NSW GOVERNMENT SUBMISSION

POST-IMPLEMENTATION REVIEW

FAIR WORK AMENDMENT (TRANSFER OF BUSINESS) ACT 2012

Executive Summary

1. The NSW Government's submission provides a synopsis of the Part 6-3A amendments of the Fair Work Act and the concerns of the NSW Government and new employers regarding transfers of business between a state public sector employer and a national system employer.

2. The NSW Government's primary recommendation contends that no Commonwealth transfer of business laws should apply to the NSW Government as an employer.

3. If it is decided that there are valid reasons for transfer of business laws to apply to the NSW Government then its secondary recommendation calls for the Part 6-3A provisions to be repealed and for Part 2-8 of the Fair Work Act to apply with certain modifications that would address its concerns.

Introduction

4. The NSW Government appreciates the opportunity to make a submission to the post-implementation review of the *Fair Work Amendment (Transfer of Business) Act 2012*.

5. The NSW Government regards the Part 6-3A provisions of the *Fair Work Act 2009* as an unacceptable interference by the former Commonwealth Government into the rights of state governments to effectively provide services to the NSW public in a more efficient manner and was disappointed that it was implemented without proper consultation.

6. By way of background the former Minister for Employment and Workplace Relations, the Honourable Bill Shorten MP, announced on 21 September 2012 the intention to legislate. Then in early October 2012, States and Territories officials were provided with an opportunity to discuss the details of the draft legislation.

7. Unfortunately the process followed was in clear contravention of the protocols set out in the *Inter-Governmental Agreement for a National Workplace Relations System for the Private Sector* which requires notice of three months in writing of

the intention to commence consultations about amendments to the Fair Work legislation.

8. There was no explanation given as to why the amendments were urgent or unforseen and would therefore justify a shorter notice period.

9. The NSW Government remains opposed to the legislation and submits that if a proper consultation process had taken place it would have enabled some of the inherent problems of the current laws to be highlighted.

The Part 6-3A amendments to the *Fair Work Act 2009*

10. Prior to 5 December 2012, there was no federal legislation imposing any requirements in circumstances where NSW public sector employees transfer to the national workplace relations system as a result of a transfer of business. This changed with the commencement of the *Fair Work Amendment (Transfer of Business) Act 2012.*

11. Broadly, Part 6-3A provides that where there is a transfer of business between a state public sector employer and a national system employer any state award or enterprise agreement that applies to public sector employees will continue to apply to them upon commencement with the new national system employer as 'copied State instruments'.

12. A copied State award can operate for a period of up to five years after the transfer while a copied State employment agreement applies until it is terminated, which in NSW will generally be for a period of up to three years. It is expected that in practice, most commercial transactions will transfer to the national system on a single date. However, the general rule is that each transferring employee will have their own copied State instrument(s) because they may have different terms and conditions to each other depending upon the date their employment is terminated.

13. Upon application by certain parties or on its own initiative the Fair Work Commission (FWC) has the power to vary a copied State instrument; modify its coverage and to consolidate the various workplace instruments applying to a national system employer's workplace. Similar provisions are also available in

Part 2-8 of the Fair Work Act in relation to transfers of business between two national system employers. Part 2-8 is further discussed at para 37 below.

Interfering with the rights of State Governments

14. The operation of the Part 6-3A provisions has significant implications for the ability of the NSW Government to effectively conduct commercial operations, including the outsourcing of its staff and assets and to carry out the general management of its industrial relations policies unhindered.

15. The NSW Government does not agree with the former Commonwealth Government's proposition that one of the main reasons for the introduction of the legislation was to protect the entitlements of employees transferring from a state public sector employer to a national system employer. Prior to the introduction of the Commonwealth amendments, the NSW Government made appropriate provisions for employee rights and entitlements when it engaged in outsourcing or asset sales and continues to do so.

16. The NSW Government has demonstrated that it can negotiate with unions and agree on a range of measures for public sector employees transferring to private sector employment as part of outsourcing or asset sales which address the transition from public sector employment to private sector employment. These have included, as and when appropriate:

    - transfer payments
    - job security guarantees
    - continuation of employment conditions, including continued access to defined benefits superannuation schemes, and
    - recognition of previous service by the new employer.

