

**THE VALIDITY OF THE INDUSTRIAL RELATIONS AMENDMENT  
(PUBLIC SECTOR CONDITIONS EMPLOYMENT) BILL 2011**

**MEMORANDUM OF OPINION**

**1. INTRODUCTION**

1.1 We are instructed by the Police Association of New South Wales (*the Association*) to provide advice in relation the *Industrial Relations Amendment (Public Sector Conditions of Employment) Bill 2011 (the Proposed Amending Act)*, which proposes to amend the *Industrial Relations Act 1996 (NSW) (the IR Act)*.

1.2 The purpose of the Proposed Amending Act is to amend the IR Act to:

*“...require the Industrial Relations Commission to give effect to certain government policies on public sector conditions of employment...”*

1.3 The Proposed Amending Act seeks to achieve its purpose by seeking to insert a new section 146C into the IR Act. The primary sub-provisions of s.146C would, if enacted, stipulate that:

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

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

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

- (2) *Any such regulation may declare a policy by setting out the policy in the regulation or by adopting a policy set out in a relevant document referred to in the regulation.*
- (3) *An award or order of the Commission does not have effect to the extent that it is inconsistent with the obligation of the Commission under this section.*
- ...
- (5) *This section does not apply to the Commission in Court Session.*
- (6) *This section extends to proceedings that are pending in the Commission on the commencement of this section. A regulation made under this section extends to proceedings that are pending in the Commission on the commencement of the regulation, unless the regulation otherwise provides.*
- (7) *This section has effect despite section 10 or 146 or any other provision of this or any other Act."*

1.4 For the purpose of these provisions, a "*public sector employee*" is defined to mean a person employed in any capacity in the Government Service, the Teaching Service, the NSW Police Force, the NSW Health Service, the service of Parliament or any other service of the Crown.

1.5 We are instructed to provide an opinion as to the following questions:

- (a) the constitutional validity of the Proposed Amending Act (*the Constitutional Question*);
- (b) the legislative validity of the Proposed Amending Act (*the First Validity Question*);

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- (c) the appropriateness and/or validity of the use of regulation making powers to alter the scheme of the IR Act (*the Second Validity Question*).

1.6 We have been asked to provide this opinion on an urgent basis and, therefore, have confined our analysis to the main questions which arise. In due course, we will be in a position, if instructed, to provide a more fulsome analysis of each of the issues considered in this Opinion together with other issues which we have not had the time to consider.

## 2. EXECUTIVE SUMMARY

2.1 In summary, it is our opinion that:

- (a) it is arguable that Proposed Amending Act would impair the institutional integrity of the Industrial Relations Commission (*the Commission*) so as to make it a body (when in Court Session) whose exercise of judicial power is incompatible with Chapter III of the Australian Constitution;
- (b) the Proposed Amending Act, if enacted, is likely to be considered a valid exercise of the power conferred upon Parliament by the *Constitution Act 1902 (NSW)*;
- (c) if the Proposed Amending Act was enacted, any awards made by the Commission pursuant to the mandatory provision in s.146C(1) (to give effect to Government policy as promulgated in a Regulation) are susceptible to be set aside and quashed upon application for prerogative relief upon the basis that they will have been made in denial of procedural fairness;
- (d) if any Regulation is promulgated pursuant to the IR Act (as amended by the Proposed Amending Act) which seeks to require the Commission to enforce a Government policy on the setting of public sector terms and conditions of employment (including as to the removal of existing benefits), then the Regulation may itself

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be susceptible to judicial review and declared invalid on the grounds that it:

- (i) is inconsistent with the objects of the IR Act;
- (ii) denies procedural fairness to employees.

### 3. THE CONSTITUTIONAL QUESTION

3.1 The IR Act creates a distinction between the Commission in Court Session and the Commission not in court session: see Chapter 4 of the IR Act (including Parts 1 and 2). The Commission exercises jurisdiction that may be best described as arbitral and/or quasi legislative: see *Powercoal Pty Ltd v Industrial Relations Commission of New South Wales* (2005) 64 NSWLR 406 at [38]-[40]. By contrast, the Commission in Court Session is described in s.152 of the IR Act as a “superior court of record”. The Judges appointed to the Commission have status equivalent to judges of the Supreme Court of New South Wales: see Schedule 2 of the IR Act and Part 9 of the *Constitution Act 1902* (NSW).

