NSW Industrial Relations Commission.

- 3.27 The Industrial Relations Amendment (Dispute Orders) Bill 2012 if adopted will provide for fines of up to \$110,000 for the first day of a first offence and \$55,000 for each subsequent day (currently \$10,000 and \$5,000) for both organizations and individuals. The fine is doubled to a maximum of \$220,000 and \$110,000 for second and subsequent offences (compared to the \$20,000 and \$10,000 respectively). This compares to a maximum under the FW Act of \$6,600 for individuals and \$33,000 for bodies corporate for each offence.
- 3.28 Given the new constraints on what can be ‘bargained’ by unions with public sector agencies or arbitrated by NSW IRC, combined with the absence in legislation of a right for public sector workers to take protected industrial action, the new penalties are clearly designed to eliminate any inclination among workers and their unions to take industrial action in pursuit of a new enterprise agreement. Together, these measures effectively deny public sector workers, including tens of thousands of nurses and midwives, their fundamental human right to collectively bargain and take industrial action.

4. TCR changes to state legislation and ILO Conventions

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

- 4.1 A 2011 ILO comparative survey of the impacts of the GFC on employment standards commented that:

“ Countries may have actually reduced workers rights in an effort to stave off the effects of the crisis, particularly in respect of employment. The logic is clear: Cheapen or reduce rights at work in the hope of saving or creating jobs. . . . A few countries have moved or looked to move to loosen restrictions on termination of employment at the initiative of the employer. The Czech Republic is one; Australia is another. In the case of Australia, although its Labour Party government substantially improved coverage compared with the preceding government, provisions applicable to small business employers reduce the ability of an independent tribunal to review afresh the grounds for termination, including termination on operational/economic grounds. (*Rights at work in times of crisis: Trends at the country level in terms of compliance with international labour standards*, Employment Working Paper No. 101, 2011 by David Tajzman, Catherine Saget, Natan Elkin and Eric Gravel).

- 4.2 While in the current context it is not fair to single out the Commonwealth Government, given the changes about to be discussed in a number of the states, there is no doubt that there has been a move toward making it easier for employers, both private and public to terminate employees and to avoid legal or any obligations to notify or consult employees and their unions (and which are required under ILO Conventions to which Australia is a signatory).
- 4.3 It is pleasing to see that the Commonwealth has also attempted to protect state public sector workers through the Fair Work Amendment (Transfer of business) Act 2012 where their work is contracted out to the private sector. While the transfer of business provisions in the Fair Work Act have their limitations (especially in a *Gribbles Pathology* situation where no “assets” transfer) at least there is now uniform protection for all workers.
- 4.4 Of course, in relation to public sector workers in Victoria there is arguably no regulation of termination change and redundancy. Matters pertaining to redundancy are expressly excluded from the 2009 referral of powers to the Commonwealth. Redundancy and related matters are not dealt with by state legislation, but rather are set out in a policy that is contained within the Public Sector Workplace Relations Policies 2012.

Queensland

- 4.5 The issue that forms the basis of this term of reference relates to the August, 2012 adoption by the Queensland Parliament of the *Public Service and Other Legislation Amendment Act 2012* (the Amendment Act). Part 5 of this legislation amended key sections of the *Industrial Relations Act 1999* in that it voided the effect of any contracting, employment security and organisational change provisions in industrial instruments covering state government entities. The Queensland Nurses Union have given examples of the kind of Agreement clauses that this legislation unilaterally invalidates (see Attachment 1 of their submission). Division 2 of the Queensland IR Act provides for “Orders giving effect to Article 13 of the Termination of Employment Convention”. However, the amendment to section 89 in Division 2 adds a new sub-clause (2) that specifies that “this division does not apply in relation to an employee to whom a relevant industrial instrument under chapter 15, part 2 applies.”
- 4.6 The new chapter 15 provides at s. 691B(1) that the Part applies to industrial instruments (whether made or certified before or after the commencement of this Part) to the extent the instrument applies to the employment of persons in a government entity.” It then proceeds to say that in such instruments provisions relating to contracting, employment security and organizational change (although each relevant section is careful to say that these provisions “do not include a TCR provision”).

- 4.7 However, in relation to TCR provisions at s. 691D the amended Industrial Relations Act also included principles related to termination, change and redundancy provisions and how award/agreement TCR provisions requiring notification or consultation about a decision are amended.
- 4.8 These 'principles' mean that government entities are not required to:
- notify of the decision until the entity considers appropriate;
 - consult about the decision until it notifies the decision; and
 - consult about the decision other than in relation to implementation of the decision.
- 4.9 To the extent that provisions in industrial instruments require government entities to do these things, those provisions are of no effect. The ANF submits that the changes implemented to termination, change and redundancy (TCR) standards found in Queensland public sector awards and agreements as a result of the *Public Service and Other Legislation Amendment Act 2012* breach the ILO's *Termination of Employment Convention, 1982 (No. 158)*, as ratified by Australia in 1993.
- 4.10 In 1987 the then Queensland Industrial Conciliation and Arbitration Commission ((1987) 125 QGIG 1119) heard claims for standards in relation to termination Change and Redundancy and adopted a position that similar to the 1984 (*Termination, Change and Redundancy Case*, 1984) 8 IR 34; *Termination, Change and Redundancy Case – Supplementary Decision* ((1984) 9 IR 115) at the federal level. That case had built on the first TCR standards case in NSW in 1983 and the Employment Protection Act 1982 in NSW. The recent amendments in Queensland are antithetical to the fundamental requirements of the federal and state TCR test case provisions which require genuine consultation (including an opportunity for employees and unions to suggest alternatives) and adequate notice so affected employees can plan for the proposed change.
- 4.11 The TCR standards had regard to the framework provided by the International Labor Organisation's *Termination of Employment Convention, 1982 (No. 158)* which sets out the key principles on termination of an employment relationship at the initiative of the employer.
- 4.12 Article 1 of the Convention confirms that the Convention applies 'to all branches of economic activity and to all employed persons', including public servants and public sector workers. There are limited flexibility provisions within the Convention which enable a signatory state to identify limited categories of employees as not being within the scope of the Convention. This notification must be notified at the time of the first report after signing the Convention and only

after consultation with employer and union groups. Australia did not report any exclusions in 1995 when filing the first report after ratification.

- 4.13 There is no subsequent opportunity to list exclusions. A background paper produced by the ILO for the April 2011 Tripartite Meeting of Experts to Examine the Termination of Employment Convention 1982 (No. 158) and the Termination of Employment Recommendation (No. 166) in April 2011 said at paragraph 47:

The CEACR on several occasions has noted that Article 2(6) allows governments to take account of future developments that would enable a modification of the exclusions listed in a first report. It has reminded several governments that the Convention does not allow the introduction of new exceptions beyond those listed in the first report, and since 2007 has called the attention of several governments to the exclusion of workers from the scope of application of the Convention despite the fact that they had not been mentioned in the first report.”

- 4.14 The key articles in the Convention for present purposes are Articles 13 and 14 which provide standards on collective dismissals. Article 13 of the Convention deals with consultation of workers’ representatives. Article 13 requires the employer, when contemplating terminations “for reasons of economic, technological, structural or similar nature” to:

- (i) Provide the workers’ representative concerned in good time with relevant information including the reasons for the terminations completed, the number and category of workers like to be affected and the period over which the terminations are intended to be carried out; and
- (ii) 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 minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.