17. The NSW Government submits that the outsourcing of public sector functions and services on a secure commercial basis is an important component of its strategy to reform public administration and make service delivery more efficient and innovative in collaboration with private sector partners. The operation of the Part 6-3A transfer of business provisions constrains the capacity of NSW to

effectively pursue this strategy by creating impediments to the delivery of flexible, innovative client-based services.

Concerns of the NSW Government

Differential treatment of copied State awards and copied State employment agreements

18. The NSW Government submits that the differential treatment of State awards and enterprise agreements in the Part 6-3A provisions of the Fair Work Act are inappropriate. Unlike the other States and Territories jurisdictions, the NSW Government uses awards as the chief means of setting wages and conditions for public sector employees.[1]

19. The enterprise agreement provisions of the *Industrial Relations Act 1996* (NSW) are not extensively used in the NSW industrial relations system. Indeed, many NSW public sector awards operate much more like enterprise agreements insofar as they are often the product of bargaining and negotiation between the employer and employees (usually represented by a union).

20. Unlike modern awards NSW public sector awards contain the *actual* rates of pay and comprehensive conditions of employment, often set a term during which regular wage increases operate and make provision for a fresh round of bargaining when the award is due to be varied or replaced.[2] A number of these award conditions arise from the particular circumstances of public sector employment and may not be relevant to, or compatible with, the operational requirements of the new employer's workplace in the national system.

21. The above concerns are exacerbated by employees covered by copied State awards potentially being able to derive a benefit from any annual national minimum wage increases granted by the FWC.[3] Whether these increases will be subject to absorption by any programmed pay increases contained in the relevant

[1] According to internal NSW Industrial Relations data 99.5% of public sector employees who have their wages and conditions determined in the NSW industrial relations system are covered by awards.

[2] See for example the *Crown Employees (Public Sector-Salaries 2008) Award* and *Crown Employees (Public Service Conditions of Employment) Reviewed Award 2009*.

[3] This is by operation of s768AW and s768BY of the *Fair Work Act 2009* as inserted by the *Fair Work Amendment (Transfer of Business) Act 2012.*

copied State award, (which is a feature of a number of NSW State awards), will be a matter for the FWC's determination.

Disincentives to bargaining

22. Providing potential access to minimum wage increases in the national workplace relations system to former public sector employees, along with the comprehensive workplace conditions that are contained in copied State awards, may act as a disincentive for the relevant employees to enter into the collective bargaining stream.

23. Such an outcome would be contrary to one of the overriding objectives of the Fair Work Act which emphasises the achievement of productivity and fairness through enterprise level bargaining.[4] By contrast, employees under copied State employment agreements will not be subject to Annual Wage Review increases and would have to initiate collective bargaining with their new employer in the national system to secure higher wage rates.

24. The NSW Government submits the lack of consultation with other participating jurisdictions alluded to earlier has led to legislation that fails to properly take into account salient features and requirements of the NSW industrial relations system, and in particular its public sector employment arrangements.

Concerns for new employers

Public sector award conditions may be inappropriate for national system employers

25. There are also concerns that copied State awards may provide transferring public sector employees with more comprehensive entitlements than those applying to the non-transferring employees under an existing agreement covering the new employer's enterprise.

26. This type of circumstance may not hinder commercial transactions between the NSW Government and larger well-resourced employing entities. However, the provenance of many copied State awards means they may not be properly

[4] See s3(f) of the *Fair Work Act 2009*

aligned with the business and operational needs of the new national system employer. This may present problems, particularly for those small to medium enterprises that may not be able to absorb the additional employment costs involved.

Disincentive for new employers to employ public sector employees

27. The transfer of business provisions can have negative consequences for employment opportunities of NSW public sector employees who are affected by commercial transactions. New employers may consider the impost of having to apply public sector award terms and conditions as outweighing any benefits from employing staff who formerly provided the function in the public sector.

28. These concerns are heightened where the new employer is able to employ private sector employees as an alternative option to the employment of the affected public sector employees.

29. Should the new employer choose not to employ the affected public sector employees, the impact could be even greater in rural or regional areas where opportunities for securing employment may be limited compared to metropolitan locations.

The role of the Fair Work Commission

30. As noted earlier the FWC has the power (either on its own initiative or by application) to make certain orders including which employees are covered by the relevant copied State instrument. The NSW Government submits this process is potentially a costly, time consuming burden for any new employer who may wish to commence an application to remove the coverage of copied State instruments they perceive to be incompatible with their existing employment arrangements and business objectives.