3.2 The Proposed Amending Act would oblige the Commission to a directed result. Although the directed result relates to a matter concerned with the Commission’s exercise of arbitral functions, it removes any adjudicative process on the Commission’s part. It renders the Commission as, in effect, an *alter ego* of the Executive.

3.3 If such powers were conferred upon a Court, there is no doubt that they would be considered repugnant to the judicial process: *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at [50]. However, the Constitutional Law Question must be considered in light of the fact that the doctrine of separation of powers does not apply in New South Wales so as to deny Parliament power to pass, in the form of a statute, a legislative judgment: *Clyne v East* (1967) 68 SR (NSW) 385; 86 WN (Pt 2) 102; and *Building & Construction Employees & Builders Liability* is limited by a scheme approved under Professional Standards Legislation.

*Labourers' Federation (NSW) v Minister for Industrial Relations (the BLF case)* (1986) 7 NSWLR 372.

3.4 In turn, the absence of any separation of powers in New South Wales must be considered in light of the High Court's decision in *Kable v Director of Public Prosecutions (NSW) (Kable)* (1996) 189 CLR 51, which provides some grounds upon which to contend that Chapter III of the Australian Constitution prevents the State legislature from granting to a State court judicial powers to be exercised in circumstances where the principal powers reposed on the judges thereof are incompatible with the exercise of judicial power.

3.5 The concept of "incompatibility" in light of the emerging Chapter III jurisprudence was considered in *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575. In that case, Kirby J at [50] held:

*"Ch III of the Constitution forbids attempts by State parliaments to impose on courts functions that would oblige them to act in relation to a person "in a manner which is inconsistent with traditional judicial process". It prevents attempts to impose on such courts "proceedings [not] otherwise known to the law", that is, those not partaking "of the nature of legal proceedings". It proscribes parliamentary endeavours to "compromise the institutional impartiality" of a State Supreme Court. It forbids the conferral upon State courts of functions "repugnant to the judicial process". (Internal references omitted)*

3.6 This passage was cited with approval by Gummow, Hayne, Heydon and Kiefel JJ in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532.

3.7 The judicial power vested in Chapter III courts (including, by dint of s 77(iii) of the Constitution, any court of a State), is informed by the common law, history and traditions (*Reg. v. Davison* (1954) 90 CLR 353; *R v Quinn*; *Ex parte Consolidated Foods* (1977) 138 CLR 1; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 66-7; *Kable v Director of Public*

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*Prosecutions (NSW)* (1996) 189 CLR 51 at 107; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 109) including traditions relating to judicial procedures, remedies and methodology (*Polyukovich v The Queen* (1991) 172 CLR 501 at 606-7).

- 3.8 The powers conferred by the Proposed Amending Act are not to be reposed in a strictly judicial body, but upon a body which has both arbitral and judicial roles. In *Powercoal Pty Ltd v Industrial Relations Commission of New South Wales* (2005) 64 NSWLR 406, Spigelman CJ (with whom Mason P and Handley JA agreed) found that the Commission's exercise of arbitral and quasi-legislative powers was not incompatible with its exercise of criminal jurisdiction (under applicable occupational health and safety legislation). In arriving at this conclusion, the Chief Justice cited and relied at [43] upon McHugh J's judgment in *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575 at [41]-[43] as follows:

*“The bare fact that particular State legislation invests a State court with powers that are or jurisdiction that is repugnant to the traditional judicial process will seldom, if ever, compromise the institutional integrity of that court to the extent that it affects that court's capacity to exercise federal jurisdiction impartially and according to federal law. State legislation may alter the burden of proof and the rules of evidence and procedure in civil and criminal courts in ways that are repugnant to the traditional judicial process without compromising the institutional integrity of the courts that must administer that legislation. State legislation may require State courts to exercise powers and take away substantive rights on grounds that judges think are foolish, unwise or even patently unjust. Nevertheless, it does not follow that, because State legislation requires State courts to make orders that could not be countenanced in a society with a Bill of Rights, the institutional integrity of those courts is compromised.”*