- 4.15 Clearly the ‘principles’ adopted into law by the Queensland Government breach the obligation under Article 13 to provide timely information and notification to both affected employees and unions, with the aim that some or all of the terminations will not need to proceed or that the impact on workers is reduced.

- 4.16 Article 14 provides that the employer will notify the ‘competent authority’ of the reasons for the terminations, the number and categories of the workers involved and the period over which

the terminations will occur. These provisions are replicated at s. 530 of the Fair Work Act (the competent authority being Centrelink). Section 531 of the FW Act provides that FW Commission may make orders against an employer where there is a failure to notify or consult registered employee associations about dismissals. There does not appear to be a similar requirement in relation to notifying the competent authority in some state legislation, although Queensland has similar provisions at ss 90 and 91. Unfortunately, the impact of the amendments is to over-ride these requirements.

- 4.17 That consultation around termination at the initiative of the employer must be real and meaningful has been made clear by the ILO Committee of Experts on the Application of Conventions and Recommendations (or CEACR in their 1995 General Survey entitled *Protection against unjustified dismissal* para. 283) :

'The opportunity for workers' representatives to be consulted... reflects a situation which differs from mere information or co-determination; it should be able to have some influence on the decision taken. In particular, consultation provides an opportunity for an exchange of views and the establishment of a dialogue which can only be beneficial for both the workers and the employer, by protecting employment as far as possible and hence ensuring harmonious labour relations and a social climate which is propitious to the continuation of the employer's activities. Indeed, transparency is a major element in moderating or reducing the social tensions inherent in any termination of employment for economic reasons.'

- 4.18 Further, the CEACR noted in the General Survey that that consultation should take place as early in the process as possible. The ILO Committee of Experts has noted:

'For consultation to have a chance of making a positive contribution, the Convention stipulates that it must take place "as early as possible", which would allow the possible measures to be contemplated without haste and with circumspection.

For the workers' representatives to be able to participate in consultations with the necessary information to allow them to put forward their ideas on the measures which might be taken, the employer must provide information "in good time", which must be "relevant" and include the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out. This information allows the workers' representatives to engage in the consultation with the necessary information to enable them to evaluate the situation. In the absence of relevant information on the proposed terminations of employment, the workers' representatives would not be able to participate effectively and genuinely in such consultations and the objective of the Convention would not be achieved.'

- 4.19 The Queensland amendments also breach this fundamental provision of the Convention.
- 4.20 The Convention was supported by the *Termination of Employment Recommendation, 1982* (No. 166) which was passed by the same ILC plenary as the Convention. It provides authoritative guidance to states on implementation of the Convention in practice.
- 4.21 The Recommendation provides at clause 19 that:
19. All parties concerned should seek to avert or minimise as far as possible termination of employment for reasons of an economic, technological, structural or similar nature, without prejudice to the efficient operation of the undertaking, establishment or service, and to mitigate the adverse effects of any termination of employment for these reasons on the worker or workers concerned.
 20. (1) When 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.

(2) 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.
- 4.22 It should be noted that the need for consultation is at the time the employer contemplates the change, not after the decision is set in stone. In this regard the Queensland amendments are out of step with the Convention and Recommendation. Finally, the Recommendation explicitly talks about the need for the social partners to cooperate to either reduce the number of terminations or the effect of those terminations:
21. The measures which should be considered with a view to averting or minimising terminations of employment for reasons of an economic, technological, structural or similar nature might include, inter alia, 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.

- 4.23 Again, the removal of any requirement to consult employees and unions until after a final decision is made means that this element of the Convention and the Recommendation is breached
- 4.24 We note and agree with comments that the TCR changes implemented by the Newman Government also breach ILO standards on collective bargaining (see s.22A and s.691D) in that they interfere in the bargaining process and impose restrictions on the capacity to bargain over key elements of employment.

New South Wales

- 4.25 We note that the amendments to the Industrial Relations Act referred to earlier in this submission (insertion of a new s146C which excludes the NSW IRC from determining matters where the State Government has an employment policy that has been expressed in a regulation) also affect matters other than wages policy.
- 4.26 Under the *Industrial Relations Amendment (Public Sector Conditions of Employment) Regulations 2011* Regulation 6(1)(f) precludes “Policies regarding the management of excess public sector employees are not to be incorporated into industrial instruments.” The precise scope of this sub-regulation is not immediately apparent.
- 4.27 As per the discussion above, the removal of enforceable rights to timely notification and meaningful consultation from industrial instruments is in breach of the Convention 158.
- 4.28 While some changes to policies have been made in 2012 it might be argued that to date the NSW Government has not to date chosen to radically change “managing excess staff” policies that currently require early notification and meaningful consultation with unions (such as Policy Directive PD2012_021 *Managing Excess Staff of the NSW Health Service*). However, it would clearly be able to do so at any time. This is apparent from the policy itself which at the commencement says that “This Policy Directive may be varied, withdrawn or replaced at any time.”
- 4.29 For nurses and midwives in the public sector these policies set out the requirement for the health authority to have a restructuring plan, to consult with staff and unions before any steps are taken to call for redundancies, to attempt to relocate or redeploy staff and the amounts payable upon voluntary or forced redundancy. The effect of Regulation 6(1)(f) is to ensure that current rights could never be made enforceable in any industrial instrument (and the Act defines industrial instrument very broadly to mean an award, an enterprise agreement, a

public sector industrial agreement, a former industrial agreement, a contract determination or a contract agreement).

- 4.30 Further, if the State Government sought to reduce the current requirements and entitlements a union could not bargain around these issues (which is most probably in breach of the fundamental ILO Conventions 87 and 98) nor could the NSW Commission include them in any agreement or award, whether arbitrated or not.
- 4.31 This latter point has been confirmed in the SASS Redundancy case (*Re Crown Employees (School Administrative and Support Staff) Award* [2012] NSWIRComm 127) where the NSW PSA sought to vary the award to improve termination and redundancy provisions based on the TCR test case provisions and to include certain categories of employee (long term temporary employees) excluded by the Government's Managing SAS Staff Policy. However, President Justice Boland found that "in my opinion, cl 6(1)(f) declares, for the purposes of 146C of the Act, a policy. That policy is that "policies regarding the management of excess public sector employees are not to be incorporated into industrial instruments"" [at para. 94].

5. Unilateral changes to existing collective agreements

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

- 5.1 Australia has ratified the ILO's two fundamental conventions related to collective bargaining: the *Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No.87) and the ILO's *Right to Organise and Collective Bargaining Convention*, 1949 (No. 98).
- 5.2 The monitoring and interpretation of these Conventions and disputes as to how they apply is the responsibility of the ILO Supervisory bodies such as the Committee of Experts (Committee of Experts on the Application of Conventions and Recommendations – CEACR). In the last major General Survey of the Committee of Experts on Freedom of Association and Collective Bargaining (1995 revised) they make a number of relevant points.
- 5.3 The first is that all public servants except perhaps those directly involved in the administration of the state should have access to collective bargaining:

886. All public service workers other than those engaged in the administration of the State should enjoy collective bargaining rights, and priority should be given to collective bargaining as the means to settle disputes arising in connection with the determination of terms and conditions of employment in the public service.