31. The relevant provisions confer a broad discretion upon the FWC when it determines whether or not to grant orders. The FWC is merely required to take into account considerations such as whether the copied State instrument would have a negative impact on the productivity of the new employer's workplace or

the new employer would incur significant economic disadvantage as a result of being covered by the instrument.[5]

32. These important matters are not accorded any priority under the terms of Part 6-3A of the Fair Work Act when the FWC exercises its jurisdiction in relation to coverage or consolidation orders.

33. The NSW Government submits that the mere ability to make an application to the FWC will not necessarily effectively address the regulatory uncertainty resulting from copied State instruments binding the new employer. This is particularly the case in circumstances where different terms and conditions of employment may apply to different transferring employees and those terms are inconsistent with the new employer's enterprise agreement.

Copied State instruments can apply to successor employers

34. Any State award or State enterprise agreement that applied to the relevant employee on the date of termination of the employee's employment is taken to come into operation as a copied State instrument immediately after that date.

35. A legislative note in s768AM(2) indicates a copied State award can be in operation for up to five years and not only apply to the new employer but is capable of binding successor employers in the national system during that period.[6]

36. It is concerning that national system employers who were not a party to the original transaction between the public sector employer and the new employer, will potentially be subject to enforceable terms and conditions of employment which have been derived from public sector employment arrangements.

Part 2-8 of the *Fair Work Act 2009*

37. Part 2-8 of the Fair Work Act deals with transfer of business transactions between national system employers. It makes provision for the circumstances which constitute a transfer of business and what federal instruments can transfer to the new employer. It also deals with the transfer of entitlements through

[5] See 768BA(3) of the *Fair Work Act 2009*

[6] See s768AM(2) this subsection may operate in relation to another employer in the event of a later transfer of business under Part 2-8 (dealing with a transfer of business between national system employers).

provisions requiring the new employer to recognise the service of the employee with the old employer for the purposes of calculating the transferring employee's entitlements under the Fair Work Act.

38. While the Part 2-8 rules are similar to those of Part 6-3A about matters such as when a transfer of business occurs, or the powers of the FWC regarding particular instruments, the rules applying to the treatment of copied State instruments differ. As noted earlier, under Part 6-3A, a copied State award has a fixed statutory life of up to five years unless replaced by federal enterprise agreement, whereas a transferable instrument under Part 2-8 can be terminated according to its own terms (or if replaced by another instrument).

39. The Part 2-8 rules for termination essentially give effect to the terms of the transferring instrument and provide some flexibility in the way such instruments can be brought to an end for legitimate operational reasons or with the agreement of the parties. These rules apply to other public sector national system employers (including the Commonwealth and Victoria) but are not currently available to the NSW Government.

40. The NSW Government submits that the differential treatment of copied State instruments under Part 6-3A and transferring instruments under Part 2-8 of the Fair Work Act is anomalous and should be rectified.

Conclusion

Primary recommendation

41. The NSW Government submits for the reasons outlined in this submission that Part 6-3A of the Fair Work Act is flawed in its purpose and operation. The amendments create unnecessary and unacceptable risks to the way the NSW Government as an employer, manages its own industrial relations policies and conducts commercial undertakings such as outsourcing its functions and engages in strategic planning to ensure services are provided to the people of NSW in a more efficient manner.

42. Accordingly, the NSW Government submits that an appropriate course of action for the Commonwealth to take would be the repeal of the Part 6-3A provisions of

the Fair Work Act. This would ensure that NSW is not statutorily constrained and that no transfer of business rules would apply to the NSW Government as an employer. This would permit the NSW Government to make its own arrangements when entering into commercial transactions.

43. There were no cogent reasons provided by the former Commonwealth Government for the introduction of the Part 6-3A provisions, particularly given that comprehensive employee protections have been a long standing feature of public sector transactions in NSW.

Secondary recommendation

44. If it is determined that transfer of business rules are to be retained where NSW public sector employees transfer to the national workplace relations system, the NSW Government submits that Part 6-3A should be repealed and the Part 2-8 provisions of the Fair Work Act, with certain modifications that address the concerns of the NSW Government should apply.

45. This would ensure that NSW is operating on a level playing field with national system employers, including the Commonwealth, Victorian and Australian Capital Territory and Northern Territory Governments.