3.9 At [45], the Chief Justice also cited and relied upon the judgment of Callinan and Heydon JJ in *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575 at [219] where their Honours stated:

*“It is necessary to keep in mind the issues with which Kable was concerned and the true nature of the decision which the court made there. Despite the differing formulations of the justices in the majority, the primary issue remained whether the process which the legislation required the Supreme Court of New South Wales to undertake, was so far removed from a truly judicial process that the Court, by undertaking it, would be so tainted or polluted that it would no longer be a suitable receptacle for the exercise of federal judicial power under Ch III of the Constitution. This court did not in Kable hold however that in all respects, a Supreme Court of a State was the same, and subject to the same constraints, as a federal court established under Ch III of the Constitution. Federal judicial power is not identical with State judicial power. Although the test, whether, if the State enactment were a federal enactment, it would infringe Ch III of the Constitution, is a useful one, it is not the exclusive test of validity. It is possible that a State legislative conferral of power which, if it were federal legislation, would infringe Ch III of the Constitution, may nonetheless be valid. Not everything by way of decision-making denied to a federal judge is denied to a judge of a State. So long as the State court, in applying legislation, is not called upon to act and decide, effectively as the alter ego of the legislature or the executive, so long as it is to undertake a genuine adjudicative process and so long as its integrity and independence as a court are not compromised, then the legislation in question will not infringe Ch III of the Constitution.”*

3.10 Spigelman CJ concluded that the exercise by the Commission of both arbitral and judicial powers itself was not an incompatibility of the same character as the incompatibility which arose in *Kable: Powercoal* (supra) at [48]. His Honour held that, *“the mere fact that powers are not strictly separated does not impair the institutional integrity of the court. Something*

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*considerably more is required*”: *Powercoal* (supra) at [48].

3.11 In the present case, the requirement that the Commission give effect to government policy does not amount to a “*legislative judgment*” as it does seek to intrude upon a curial determination of rights as between parties: c.f., *Kable*; and *the BLF Case*. Nevertheless, there is there is considerable force in the contention that the judicial independence of members of the Commission will be curtailed by them exercising arbitral or quasi-legislative powers to do nothing more than give effect to Government policy. The incursion into the independence of members of the Commission may be so profound that it fundamentally impairs the “*institutional integrity*” of the Commission.

3.12 By contrast to the legislative scheme considered in *Powercoal* (which did not include any provisions of a like nature to those contained in the Proposed Amending Act), the present scheme (if enacted) would require the Commission to, in effect, act as an extension of the Executive. In our opinion, this is a profound change in the legislative scheme which is likely to lead to a conclusion different to that which was reached in *Powercoal*.

3.13 If the Proposed Amending Act is enacted and the relevant regulations promulgated, it could no longer be contended that the Commission was undertaking a “*genuine adjudicative process*” in relation to the making of awards affecting public sector employees. And in applying the IR Act, it will not be called upon to act and decide the matter independently and will be doing so “*effectively as the alter ego of the legislature or the executive*”: c.f., *Fardon* (supra) per Callinan and Heydon JJ at [219].

3.14 In our opinion, although not free from doubt, there are reasonable grounds upon which to conclude that Proposed Amending Act will impair the institutional integrity of the Commission so as to render its exercise of judicial powers incompatible with Chapter III of the Australian Liability is limited by a scheme approved under Professional Standards Legislation.

Constitution.