892. 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; if this were not the case, Convention No. 98 would be deprived of much of its scope. To sum up, all public service workers, with the sole possible exception of the armed forces and the police and public servants directly engaged in the administration of the State, should enjoy collective bargaining rights.

5.4 It is made clear that “Persons employed in public hospitals should enjoy the right to collective bargaining.(See 306th Report, Case No. 1882, para. 433.)”

5.5 The Committee goes on to discuss the cases relating to unilateral changes of concluded agreements by government or laws precluding bargaining over particular matters.

918. Legislation amending collective agreements which have already been in force for some time, and which prohibits collective agreements concerning the manning of ships from being concluded in the future, is not in conformity with Article 4 of Convention No. 98. (See the 1996 Digest, para. 810.)

919. Legislation establishing that the ministry of labour has powers to regulate wages, working hours, rest periods, leave and conditions of work, that these regulations must be observed in collective agreements, and that such important aspects of conditions of work are thus excluded from the field of collective bargaining, is not in harmony with Article 4 of Convention No. 98.

5.6 In the view of the Committee of Experts freedom to bargain under the Conventions means that there should not be any restriction on the subject matter of bargaining or the level at which bargaining occurs (workplace, employer, region, industry or economy). Additionally, once agreements are concluded the state should not be able to unilaterally change the content of bargained agreements.

5.7 So at least in respect to s.691C of the Queensland Industrial relations Act (which invalidates existing agreement provisions around contracting, employment security and organizational change) it would seem clear that such legislative provision is in breach of Australia’s obligations under ILO Conventions.

5.8 So too, the exclusion in NSW amendments (s146C of the IR Act) of matters “regarding the management of excess public sector employees” would appear to be in breach of Australia’s obligations.

6. Does state legislation provide protections required by ILO Conventions

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

- 6.1 It seems clear that certain recent industrial legislation amendments in Queensland and New South Wales Australia do not appear to be in conformity with Australia's obligations under ILO Conventions such as C158, C87 and C 98. To the extent that some states have introduced harmonization with the Fair Work Act, then issues of whether the FW Act is compliant with the ILO Conventions (discussed in Section 7) become relevant. These include prohibitions on pattern bargaining, criteria for termination of protected industrial action, Ministerial intervention to terminate industrial action and the requirements for protected industrial action ballots to name the most obvious.
- 6.2 As to the myriad of other obligations under ILO Conventions the ANF is not in a position to give a detailed analysis of each state industrial relations law compared to the 50 Conventions ratified by Australia that are in force (7 of 8 Fundamental Conventions, 3 of 4 Governance Conventions (Priority) and 48 of 177 technical Conventions). We assume that DEEWR will have a comparative technical analysis available that could aid the Committee in relation to this term of reference.
- 6.3 We note that some states make an effort within their legislation to reference ILO Conventions. For example the Fair Work Act 1994 in South Australia s. 3 has as an objective:
- (j) to provide employees with an avenue for expressing employment-related grievances and having them considered and remedied including provisions for a right to the review of harsh, unjust or unreasonable dismissals—
 - (i) directed towards giving effect to the *Termination of Employment Convention*; and
 - (ii) ensuring industrial fair play; and
- 6.4 In addition the Court and Commission is directed in s.3(2) to:
- have regard (where relevant) to the provisions of—
- (a) the Worst Forms of Child Labour Convention 1999 (See Schedule 9); and
 - (b) the Workers with Family Responsibilities Convention 1981 (See Schedule 10); and
 - (c) the Workers' Representatives Convention 1971 (See Schedule 11).

- 6.5 We think that apart from repeating the language of ILO Conventions as per the Fair Work Act ss. 530-531 and Queensland IR Act ss. 90-90A that there is considerable merit in referencing other ILO instruments to ensure that these instruments form part of the considerations of the tribunal.
- 6.6 Based on our knowledge of the state legislation it is clear that in some areas the concerns related to state legislation compliance with ILO obligations will be similar to those outlined in section 7 in respect to the federal legislation. For example:
- Industrial action and the right to strike which is limited to “protected industrial action’ related to enterprise bargaining. The ILO has consistently drawn the attention to the Commonwealth to issues related to limitations on the right of workers to take industrial action, including for economic and social purposes.
 - It is to be noted that in NSW the legislation does not provide a right to protected industrial action. Section 141 of the NSW Industrial relations Act provides that “A person may not bring or continue an action in tort to which this Part applies while the industrial dispute to which the action relates is subject to conciliation by the Commission.” However, this right is extremely limited in that the dispute must be under active conciliation.
 - In Queensland under ‘harmonization’ the criteria to suspend or terminate industrial action now includes “significant damage to the economy, community or local community, or part of the economy” (our emphasis) with similar wording in respect to endangering the personal safety, health or welfare of the community or art of it” as opposed to ‘population.
 - We also note that under several State Acts, like the FW Act, there is a right of Ministerial intervention to stop industrial action. We believe this provision does not conform to relevant ILO Conventions.
- 6.7 To the extent that state legislation is not in conformity with Australia’s obligations under ratified ILO Conventions then the Fair Work Act should be amended, using the external affairs powers of the Constitution, to ensure that public sector workers (including those subject to state legislation) are provided with adequate protections. The external affairs power has been used in the past to extend protections under the federal legislation to workers in relation to parental leave and unlawful termination/unfair dismissal.

7. Difficulty in bargaining

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

Federal Legislation

7.1 The ANF notes the submission of the ANF (Victorian Branch) and supports the recommendations proposed in its submission. Under Commonwealth legislation the rules are ostensibly the same for all workers, whether public or private sector. However, as indicated in the ANF Victorian Branch submission to this Inquiry and in earlier submissions by the ANF to the Fair Work Act Review panel, there are significant differences between public and private sector in respect to:

- The existence of a multitude of service providers in the state government funded sector which are regarded as legally separate employers but are, for all intents and purposes, branches of one organization performing the same, commonly funded service: the problems associated with gaining a ‘single interest authorization’ and the conditions around multi-employer agreements
- Funding of organizations and the resulting control and influence exerted by State Governments who are often not directly engaged in the bargaining process: the problem of good faith and triangular bargaining
- The impact of industrial action on ‘essential services’ and (in the case of nurses and midwives) “the life, the personal safety or health, or welfare safety of the population or of part of it” (FW Act s424): the problem of how public sector workers are able to engage in effective industrial action
- The constitutional issues (Re AEU) that mean that not all matters subject to negotiation between a state government and a public sector union can be arbitrated by the FW Commission when effective action is suspended or terminated: the inability to have arbitration on all matters
- The size of many public sector organizations, especially in health, which makes the requirements for approving protected industrial action particularly onerous.

7.2 In general terms, the ANF considers that the bargaining provisions of the Fair Work Act are a major improvement on the provisions contained in the Workplace Relations Act and provide unions with more options to encourage employers to bargain (such as majority support orders, low paid authorizations etc).

- 7.3 The ANF supports the wider range of matters that can now be included in enterprise agreements. The removal of the list of 'prohibited content' prescribed by the previous Workplace Relations Act has been beneficial for employees. Employees now have greater ability to assert their rights as union members, for example by being able to include provisions about contractors/agency workers and paid union training in enterprise agreements. The 'prohibited content' restrictions under the previous legislation undermined the ability of the parties to include items that had the potential to improve efficiency, for example in relation to the use of agency nurses.
- 7.4 As unions are now the default bargaining representatives for their members by virtue of paragraph 176(1)(b), the bargaining process is not delayed by unnecessary arguments about whether unions can assume this role. This gives unions the opportunity to represent and inform their members more effectively.
- 7.5 Despite the improvements in respect to bargaining contained in the FW Act, the ANF is concerned that there are still difficulties in respect to bargaining faced by unions representing public sector workers, like the ANF. In addition, in critical areas the FW Act and, to some extent, state legislation is not in compliance with ILO Conventions.

Multi-employer bargaining

- 7.6 The ANF opposes the continued restrictions on bargaining with more than one employer and engaging in pattern bargaining (clauses 409(4), 412). Protected industrial action cannot be taken in pursuance of a multi-employer agreement (s. 413(2)) unless the group of employers agrees to obtain a single interest authorization. Nor can industrial action be taken even if a low paid bargaining order is in place. Good faith bargaining rules do not apply even if employers agree to bargain for a multiple-employer agreement, except in the case of single interest employer authorisations (s172(5)(c)) and low paid bargaining (s229(2)).
- 7.7 Pattern, industry or sector wide bargaining is important in many industries, including the health industry, on sound industrial, commercial and public interest grounds.
- 7.8 Prohibiting pattern bargaining ignores consideration of the needs of the health industry. Pattern or industry wide industrial standards are often preferable to enterprise differences because they benefit employers, employees and the community generally. There are benefits in consistent wages and working conditions or in other words pattern outcomes.
- 7.9 Nursing and midwifery is an essential service provided to the Australian community and the quality of nursing care provided affects people from all walks of life. Nurses and midwives, wherever they work, need adequate resources to enable the provision of best quality care.

Nurses and midwives need a secure and stable working environment to provide quality care and this is ensured by the ongoing recognition of the professions of nursing and midwifery. The value of the nurse or midwife is not determined by the setting in which they are employed, but by the consistent application of standards, including industrial standards.

- 7.10 The industrial and professional history of nursing and midwifery is founded on a recognition that the professions work across a range of settings in the health and welfare sectors. Nurses and midwives are a highly mobile workforce where staff shortages remain entrenched and ever growing. The impact of these characteristics on the nursing labour market has in part resulted in federal and state tribunals favouring consistent safety net wage and employment conditions in awards. As professions, nurses and midwives strongly identify with each other regardless of the sector in which they work. This also serves to make them a clearly identifiable group by employers and the public. Common issues across the sectors such as labour shortages, workload management and wages and conditions bond us professionally and assist in maintaining standards of care. Further, common national training and registration requirements facilitate labour mobility and further strengthen the justification to bargain on a multi-employer or industry basis, and take industrial action in support of bargaining.
- 7.11 The ANF considers that the level of bargaining should be decided by the workers involved and not dictated by the legislation. The current legislation is arguably in breach of ILO Conventions and therefore one of the objects of the Fair Work Act. Section 3(a) says it is an object of the Act to provide a balanced framework of workplace relations which “take into account Australia’s international obligations”. Indeed, the wording is instructive in the use of the words “take into account” rather than the less equivocal “comply with..”.
- 7.12 We note the report and recommendations of the International Labour Organisation’s Freedom of Association Committee (357th Report of the Committee on Freedom of Association, Geneva, June 2010) which recommended at paragraph 229:
- (d) Taking into account its conclusions on such matters reached in previous cases concerning Australia, the Committee requests the Government to review sections 409(1)(b), 409(4) and 413(2) of the FWC, in full consultation with the social partners concerned.*
- 7.13 At the International Labor Conference 99th Session in 2010 the Report of the Committee of Experts on the Application of Standards and Recommendations commented at page 56 in relation to Australia:

The Act maintains the removal of protection of industrial action in support of multiple enterprise agreements (section 413(2)). The Committee notes that the Government

indicates in its report that, under the Fair Work Act, certain categories of multiple employers with a close connection to each other are able to bargain together as single-interest employers for a single enterprise agreement with their employees. In that instance, protected industrial action is available to employers and employees. The Fair Work Act also allows voluntary multi-employer bargaining. However, employers and employees do not have access to protected industrial actions in these circumstances. In addition, the pre-existing secondary boycott arrangements, regulated by the Trade Practices Act, 1974, remain in place. The Committee requests the Government to review the abovementioned provisions, in the light of its previous comments, in full consultation with the social partners concerned, with a view to bringing them into full conformity with the Convention.

7.14 Further, in its report to the ILC 101st session 2012 The Committee of Experts said [para. 222]

222. Under the terms of Paragraph 4(1) of the Collective Bargaining Recommendation, 1981 (No. 163), “[m]easures adapted to national conditions should be taken, if necessary, so that collective bargaining is possible at any level whatsoever, including that of the establishment, the undertaking, the branch of activity, the industry or the regional or national levels”. On various occasions, the Committee has recalled the need to ensure that collective bargaining is possible at all levels, both at the national level, and at the enterprise level. It must also be possible for federations and confederations.

Accordingly, legislation that unilaterally imposes a level of bargaining or makes it compulsory for bargaining to take place at a specific level raises problems of compatibility with the Convention. In practice, this issue is essentially a matter for the parties, who are in the best position to decide the most appropriate bargaining level including, if they so wish, by adopting a mixed system of framework agreements supplemented by local or enterprise level agreements.

7.15 In this regard we believe the Act should be amended to ensure that multi-employer and industry bargaining is permitted and that the rules in respect to protected industrial action are the same at all levels of bargaining.

Single interest employer authorisations (SIEAs)

7.16 The single interest employer authorisation (SIEA) is the only form of multi-employer bargaining during which protected industrial action is allowable. It is possible that an SIEA would be made in respect to a collection of private employers operating in the same area with a common source of funding (e.g. Commonwealth private residential aged care providers or general practices).

However given the criteria in s. 247(4) it would usually be in respect to the public sector that an application for a SIEA would be made.

- 7.17 The problem is that rather than the workers concerned determining who is included in the multi-employer group, only the employers (and controlling third parties, e.g. state government) can make an application to the Minister for a declaration pursuant to s. 247 of the Act, and to FWC for the authorisation itself.
- 7.18 This effectively means the employer is determining the level at which workers bargain. In addition, employees and unions/bargaining representatives have no say on the scope of bargaining. This was demonstrated in the 2011/12 Victorian nurses bargaining round, where the government excluded some 40 community health centres from the SIEA group bargaining for the new public sector agreement, despite them being covered by the recently expired agreements and despite ANF requests for them to be included.
- 7.19 It is the ANF view that either party (a group of employers or the relevant union/s or bargaining representatives) should be able to bring an application before FWC or should be able to make submissions on the criteria that the Minister and FWC have to consider. The interests and views of employees and their bargaining representatives should also be added to the criteria which the Minister and FWC must take into account in s. 247(4) and s. 249. We see little merit in the current two step process whereby the Minister must first issue a certificate. This first step should be abolished with FWC receiving and deciding applications.