#### 4. THE FIRST VALIDITY QUESTION

4.1 The legislative validity of the Proposed Amending Act requires a consideration of the *Constitution Act* 1902 (NSW). The *Constitution Act* was passed by the New South Wales Parliament under the authority of the English Parliament conferred on the local legislature by the *Colonial Laws Validity Act* 1865. Section 5 of the *Constitution Act* provides that Parliament has the power to make laws for the “*peace, welfare, and good government of New South Wales*”. In the *BLF Case*, Street CJ held at 385 that the legislation in question (which directed the deregistration of the BLF) may well have been a regrettable interference with the judicial process, but that alone did not take it beyond the wide limit of the legislative field open to Parliament under the *Constitution Act*. We are of the opinion that the same result would arise here.

4.2 However, a further question arises as to whether, if the Proposed Amending Act is enacted, any award made by the Commission in exercise of the powers under s.146C would itself be valid or liable to be set aside or quashed by writ of certiorari.

4.3 The effect of s.146C on its face would require the Commission to make an award, or determine an application for the making or variation of an award, to simply give effect to a Government policy. In those circumstances, one queries the utility of any hearing of an application by a party which was contrary to or at odds with the Government policy. Any such hearing would be superficial and would achieve no purpose. Sections 11 and 17 of the IR Act deal with the circumstances in which an award can be made and varied. Section 162 empowers the Commission to determine its own procedure. Traditionally, where there has been an application for an award or variation, which is not by consent, the Commission has convened a

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hearing and determined the matter by way of arbitration. In *Federated Gas Employees' Industrial Union v Metropolitan Gas Co Ltd* (1919) 27 CLR 72 at p90, Gavan Duffy J held that:

*"...arbitration means a contest in which a claim, whether moral or legal, is made on one side and resisted on the other, and the settlement of a claim by award means the determination of the question at issue between the parties."*

4.4 Other provisions of the IR Act deal with the conduct of hearings before the Commission. Section 166 of the IR Act deals with how parties may be represented in any proceedings before the Commission and other provisions (such as sections 163 and 164) deal with the presentation of evidence and production of documents. None of these provisions is affected by the Proposed Amending Act.

4.5 In *Kioa v West* (1985) 159 CLR 550, Mason J held at 582–3 that:

*"It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it: ... The reference to 'right or interest' in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests.*

*The reference to 'legitimate expectation' makes it clear that the doctrine applies in circumstances where the order will not result in the deprivation of a legal right or interest. Take, for example, an application for a renewal of a licence where the applicant, though he has no legal right or interest, may nevertheless have a legitimate expectation which will attract the rules of natural justice. In *Salemi**

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*(No 2) (1977) 137 CLR 396 at 404 ; 14 ALR 1 at 7 Barwick CJ expressed the view that the expression "legitimate expectation" adds little, if anything, to the concept of a right. However, later decisions demonstrate that the concept of "legitimate expectation" extends to expectations which go beyond enforceable legal rights provided that they are reasonably based: ... The expectation may be based on some statement or undertaking on the part of the authority that makes the relevant decision. In the view of some members of the court in Salemi (No 2) the "amnesty" constituted an example of such an undertaking. Alternatively, the expectation may arise from the very nature of the application, as it did in the case of the application for a renewal of a licence in FAI (1982) 151 CLR 342 ; 41 ALR 1 or from the existence of a regular practice which the person affected can reasonably expect to continue: Council of Civil Service Unions v Minister for the Civil Service [1985] 1 AC 374 at 401. The expectation may be that a right, interest or privilege will be granted or renewed or that it will not be denied without an opportunity being given to the person affected to put his case."*

- 4.6 Where parliament confers a statutory power to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, parliament is taken to intend that the power be exercised fairly and in accordance with natural justice unless it makes the contrary intention plain: see *Twist v Randwick Municipal Council* (1976) 136 CLR 106, Barwick CJ at 109; and *Annetts v McCann* (1990) 170 CLR 596.
- 4.7 In the present case, the Proposed Amending Act does not seek to alter or impair the Commission's practice and procedure as to the conduct of hearings before the Commission. Nor does the Proposed Amending Act preclude certain persons (including registered industrial organisations) from making an application for an award or for a variation of any award. Therefore, there is nothing expressly stated to suggest that parties to an award, including applications to the making or variation of an award, are to

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be denied rights of procedural fairness.