Good faith bargaining

- 7.20 The good faith bargaining provisions in the Fair Work Act have had a positive impact on bargaining. To some extent they have been a useful tool that unions have used in discussions with employers and, if necessary, via letters setting out concerns. Highlighting the provisions can be enough to prompt employers to, for example, respond to a log of claims or schedule a meeting. The rules provide some minimal statement as to what is *fair* bargaining.
- 7.21 Having said that, the provisions are limited, especially if a claim is made. Decisions made by Fair Work Australia have tended to be conservative and process-oriented, although this is partly due to the limited nature of the provisions themselves. We have concerns that the provisions do not adequately address the issue of 'surface bargaining'. Employers have to do the bare minimum to show that they are responding to proposals, attending meetings, etc, but there is still too much scope for employers to just go through the motions.
- 7.22 FWC decisions in relation to public sector nurses in Victoria demonstrate these limitations. Delays in negotiations or unwillingness to negotiate meaningfully were very evident in this

dispute. Despite this, FWC rejected an application for a bargaining order against the employer representative (*ANF v VHIA* ([2012] FWC 285 PR518962, 10 January 2012). In this case the ANF Victorian Branch gave the employers a comprehensive list of questions in August 2011. As of December 2011 there had been partial response to the request for information which in most cases was readily available to each employer through their payroll system.

- 7.23 This and other decisions illustrates the lack of pressure on employers through the legislation and the unwillingness of the tribunal to regard anything except virtually complete inaction as breaching the good faith bargaining principles. This means there is less incentive for employers to actually *reach an agreement* with bargaining representatives, thereby undermining collective bargaining and the concept of bargaining representatives [and the objects of the Act, in particular section s3(e) and (f)].
- 7.24 Accordingly, the ANF considers that the good faith bargaining provisions need to be strengthened and there needs to be more emphasis on the bargaining representatives reaching agreement to rectify the problem of employers engaging in surface bargaining. In this respect we believe the New Zealand legislation at s. 33 of the *Employment Relations Act 2000* should be considered. That section reads:

Duty of good faith requires parties to conclude collective agreement unless genuine reason not to

- (1) The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to.
- (2) For the purposes of subsection (1), **genuine reason** does not include:
- (a) opposition or objection in principle to bargaining for, or being a party to, a collective agreement; or
- (b) disagreement about including in a collective agreement a bargaining fee clause under Part 6B.

- 7.25 Strengthening good faith bargaining rules to *require* an agreement to be reached (unless exceptional reasons otherwise) would be one way to ensure that bargaining is genuine.
- 7.26 A related issue is that bargaining representatives should be able make good faith bargaining applications at least 120 days before the nominal expiry date of an existing agreement (s 229(a)(i)). The ANF's experience is that where an employer wants to engage in surface

bargaining, the 90 days provided by the Act is insufficient. In major agreements negotiations commence, or should commence, considerably more than 90 days before the nominal expiry of the agreement.

7.27 We note the ANF (Victorian Branch) submissions in relation to triangular bargaining and the submissions of the CPSU, especially as they relate to Victoria. We agree that a common problem for public sector workers in bargaining is that the 'person' who ultimately makes the decision as to whether an enterprise agreement outcome will be funded is not actually at the table as the 'employer' or 'bargaining representative', especially where the bargaining involves government statutory bodies or funded agencies. This is a source of frustration for the ANF.

7.28 This frustration is not simply caused by delay in the bargaining process. It extends to release of information essential to good faith bargaining and the funder or controlling party acting or making statements contrary to the employer/s and/or their bargaining representative.

7.29 The ANF Victorian Branch submission traverses the decision of *Kellogg Brown and Root Pty Ltd & Ors*, [PR951725](#) 7 September 2004 and the Full bench decision in [PR955357](#) dated 31 January 2005. This was a decision before the Fair Work Act and the introduction of good faith bargaining requirements. The Full Bench on appeal overturned the decision at first instance that held that the role played by Esso (as outside third party insisting on a particular roster pattern) was antithetical to the achievement of genuine bargaining between contractors and unions within their refinery facilities. The Full bench said at para. 30:

we are unable to attribute to Esso's involvement in the negotiations the characterization which the Commissioner gave to it. Furthermore we do not regard Esso's role in this case as unusual. Other examples can be found in contemporary industrial relations of head contractors and indeed Governments reserving a right to influence or even to control the outcome of negotiations between their contractors or agencies and the employees of the contractors or agencies. Nothing in Part VIB prohibits conduct of this type, provided there is no coercion." [emphasis added]

7.30 The existence of influential (if not determinative) third parties to the bargaining process is a matter of fact. However, given that there are now good faith bargaining requirements it is important that the good faith bargaining requirements be amended to recognize triangular bargaining and:

- require State Governments who are third party strangers who exert influence over a captive bargaining representative to adhere to good faith bargaining obligations; and

- clarify and fortify the obligations of government entities, who are third party strangers, to provide information relevant to the bargaining process and to adhere to other good faith requirements in s. 228(1) such as responding in a timely manner to proposals from employee bargaining representatives

Suspension/termination of industrial action

- 7.31 The ANF is concerned that the effect of the Fair Work Act's provisions dealing with the termination and suspension of industrial action mean that the ability of the ANF and its members to take protected industrial action for the purposes of enterprise bargaining is severely constrained. The provisions leave nursing employees with effectively little right to take protected industrial action and in fact make unprotected industrial action more likely.
- 7.32 Particularly relevant to the ANF is the ability of FWC to suspend or terminate protected industrial action on the grounds that it is threatening to endanger the life, personal safety or health or the welfare of the population or a part of it (section 424(1)(c)).
- 7.33 The ANF notes that in relation to the internationally-recognised right to take industrial action, the International Labour Organisation's Freedom of Association Committee (357th Report of the Committee on Freedom of Association, Geneva, June 2010) stated:

224. These indications notwithstanding, as regards the right to strike, the Committee must recall that the occupational and economic interests which workers defend through the exercise of the right to strike do not only concern better working conditions or collective claims of an occupational nature, but also the seeking of solutions to economic and social policy questions and problems facing the undertaking which are of direct concern to the workers. Furthermore, the right to strike may only be restricted or prohibited: (1) in the public service only for public servants exercising authority in the name of the State; or (2) in essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population) (see Digest, op. cit., paras 526 and 576). In the light of the above-noted principles, the Committee requests the Government to provide detailed information on the application of these provisions and to review them, in consultation with the social partners, with a view to their revision, where appropriate.

- 7.34 Further, in the digest of cases presented at the ILC 81st Session (1995), in the General Survey of the Reports on the Freedom of Association and the Right to Organize Convention (No. 87), 1948 and the Right to Organize and Collective Bargaining Convention (No. 98), 1949 the Committee of experts said;

159. The principle whereby the right to strike may be limited or even prohibited in essential services would lose all meaning if national legislation defined these services in too broad a manner. As an exception to the general principle of the right to strike, the essential services in which this principle may be entirely or partly waived should be defined restrictively: the Committee therefore considers that essential services are only those the interruption of which would endanger the life, personal safety or health of the whole or part of the population.

- 7.35 The response from the Australian Government in 2011 was commented upon by the Committee of Experts in its Country Observation in respect to convention 87 in late 2011 (ratified at the 101st ILC session 21012).

threatens to endanger the life, personal safety or health, or welfare, of the population or part of it or cause significant damage to the Australian economy or an important part of it under section 424 of the Fair Work Act, the Committee notes the Government's indication that applications have been received by FWC under this section and that, like under section 423, **FWC has set a high threshold for ending industrial action on these grounds [our emphasis]**. The Committee however notes comments made by ACTU with regard to a decision of FWC, upheld in appeal, to suspend protected action for two weeks in the context of industrial action in the education sector, on the basis that a union ban on recording and transmitting exam results threatened the welfare of graduating students by prejudicing their ability to secure future employment. ACTU indicates that this decision was taken despite the union having taken steps to set up an exemptions committee to ensure that any student with a genuine need to obtain results could do so. The ACTU considers that a broad interpretation of section 424 unduly restricts the rights of workers to take industrial action. The Committee further notes that the Government indicates that FWC considered cases concerning actions causing damage to the Australian economy and started applying the decision of the High Court of Australia which ruled that there must be a rigorous basis for deciding that protected industrial action is causing significant damage to the Australian economy over and above "generalized predictions" as to the likely consequence of the industrial action in question. The Committee takes due note of the detailed information provided by the Government concerning the limitations on the use of the abovementioned provisions. It also notes the

Government's indications that it has not amended the abovementioned provisions as it considers that, overall, the industrial action provisions of the Fair Work Act strike the right balance between an employee's right to strike and the need to protect life and economic stability in a manner that is appropriate to Australia's national conditions and that FWC has set a high threshold for allowing for suspension or termination of protected industrial action in specific circumstances under sections 423, 424, 426 of the Fair Work Act.

7.36 We question the advice of the Commonwealth to the ILO that FWC has set a *high threshold* in respect to s424. It does not tally with the cases that have come before Fair Work Commission, for example the Victorian Nurses dispute in 2011 (see *VHIA v ANF* [2011] FWCFB8165).

7.37 In that matter the Full Bench said:

[48] Subsection 424(1) requires that FWC must make an order suspending or terminating the protected industrial action that is being engaged in, or is threatened, impending or probable if we are satisfied that it has threatened, is threatening or would threaten to endanger the personal safety or health, or the welfare, of part of the population.

[49] It is clear that there must be an appropriate evidential basis to found such a satisfaction. As the High Court said in *Coal and Allied Operations Pty Ltd v AIRC* [1](#) in considering somewhat similar provisions in the *Workplace Relations Act 1996*:

"...the nature of the threat as to which a decision-maker must be satisfied under s 170MW(3) of the Act involves a measure of subjectivity or value judgment... [A] decision under s 170MW(3)(b) that industrial action is 'threatening... to cause *significant* damage to the Australian economy or an *important* part of it'... is not simply a matter of impression or value judgment... the decision-maker must have some basis for his or her satisfaction over and above generalised predictions as to the likely consequences of the industrial action in question".

7.38 In this case the Full Bench decided that there was sufficient evidence to warrant a three month suspension of the protected industrial action even though the evidence of the union was that [para.34:

- there is a proviso in the notice of protected industrial action that the ban or refusal would not threaten to endanger anyone's personal safety, or their life, health or welfare;
- a well established bed management committee arrangement is available;

- there are a range of exemptions focused on classes of patients; and
- there is a reporting and referral process to the ANF in respect of any unintended consequences that might endanger safety, health or welfare.

7.39 In fact the actual evidence of delay or cancellations related to a few individuals. There was evidence from four hospital managers of delays and inconvenience. Unfortunately, the more rigorous requirements of several cases in respect to s. 424(1)(d) – the significant economic damage limb – have not been applied to the safety, health and welfare limb of s. 424. (See for example Bacon C in *BHP Coal Pty Ltd, Hay Point Services Pty Ltd v CFMEU, CEPU and AMWU* PR903492 where industrial action in respect coal loading in the export coal industry was not regarded as sufficient) and Qantas grounding case at *Application by Minister for Tertiary Education, Skills, Jobs and Workplace Relations* [2011] FWCFB 7444 — FB of FWC (Giudice J, Watson SDP, Roe C) 31/10/11 and) which was considered sufficient.

7.40 From the ANF perspective we note several matters. First, given that nurses' work inherently relates to the health or safety of the population, any industrial action taken by the ANF and raises difficult issues in respect to industrial action. The ANF takes particular care not to exacerbate the impact of industrial action on patients, especially priority or emergency cases. However, even if some restriction on the right to take industrial action can be justified on the basis of endangering the life, personal safety or welfare etc, we note that the evidentiary base used by FWC in deciding these matters is often limited.

7.41 In both 2007 and 2011, the Tribunal's suspension or termination of industrial action taken by nurses and midwives in the Victorian public sector shows the difficulties of nurses and midwives exercising their legitimate right to pressure employers and governments through industrial action.

7.42 There are other examples where the tribunal has terminated protected action in circumstances where the industrial action involved had an even more tenuous link to patient/resident care than, for example, the closure of hospital beds. For example, bans on activity related to aged care paperwork was found by the AIRC to be a threat to endanger the life, personal safety, health or welfare of aged care residents (*Lutheran Homes Inc. Retirement Services v ANF*, AIRC, 31 July 2003, PR935607 – note this related to then section 170MW(3)(a) of the Workplace Relations Act, but the wording is substantially the same as the existing wording).

7.43 The ANF suggests that, in these circumstances, there ought to be stronger criteria within the legislation against which to judge the impact of the industrial action. These would include:

- That the impact, delays or cancellations to services which are alleged to endanger the safety, health or welfare of the population are proved to be a net result of the industrial

action taken and not a result of either government decisions taken independently of the industrial action or accidental factors which would probably have occurred irrespective of the industrial action; and

- That the endangering of safety, health or welfare is demonstrated by multiple examples across the system or a significant part of it and leads the tribunal to a conclusion that the danger is not isolated, but is systematic and a direct result of the industrial action. Further, FWC should be persuaded that there are no mechanisms in place to address such circumstances.

7.44 Secondly, we also note that the legislation uses the words “threatened, is threatening or would threaten” rather than the words “clear and imminent threat” We believe that the set of words used in the legislation are broader and at odds with the tighter requirement for interference in industrial action which are contained in supervisory body commentary on the ILO Conventions. The alternate words suggested were the formulation in a case involving Norway before the ILO Committee on Freedom of Association which said that termination of industrial action should only occur “where there exists a clear and imminent threat to the life, personal safety or health of the whole or part of the population.” (*Complaint against the Government of Norway presented by the Norwegian Trade Union Federation of Oil Workers (OFS)*, Case 1576, 1991, Report 279, [114]).

7.45 Attention is also drawn to the fact that the word ‘welfare’ in relation to industrial action does not appear in the ILO jurisprudence on this issue and its inclusion also broadens the scope of interference in the right of workers to engage in industrial action.