4.8 However, the Proposed Amending Act seeks to deprive parties to an award any effective right to be heard, present evidence or persuade the Commission to make a new award or vary an existing award where there is a contrary Government policy in relation to those matters. The Commission would be forced to make a decision without giving any “*proper, genuine and realistic consideration to the merits of the case*”: see *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291; and *Minister for Immigration and Citizenship v SZJSS* [2010] HCA 48; (2010) 85 ALJR 306. Should the Commission exercise its powers in this way, without giving any right of hearing to parties to an award, or those making an application for a new award or a variation to an existing award, we are of the opinion that there would be a denial of procedural fairness.

4.9 A further dimension as to the question of natural justice and procedural fairness is the question of bias. For all practical purposes, if the Proposed Amending Act is enacted, the Commission would be forced to determine an application for a new award (such as the one made by the Association) by reference to the Policy promulgated by the Executive, which is in turn through its manifestation as the Crown is the effective employer of the relevant employees. That is, the Commission would be forced to approve nothing more than the Government’s policy, which would most certainly mean that a reasonable or fair-minded lay observer properly informed as to the nature of the proceedings might reasonably apprehend that the Commission had not brought an impartial mind to bear upon the determination of any application made by a party to a new award or a variation: *Re Refugee Review Tribunal; Ex parte H* (2001) 179 ALR 425 at [27]-[34].

4.10 The Court of Appeal of the Supreme Court of New South Wales retains a right to exercise supervisory jurisdiction over the Commission: see s.179 of the IR Act and *Kirk Group Holdings Pty Ltd v WorkCover Authority of New*

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*South Wales (Inspector Childs)* (2010) 239 CLR 531 (*Kirk*). In *Kirk*, the plurality held that a defining characteristic of State Supreme Courts as and from the time of federation was and is their exercise of supervisory jurisdiction as the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial power: at [96]-[98]. The plurality concluded that privative provisions such as s.179 of the IR Act must be read in a manner that takes account of the necessary limits on legislative power brought about by Chapter III of the Australian Constitution: at [101].

- 4.11 Accordingly, in our opinion, subject to the terms of any Regulation that is made, it would be open for parties to the making of an award to seek to quash an award made by the Commission in exercise of the mandatory direction provided for in s.146C. Such an exercise of power by the Commission would have deprived parties their rights to natural justice and procedural fairness, which remain unaffected by the Proposed Amending Act. Ultimately, it will be a question of fact as to what individual matters in each given case would amount to a denial of procedural fairness. We cannot comment on this question at this stage as we have not been provided with the Government policy which is to be the subject of the regulation, but simply note that we would expect that awards made pursuant to s.146C of the IR Act may be susceptible to challenge in the Court of Appeal.

## **5. THE SECOND VALIDITY QUESTION**

- 5.1 In our opinion, any Regulation made may itself be susceptible to challenge.
- 5.2 First, s.146C of the IR Act itself does not empower any regulations to be made; it contemplates that regulations will be made pursuant to the general regulation making power under the IR Act. Section 407(1) of the IR Act prescribes that:

*The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted*

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*to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.*

5.3 As expressly stated, the power to make regulations must be understood by reference to the purpose and objects of the IR Act. Relevantly, s.3 of the IR Act provides that the objects of the Act are to:

- (a) to provide a framework for the conduct of industrial relations that is fair and just,*
- (b) to promote efficiency and productivity in the economy of the State,*
- (c) to promote participation in industrial relations by employees and employers at an enterprise or workplace level,*
- (d) to encourage participation in industrial relations by representative bodies of employees and employers and to encourage the responsible management and democratic control of those bodies,*
- (e) to facilitate appropriate regulation of employment through awards, enterprise agreements and other industrial instruments,*
- ...*
- (g) to provide for the resolution of industrial disputes by conciliation and, if necessary, by arbitration in a prompt and fair manner and with a minimum of legal technicality,*
- (h) to encourage and facilitate co-operative workplace reform and equitable, innovative and productive workplace relations.”*

5.4 Any regulations made, which would require the Commission to give effect to Government policy may be regarded as inconsistent with the ultimate objects contained in s.3(a), (c), (d), (e) and (h) of the Act.