7.46 We further note that the Explanatory memorandum to the Fair Work Bill said in respect to s.424(1)(c):

It is not intended that these mechanisms be capable of being triggered where the industrial action is merely causing an inconvenience. Nor is it intended that these mechanisms be used generally to prevent legitimate protected industrial action in the course of bargaining.

7.47 One other option that is not included in the FW Act is the use of ‘minimum service orders’. These orders would specify the minimum level of service to be provided and, by ensuring the maintenance of critical services at an acceptable level, would allow industrial action to continue in non-critical areas. The Freedom of Association Committee of the ILO Governing Body in its 2005 (revised) *Digest of decisions and principles* discusses this option at paragraphs 606 to 614:

606. The establishment of minimum services in the case of strike action should only be possible in: (1) services the interruption of which would endanger the life, personal safety

or health of the whole or part of the population (essential services in the strict sense of the term); (2) services which are not essential in the strict sense of the term but where the extent and duration of a strike might be such as to result in an acute national crisis endangering the normal living conditions of the population; and (3) in public services of fundamental importance.

and

612. The determination of minimum services and the minimum number of workers providing them should involve not only the public authorities, but also the relevant employers' and workers' organizations. This not only allows a careful exchange of viewpoints on what in a given situation can be considered to be the minimum services that are strictly necessary, but also contributes to guaranteeing that the scope of the minimum service does not result in the strike becoming ineffective in practice because of its limited impact, and to dissipating possible impressions in the trade union organizations that a strike has come to nothing because of over-generous and unilaterally fixed minimum services.

- 7.48 A capacity for Fair Work Australia to sit down with employer and union parties to discuss minimum services in areas where it is likely, or there is a history, applications to terminate on s.424 grounds and to make an order defining minimum services would be a positive step, provided such orders were of limited scope as per the ILO commentary above. This would provide a more nuanced option than the blunt suspension or termination of all protected industrial action. It is in effect what Branches of the ANF already try to do by determining criteria that ensure urgent and emergency cases are dealt with or by excluding whole areas from industrial action such as children, midwifery and oncology from industrial action.

Compensatory Mechanisms

- 7.49 Secondly, we note that where there is a prohibition or limitation on workers in essential services taking industrial action there are meant to be 'compensatory mechanisms' provided to ensure that those workers have access to full, independent and transparent arbitration. The ILO Committee of Experts (ILC 81st Session (1995), General Survey of the Reports on the Freedom of Association and the Right to Organize Convention (No. 87), 1948 and the Right to Organize and Collective Bargaining Convention (No. 98), 1949) has noted:

If the right to strike is subject to restrictions or a prohibition, workers who are thus deprived of an essential means of defending their socio-economic and occupational interests should be afforded compensatory guarantees, for example conciliation and

mediation procedures leading, in the event of a deadlock, to arbitration machinery seen to be reliable by the parties concerned. It is essential that the latter be able to participate in determining and implementing the procedure, which should furthermore provide sufficient guarantees of impartiality and rapidity; arbitration awards should be binding on both parties and once issued should be implemented rapidly and completely. [emphasis added].

- 7.50 Interestingly, the General Survey does not call on the arbitral body to provide “incentives to bargain at a later time” as does s. 275(h) of the FW Act which sets out the criteria to be considered by the Fair Work Commission in making a determination. The ILO principle is that as the rights of workers to bargain and take industrial action are being reduced then adequate and efficient arbitration machinery must be provided which is seen as reliable by the parties. To the ANF the word ‘reliable’ implies that it is fair and reasonable in all of the circumstances. However, under the FW Act there is no doubt that while the merits of the case are taken into account, the outcome must not be so generous as to remove the incentive to bargain at a later time. Of course, this becomes circular in that many public sector workers in key areas of service provision will never get to bargain properly (including taking effective industrial action) before their action is suspended/terminated and arbitration takes effect. So the tribunal ‘holding back’ actually provides no incentive for bargaining next time around. We recommend that this requirement in sub-clause (h) be deleted.
- 7.51 We further agree with the ANF (Victorian Branch) submission that the criteria that the FWC must assess under s. 275 when conducting a workplace determination are weighted in favour of the employer and should be re-assessed. The criteria should provide a better balance between the merits of the case, a fair and reasonable outcome for the workers concerned and issues such as productivity.

Re AEU

- 7.52 Adding another layer of complexity and reducing the reliability of any current ‘compensatory mechanism’ is the issue of the scope of matters that may be arbitrated by the FW Commission, where it is possible to argue that *Re AEU: ex parte Victoria* (1995)184 CLR 188 (HCA 1995) applies. That case decided that there are constitutional limitations on a Commonwealth body imposing certain terms and conditions on a State Government through an arbitrated decision in respect to state employees, where those conditions threaten to impair “a State’s ‘integrity’ or ‘autonomy.’” The High Court said at paragraph 58 of their decision:

It seems to us that critical to that capacity of a State is the government's right to determine the number and 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 with or without notice from its employment on redundancy grounds. An impairment of a State's rights in these respects would, in our view, constitute an infringement of the implied limitation.

- 7.53 The ANF can currently have no confidence in arbitration as the compensatory mechanism, should compulsory arbitration result from the termination of industrial action pursuant to s.266 of the Fair Work Act. Many issues which are at the heart of industrial and professional life for nurses in all jurisdictions – nurse to patient ratios or nursing hours per patient day, use of unregulated workers as part of ratios etc. – are arguably caught within the limitation identified by the High Court in *Re AEU*.
- 7.54 In Victoria where industrial powers have been referred to the Commonwealth these exclusions are reflected in the referral instrument. (the Fair Work (Commonwealth Powers) Act 2009 which repealed the 1996 referral legislation and put in place an amended referral).
- 7.55 As pointed out in submission 1 (Submission of the ANF Victorian Branch) there is some debate about the actual scope of the limitation on a Commonwealth instrument prescribing the number or identity of state employees. However, the mere availability of the jurisdictional argument and the ability of the State to take this argument to higher courts has an immediate impact on the course of bargaining.
- 7.56 The recent Full Bench decision in *Parks Victoria v The Australian Workers' Union and others* [2013] FWCFB 950, has confirmed that any proposed clause, whether agreed or not, which seeks to restrict the use of certain modes of employment or specify that only an employee with certain qualifications is employed, or in this case even that persons will only be employed on merit, is likely to be regarded as dealing with excluded matters. Further the Full Bench said:
- We conclude this part of our decision by observing that the impugned clauses have been a feature of the industrial instruments which have applied to Parks Victoria, for many years. No previous challenge has been made to those provisions. The impugned clauses are also substantially similar to clauses recently agreed by the Victorian government in the context of the VPS determination. While the inconsistent approach taken by the Victorian government to these matters is regrettable it is not relevant to the task of determining whether the Commission has jurisdiction to include the impugned clauses in the workplace determination.
- 7.57 It is clear that an employer who did not want issues of staffing or workload addressed in an enterprise agreement could engineer a situation where *Re AEU* is raised, the industrial action is

terminated and there would be a relatively minimalist arbitration which would not deal with key industrial issues – issues that may already be contained in an expired enterprise agreement.

7.58 We agree with the proposal of the ANF (Victorian Branch) that in circumstances where:

- *Re AEU* is relied upon by a state negotiating party (or an agency of the State) as an impediment to bargaining and agreement making;
- *Re AEU* is also relied upon to avoid arbitration of issues and claims in dispute which would otherwise be capable of a inclusion in a determination; and
- the dispute is intractable in the sense that, for example, protected industrial action has been suspended or terminated and no further protected industrial action is able to be undertaken;

then the legislation should provide for an existing agreement to be continued insofar as that agreement deals with matters or claims subject to objection on *Re AEU* grounds.

7.59 Furthermore, given these constitutional restrictions and the need for adequate compensatory mechanisms where the right to take industrial action is restricted, the ANF recommends that industrial action should not be able to be terminated under section 424 unless the bargaining representatives have agreed that all issues in dispute between them are able to be dealt with by way of arbitration.

7.60 We note further that the International Labour Organisation Nursing Personnel Convention 1977 (ILO Convention 149) provides as follows:

Article 5

1. Measures shall be taken to promote the participation of nursing personnel in the planning of nursing services and consultation with such personnel on decisions concerning them, in a manner appropriate to national conditions.
2. The determination of conditions of employment and work shall preferably be made by negotiation between employers' and workers' organisations concerned.
3. The settlement of disputes arising in connection with the determination of terms and conditions of employment shall be sought through negotiations between the parties or, in such a manner as to ensure the confidence of the parties involved,

through independent and impartial machinery such as mediation, conciliation and voluntary arbitration.

The key point to note is in respect to the ILO expectation that nurses and their union will participate in decisions about the planning of nursing services (including staffing, skill mix and workload presumably) and negotiate conditions of employment (by which the ILO means the full range of conditions including security of employment). The ANF urges the Committee to recommend to the Australian Government that they ratify the Nursing Personnel Convention 1977 to make this clear. Additionally, the machinery to settle disputes must ensure “the confidence of the parties”.

- 7.61 In the current circumstances the ANF has no confidence that any formal arbitration under the Fair Work Act will have the jurisdiction to deal with all relevant matters in dispute, especially in light of the *Parks Victoria* decision.

Unprotected Industrial Action and the issue of s.413(5) – compliance with orders

- 7.62 We note the submission of the ANF (Victorian branch) in relation to interim orders in relation to unprotected industrial action and the effect of s.413(5) which provides that for action to be protected an employee or bargaining representative cannot have breached any order in respect to the industrial action during bargaining for an agreement.
- 7.63 The former point relates to the tactical use by employers of allegations of unprotected industrial action. Where an application cannot be dealt with within the specified time, then under s. 420(2) FWC must make an interim order stopping the industrial action to which the application applies (whether ultimately found to be protected action or not). It is an easy way for public sector employers to stop all industrial action and the requirements to obtain an interim order should be stronger, requiring the employer to demonstrate public interest grounds.
- 7.64 The second point relates to the situation where there is inadvertent contravention of an order (such as suspension of protected industrial action). This contravention means that when the suspension period ends, theoretically the resumed industrial action can never be protected. ANF supports the proposal to repeal this sub-section.
- 7.65 We believe both issues need to be addressed as suggested by the ANF (Victorian Branch) submission.

Protected action ballots

- 7.66 Contrary to employer claims that the Fair Work Act has made industrial action easier, the Fair Work Act made minimal changes to the Workplace Relations Act, and little that actually made taking action easier. Unnecessarily bureaucratic procedures, including compulsory secret ballots and an extremely high quorum for voting, remain in place.
- 7.67 ANF officers are usually bargaining in many places at once so to take the actions required to first organise and obtain a protected action ballot order, ensure that members vote so the 50% + 1 quorum requirement is met, and then take the actual industrial action is resource-intensive and time-consuming. Industrial action is not taken lightly.
- 7.68 The unnecessary difficulty of the 50% quorum requirement in paragraph 459(1)(b) is demonstrated by ballots held by The Australian Electoral Commission on behalf of the ANF's Victorian Branch in 2011, in relation to the public sector bargaining.
- 7.69 As part of the bargaining process and in order to take protected industrial action the ANF sought a protected action ballot order from FWC. There were a number of ballots, the largest being of approximately 30,000 nurses employed by the 86 employers (the large hospital networks and regional/rural hospitals) who had obtained a single interest employer authorisation from FWC. This has been one of the largest ballots ever undertaken in Australia.
- 7.70 The hurdle of 50% +1 participation in the ballot was excessively high and burdensome. In the Victorian case it involved ringing over 20,000 members over a one week period. This absorbed enormous resources for a vote which resulted in an overwhelming support for industrial action to be taken (a result which was not in doubt based on pre-ballot meetings and feedback from members).
- 7.71 The Act's provision in this respect is inconsistent with the right to exercise industrial action under the International Labor Conventions. We note the discussion by the International Labour Organisation's Freedom of Association Committee (357th Report of the Committee on Freedom of Association, Geneva, June 2010) in relation to Australia's FW Act provisions for PIA ballots:

225. As regards the complainant's allegation that the provisions in Part 3-3, Division 8, of the Fair Work Act governing the secret ballot procedures for the calling of a strike are unduly burdensome and complicated, the Committee notes that according to the Government, the said procedures are designed to be fair, have been simplified compared to the previous workplace relations laws, and are not intended to frustrate or delay the taking of industrial action. In respect of this matter, the Committee recalls that the

conditions that have to be fulfilled under the law in order to render a strike lawful should be reasonable and, in any event, not such as to place a substantial limitation on the means of action open to trade union organizations. Furthermore, the requirement of a decision by over half of all the workers involved in order to declare a strike is excessive and could excessively hinder the possibility of carrying out a strike, particularly in large enterprises (see Digest, op. cit., paras 547 and 556). The Committee requests the Government to ensure respect for these principles in practice, as well as to provide detailed information on the practical application of the secret ballot procedure provisions.

7.72 The ILC 81st Session (1995), General Survey by the Committee of Experts said:

170. If a member State deems it appropriate to establish in its legislation provisions which require a vote by workers before a strike can be held, it should ensure that account is taken only of the votes cast, and that the required quorum and majority are fixed at a reasonable level.

7.73 Therefore paragraph 459(1)(b) of the FW Act in particular is inconsistent with Australia's international obligations (section 3(a)) and the requirement should be changed to a simple majority of those who vote.

State Legislation

7.74 Apart from those issues raised earlier in this submission (particularly in respect to NSW and Queensland) we have not been advised by ANF branches of any particular difficulties for bargaining that have been created by their respective state industrial laws.

8. Uniform protection

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

8.1 Please refer to our comments above.

9. Referrals of power and options for Commonwealth

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

- 9.1 Our only comment in relation to this term of reference is that the referral in respect to public sector workers in Victoria should be amended to ensure that issues related to the number of identity of employees are referred. This would mean that matters like modes of employment (including use of casual and fixed term contractors), skill mix, staffing levels and workloads can be dealt with by the Fair Work Commission.
- 9.2 We do not believe that referral of these matters as they relate to nurses would impinge on a state's 'integrity' or ability to function. These matters have been agreed in the past and in the event that there was a workplace determination conducted by FWC then these matters would be decided on "the merits of the case". In any event, the State of Victoria could withdraw the referral at any time.