5.5 Further, to the extent that the any Regulations would purport through the process in s.146C of the Proposed Amending Act, to reflect Ministerial or Executive proclamation of wages and conditions of employment of public sector employees, the Regulation itself may be susceptible to judicial review. In *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, McHugh J referred to the principle laid down in *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508 and said at 459:

*“That principle is that, when a prerogative power of the Executive Government is directly regulated by statute, the Executive can no longer rely on the prerogative power but must act in accordance with the statutory regime laid down by the Parliament.”*

5.6 In *Macrae v Attorney-General (NSW)* (1987) 9 NSWLR 268(Macrae) Kirby P expressed the view (at 281) that the fact that the power to make judicial appointments, which was undoubtedly a prerogative of the Crown, was reposed in the State Governor by virtue of a statute, did not take it out of the category of prerogative powers. Such exercise of power may be justiciable.

5.7 In the present case, it appears that through the Proposed Amending Act, the Executive is seeking to use a *de facto* means to exercise its prerogative to determine the terms and conditions of employees employed by the Crown (in its different capacities). Irrespective of whether this exercise of power emanates ultimately from an exercise of prerogative right or through statute, and irrespective of whether that exercise of power is manifested in a regulation or an award, it is our opinion that such exercise of power may itself be susceptible to judicial review.

5.8 The proposition that the exercise of executive power is not immune from judicial review merely because it emanates from the prerogative rather than from a statutory source was adopted by all five members of the House of Liability is limited by a scheme approved under Professional Standards Legislation.

Lords in Council of *Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 (*the CCSU case*). In that case their Lordships were of opinion that the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter: see also *Minister for Arts, Heritage and the Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274. The CCSU case was referred to with approval by Mason J in *Kioa v West* (1985) 159 CLR 550 at 582–3.

- 5.9 Hence, to the extent that, whether by exercise of prerogative or otherwise, the Government seeks to adversely affect private rights of persons in their capacities as employees of the Crown, such exercise of power could also become the subject of judicial review. Ultimately, as noted above, it will be a question of fact as to what individual matters in each given case would amount to a denial of procedural fairness (such as a denial of a legitimate expectation to be heard prior to the removal of a particular allowance or benefit of employment). We cannot comment on this question at this stage.
- 5.10 Quite apart from the ability of a party to challenge a regulation, Parliament may disallow a regulation which is sought to be tabled by a Minister: see Part 6 of the *Interpretation Act* 1987 (NSW). If an impasse is reached between the Executive and Parliament as to the allowance or disallowance of a Regulation, it places Parliamentarians in the unenviable position of being lobbied by and receiving submissions from interested parties (who are subject to the award, i.e., public sector unions, employees and departmental officers) to allow or not allow the Regulation without having the necessary expertise or powers of the Commission to adjudicate between the claims of relevant interested parties. It would, in effect, make Parliament a *de facto* tribunal for receiving and debating the submissions of industrial parties; a role which quite properly has to date been left to specialist tribunals (whether through Public Service Boards or through the Commission).
- 5.11 Although the appropriateness of requiring Parliament to become embroiled in the setting of wages and conditions of public sector employees is a matter of policy and not law, there is much to be said for such a role being

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conferred not upon members of Parliament but upon a specialist tribunal. In truth, it would lead to no more certainty in relation to the determination of the wages and conditions of employees than presently exists, except that the terms and conditions would not be determined by an independent and impartial tribunal but by Parliamentarians susceptible to being lobbied (in a non-transparent way) as to whether to allow or disallow a regulation.

**6. CONCLUSION**

- 6.1 In our opinion, if enacted, the Proposed Amending Act and any awards made pursuant to s.146C, would be the subject of reasonable challenge as their validity. We consider that such challenges have a reasonable foundation.



**Arthur R. Moses SC  
Frederick Jordan Chambers**



**Yaseen Shariff  
12 Selborne Chambers**

**30 May 2011**